INTERIOR BOARD OF INDIAN APPEALS

Lois Jean Brewer v. Acting Deputy Assistant Secretary - Indian Affairs (Operations)

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United States Department of the Interior

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

LOIS JEAN BREWER

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 82-8-A Decided September 30, 1982

Appeal from decision by Acting Deputy Assistant Secretary--Indian Affairs (Operations) canceling assignment to appellant of 79 acres of Indian trust land.

Affirmed in part and reversed in part.

1. Indian Lands: Assignments

While portions of assigned Indian trust land might be properly canceled for nonuse by appellant assignee, where it appeared she had leased nonresidential portions of the assigned lands despite provisions of her assignment which required the lands be devoted entirely to her exclusive personal use and that of her heirs, cancellation of the assignment, even if found to be a legally proper response to the leasing, may not be ordered without giving prior notice of the proposed action, including the reasons therefor, and an opportunity to respond.

APPEARANCES: Larry Leventhal, Esq., and Mitchell R. Hadler, Esq., for appellant; Mariana R. Shulstad, Esq., Office of the Field Solicitor, for appellee.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Procedural Background

On September 25, 1981, appellee Acting Deputy Assistant Secretary--Indian Affairs (Operations) affirmed an earlier decision by the Minneapolis Area Director, Bureau of Indian Affairs (Area Director, Bureau), canceling an assignment of 80 acres of trust lands to appellant Lois Jean Brewer. The decision of the Area Director explains the action taken:

> [Y]ou have been leasing a portion of your assignment to J. Kenneth Rutt & Sons, of Shakopee, Minnesota, for farming purposes. We have copies of canceled checks indicating payment to you of $1,730.00 in 1979 from the Rutt family.
>
> You have been verbally advised in the past of the prohibition of leasing your assignment without the proper approval from the Area Director.
>
> It is stated in the certificate granting you the assignment that, "any sale, lease, transfer, or incumbrance of said land, or any part thereof to any person or persons whomsoever, except it be to the United States, and as herein provided, is and will continue to be utterly void and of no effect."
>
> Because the $1,730.00 was obtained from 1886 Land, you must remit that amount to the Bureau of Indian Affairs so that it may be placed in an account for the credit of the Mdewakanton Sioux Tribe of Minnesota.
>
> It is the decision of this office, and concurred with the Shakopee Community Council, that since you have repeatedly leased

> this assignment invalidly, your assignment for it, except for a one (1) acre parcel where your home is located, will be canceled.

(Area Director's Decision dated Sept. 16, 1980, at 1).

The documentary evidence of appellant's interest in the 80-acre tract which is the subject of this appeal is entitled "Indian Land Certificate," which recites:

> TO ALL WHOM IT MAY CONCERN:
>
> It is hereby certified that Mrs. Lois (Pendleton) Brewer, a member of the Mdewakanton band of Sioux Indians residing in Minnesota, has been assigned the following-described tract of land, viz: South Half of the Northwest Quarter (S 1/2 NW 1/4) of Section 22, Township 115 North, Range 22 West. This description is the North Half of Tracts 55, 56, 57, 58, 59, 60, 61, 62 and 63, in Scott County, Minnesota, containing 80 acres, more or less.
>
> It is also certified that the said Lois (Pendleton) Brewer and her heirs are entitled to immediate possession of said land, which is to be held in trust, by the Secretary of the Interior, for the exclusive use and benefit of the said Indian, so long as said allottee or his or her heirs occupy and use said land. If said land should be abandoned for 2 years by the allottee, then said land will be subject to assignment by the Secretary of the Interior to some other Indian who was a resident of Minnesota May 20, 1886, or a legal descendant of such resident Indian.
>
> It is also declared that this certificate is not transferable and that any sale, lease, transfer or encumbrance of said land, or any part thereof to any person or persons whomsoever, except it be to the United States, and as herein provided, is and will continue to be utterly void and of no effect. It is further declared that said land is exempt from levy, taxation, sale, or forfeiture, until otherwise provided by Congress.
>
> IN TESTIMONY WHEREOF, I, W.W. Palmer, Superintendent, Minnesota Agency, Bureau of Indian Affairs, have hereunto set my hand and caused the seal of this office to be hereto attached at the City of Bemidji, Minnesota, this 4th day of September 1958.

Since the decision by appellee adopted both the Area Director's decision and the stated basis for that decision, it is in the context of the original notice of cancellation that the issues on appeal are framed. Appellant contends on appeal that: (1) She is an allottee of the land, not a mere assignee, therefore her interest in the land is not subject to cancellation; (2) the Area Director was deprived of any power to cancel assignments to Shakopee Mdewakanton lands by the Act of December 19, 1980, 94 Stat. 3262; (3) the Area Director's action was without basis in fact or law; and, (4) the cancellation of appellant's interest was not made in good faith. These contentions, denied by appellee, are discussed in the order listed.

Factual and Legal Background

In support of her first two contentions, appellant relies upon Sioux treaties and the historical background of the Mdewakanton Sioux and the lands described in her certificate. As relates to this appeal, that background is as follows.

By treaty with the Sioux of June 19, 1858, 12 Stat. 1031, a reservation was established along the Minnesota River in south-central Minnesota. Following a Sioux uprising in 1862, the Minnesota Sioux were relocated to what is now southern South Dakota and northern Nebraska, and Congress passed the Act of February 16, 1863, 12 Stat. 652, which provides in part:

> That all treaties heretofore made and entered into by the Sisseton, Wahpaton, Medawakanton, and Wahpakoota bands of Sioux

> or Dakota Indians, or any of them, with the United States, are hereby declared to be abrogated and annulled, so far as said treaties or any of them purport to impose any future obligation on the United States, and all lands and rights of occupancy within the State of Minnesota, and all annuities and claims heretofore accorded to said Indians, or any of them, to be forfeited to the United States.

The territory which comprised the Mdewakanton Sioux Reservation before the outbreak thus ceased to be a reservation in 1863. The Mdewakanton band itself was relocated outside Minnesota.

While, as appellant points out, an intention to abrogate or modify a treaty is not to be lightly imputed to Congress, the authority to abrogate treaty provisions does exist. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). So far as pertinent in this case, Congress expressly abrogated its treaty obligations with certain Sioux Indians by the Act of February 16, 1863, and, proceeded to declare in the same Act that "all lands and rights of occupancy within the State of Minnesota * * * heretofore accorded to said Indians * * * be forfeited to the United States." Accordingly, the Mdewakanton band ceased to exercise any jurisdiction or control over the former reservation in Minnesota. The trust status of the reservation in Minnesota was terminated in 1863. 1/

1/ Appellant erroneously relies upon Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968), for the proposition that treaty rights survived the 1863 Act and subsequent events. Menominee construed two 1954 Acts which terminated Federal supervision over the Menominee Tribe. The Court ruled that the Acts did not terminate or abrogate treaty rights, noting:

> "The provision of the Termination Act * * * that 'all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to members of the tribe' plainly refers to the termination of federal supervision. The use of the word 'statutes' is potent evidence that no treaty was in mind."

391 U.S. at 412 (citations omitted, emphasis in original).

After the Sioux uprising, it appeared some members of the band were permitted to remain in Minnesota. Congress recognized the existence of these Indians in section 9 of the February 16, 1863 Act, supra, which provides:

> That the Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be alienated or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever.

Apparently, the authority of the Secretary of the Interior to set aside these lands was never exercised. However, additional funds for the benefit of these Indians were appropriated by the Act of August 19, 1890, 26 Stat. 336, 349, for

> Indians in Minnesota heretofore belonging to the Medawakanton band of Sioux Indians, who have resided in said State since the twentieth day of May, eighteen hundred and eighty-six, or who were then engaged in removing to said State, and have since resided therein, and have severed their tribal relations * * *.

The funds provided were apparently used in part by the Secretary of the Interior to purchase lands at several locations in southern Minnesota. One such location, in Scott County and now a part of the Shakopee Mdewakanton Sioux Reservation, included the lands which were ultimately assigned to appellant. 2/

2/ Appellee's Brief on Appeal (Exhs. 1, 2, and 5).

Inasmuch as appellant claims her assignment of land is tantamount to a formal allotment, it is necessary to briefly examine the Indian allotment process. The general scheme of allotment is described in the Indian General Allotment Act of February 8, 1887, 24 Stat. 388, 25 U.S.C. §§ 331-354 (1976). With some exceptions, allotments on most Indian reservations were made pursuant to this Act. Thus, the word "allotment" refers both to the process of land administration created by this, or similar Acts, and to a trust estate in real property created by the legislation. Section 5 of the General Allotment Act provides that the Secretary of the Interior issue patents to allottees, specifically describing the lands selected. The Act provides that the United States hold fee title to the land in trust for allottees for a period of 25 years from the date of the patent, and, at the expiration of the 25-year trust period, convey fee title in the lands to the allottee or his heirs, free of encumbrance. The trust period could, however, be extended. The beneficial interest in allotments vests in the allottee, is inheritable, devisable, and can be conveyed with the approval of the Secretary. For a detailed review of the allotment system, see F. Cohen, Handbook of Federal Indian Law (1982 ed.) at pages 127-143.

The allotment process described by the General Allotment Act and its progeny was not followed with respect to the land now assigned to appellant. A 1915 letter from Assistant Commissioner E. B. Meritt to the Secretary outlines instead, with regard to this land, a practice of assigning to individual Indians the right to use and occupy these lands on a conditional basis:

> The Indian occupants of these tracts hold under a form of certificate signed by the Commissioner of Indian Affairs. This form

> was approved by the Department November 21, 1904 and similar certificates are now held by eighty-nine of these Mdewakanton Sioux. No attempt has been made by the Department or this Office to transfer any title to these eighty-nine Indians, other than the conditional occupancy and use mentioned in the certificate. [3/]

The letter continues by discussing arguments similar to those put forth by appellant:

> The points are advanced by Mr. Pollock that deeds were taken running to a number of these Mdewakanton Sioux; that the law contemplated the purchase of lands for individual Indians; and that the form of certificate above referred to was unauthorized by law; that the individual assignees have therefore a vested interest susceptible to inheritance, and the reassignment of which cannot be made at the discretion of the Department. He suggested that the matter of making further reassignments be therefore held up until legislation can be procured subjecting these tracts to the provisions of the General Allotment Act and amendments. [4/]

The letter notes the absence of legislation to authorize issuance of patents in fee or in trust to the lands. It concludes:

> [T]he Office believes it was the result of the legislation authorizing these purchases, that the land be disposed of in a manner which was deemed best by the Secretary of the Interior, and that he deemed it best not to dispose of any permanent interest in these lands pending further legislation which has not yet been enacted. The Department is respectfully advised that the Office has in mind presenting a draft of legislation to the Department for submission to the next Congress which will make it possible to allot these assignments under the provisions of the General Allotment Act and its amendments. [5/]

3/ Letter from E. B. Meritt to the Secretary of the Interior dated Sept. 30, 1915 (Appellee's Exh. 4), at 1.

4/ Id. at 2-3.

5/ Id. at 6-7.

It appears the legislation contemplated above was not adopted. The next Act of Congress relevant to these lands, the Act of December 19, 1980, 94 Stat. 3262, provides in pertinent part:

> That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States--
>
> (1) with respect to the some 258.25 acres of such lands located within Scott County, Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota;

The Departmental report of Under Secretary James A. Joseph, dated December 10, 1980, commenting upon the Act, states:

> The effect of * * * [the proposed bill] would be to change the legal status of the ownership of the lands involved, which are now held by the United States under the Acts described above for the use of those Mdewakanton Sioux Indian individuals who resided in (or were enroute to) the State of Minnesota on May 20, 1886, and for their descendants. Under the enrolled bill, as noted above, all right, title, and interest in such lands would be declared instead to be held by the United States in trust for three Minnesota Sioux tribal communities.

Discussion and Decision

The Department's position concerning these lands has, as shown above, consistently been that they were not made available by Congress for allotment, were never allotted, and were therefore available in 1980 to become tribal lands held by the Department in trust. Congress approved this

position when it adopted the 1980 Act. This position is consistent also with the language of the document of title held by appellant, which contains no language similar to that found either in a trust patent nor in conveyances of a restricted fee. 6/ While the word "allottee" appears in the certificate, the estate conveyed to the certificate holder is apparently neither a trust patent nor a restricted fee, but a tenancy personal to the assignment holder and her heirs conditioned upon personal occupancy and personal use. 7/ Since appellant's assigned lands were never personally allotted to her, appellant is not, in this case, the beneficial owner of an interest in allotted Indian trust lands. 8/

Prior to passage of the Act of December 19, 1980, appellant's lands were held by the United States for the use and benefit of a class of Mdewakanton Sioux, of which appellant was a member when the certificate dated September 4, 1958, was issued to her. That class is apparently

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6/ The various types of allotment are discussed and described in Cohen, Handbook of Federal Indian Law (1941) at pages 108-10.

7/ The record establishes the 80-acre tract assigned to appellant was never allotted. It also establishes that other Mdewakanton Sioux, apparently unrelated to appellant, were her predecessors on the tract, and that their tenancy was on the same terms and conditions as that enjoyed by appellant (Appellee's Brief, Exhs. 7-10).

8/ The certificate cannot be characterized as an allotment certificate, since that term is applied to the trust patent, the issuance of which conveys a vested interest to an allottee. See Monson v. Simonson, 231 U.S. 341, 345-47 (1913), and Cohen, cited supra note 5.

It is also noted, the Acting Associate Solicitor for Indian Affairs, Department of the Interior, in a memorandum opinion of Mar. 19, 1974 (see Appellee's Brief, Exh. 13), discussed the nature of title to these lands and concluded, at page 5 of the memorandum, they were not individually owned lands in the nature of allotments: "The lands are held in trust by the United States with the Secretary possessing a special power of appointment among members of a definite class. The interest the Secretary may grant by such appointments (called assignments) is either a tenancy at will or a defeasible interest."

somewhat different from the tribe for which title is held in trust since December 19, 1980, inasmuch as the Shakopee Mdewakanton Sioux Community is a federally recognized Indian community organized under the Indian Reorganization Act of June 18, 1934, with membership defined in a written constitution. With passage of the Act of December 19, 1980, title was held in trust for the community to be managed by it for the benefit of the community and its members. While appellant may also be a member of the Shakopee community, her membership by no means bestows upon her any individual ownership of tribal trust lands or elevates her existing assignment of trust land to the status of an individual allotment.

Although appellant is not an allottee, she clearly has a property interest in the 80-acre tract assigned to her. In this regard, section 3 of the Act of December 19, 1980, 94 Stat. 3262, does provide, as pointed out by appellant, that:

> Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment, entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment.

In her reply brief appellant argues that she "does not admit * * * she has leased any of the land" and that the record on appeal is devoid of any showing there was an inconsistent use made of the land by appellant. She denies that she received adequate notice that any of her actions, whether admitted or not, might result in loss of the assigned tract. In this connection, she demands a hearing, apparently to enable her to cross-examine

J. Kenneth Rutt & Sons and the drawers of the checks totaling $1,730 (previously shown to her) ostensibly given for the rental of her assigned land.

Arguably, the administrative record is sufficient as constituted to support the finding that appellant leased a portion of her lands to J. Kenneth Rutt & Sons for $1,730 in the 1979 farming season. Appellant does not directly deny giving the lease, but as appellee points out, her affidavit in support of her petition on appeal is most reasonably construed to admit that the lease took place, although the consequences of such action may not have been understood or foreseen by appellant. Appellant has offered two affidavits, in addition to other evidence, neither of which directly controverts the finding by the Bureau that the unauthorized lease for the stated amount was made. The Board finds that there is some evidence of a lease. It is unnecessary, however, to find, given the Board's holding here, that a lease was, in fact, executed. Further, while lease of the assigned lands may possibly support cancellation of the misused portion of the assignment, 9/ there is no showing of record that appellant was ever notified that lease of the assigned lands would result in cancellation of her assignment. Nor does her "Indian Land Certificate" provide that lease of the land will result in cancellation of the assignment.

9/ The authority of the Bureau of Indian Affairs to cancel a similar land assignment was reviewed and approved in United States v. Vig, Civ. No. 3-71-207 (D.C. Minn. 1972) (Appellee's Exh. 24). In that case, however, the court found, "By the terms of her certificate, failure to use and occupy the land for a period of one year would be considered abandonment and the certificate would be cancellable by the Superintendent of the Minnesota Agency." It does not appear from the record as now constituted whether appellant has abandoned her assigned tract nor that the Bureau has concluded her use of the land can be equated to an abandonment. These questions are not presented on appeal and are not decided in this opinion.

[1] Although the Area Director's opinion indicates appellant was previously notified that leasing of the assigned lands was improper, no assertion is made that she was informed that her assignment would be canceled as a result. 10/ While the Department has not promulgated special regulations governing cancellations of assignments of lands to the Mdewakanton Sioux, it has regulations dealing generally with cancellations of interests in Indian trust lands which amount to less than a fee interest. These regulations require that prior notice of cancellation be given to persons whose interests are to be terminated and that the notice provide reasons for the cancellation and an opportunity to respond to the notice or otherwise correct the condition which is the basis for cancellation. 11/ Such procedure is required in any instance where property rights of individuals in Indian trust lands are to be affected by Bureau decisionmaking. 12/ Considerations of due process require such a notice in this case, with opportunity to respond, before appellant's assignment of the 80-acre tract may be canceled. See Coomes v. Adkinson, 414 F. Supp. 975, 995 (D.S.D. 1976). 13/

Appellant also claims the Bureau canceled her assignment for reasons unconnected with her use or nonuse of the land. Since this appeal is decided on other grounds as described in this opinion, this contention is not reached.

10/ Appellant was obviously on notice, however, through plain wording of the certificate, that any lease of the land would be voidable.

11/ See, e.g., 25 CFR 131.14. See also 25 CFR 131.12 concerning subleases and assignments.

12/ See the discussion in Kuykendall v. Phoenix Area Director, 8 IBIA 76, 87, 87 I.D. 189 (1980), rev'd on other grounds sub nom. Yavapai-Prescott Indian Tribe v. Watt, Civ. No. 80-464 (D.C. Ariz. 1981) (appeal filed No. 82-5405 (9th Cir. 1982)).

13/ As noted previously (note 9), the Board makes no finding that the leasing of an assignment provides legal grounds for cancellation of the assignment.

No opinion, therefore, is expressed concerning appellant's contentions that the Bureau acted in bad faith when it attempted to cancel her assignment.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision approving cancellation of appellant's assignment is reversed; this matter is remanded to the Bureau with instructions to provide appellant with written notice of conduct deemed inconsistent with the terms of her assignment, including an opportunity to respond thereto. See, as a guideline, procedural regulations found at 25 CFR Part 131 and remand instructions to the Bureau in Coomes v. Adkinson, supra.

This decision is final for the Department.

//original signed
Franklin D. Arness
Administrative Judge

I concur:

//original signed
Wm. Philip Horton
Chief Administrative Judge

ADMINISTRATIVE JUDGE MUSKRAT CONCURRING:

In my judgment, the holding in this case is of sufficient importance to justify emphasis in a separate opinion. As trustee for Indian tribes and individuals, the United States and its agent, the Bureau of Indian Affairs (BIA, Bureau), are bound by principles of guardianship and pertinent constitutional restrictions (especially due process considerations). St. Pierre v. Commissioner of Indian Affairs, 9 IBIA 203, 89 I.D. 132 (1982). Accordingly, cancellation by the Bureau of an assignment of Indian trust lands must comport with principles of due process including prior notice of the proposed action, with the reasons and authority therefor, and an opportunity to respond. In the case before us, the BIA failed to fulfill these requirements and, therefore, the Board has quite properly remanded this case for further proceedings consistent with the majority opinion. By separate concurrence, I wish to emphasize some additional factors and considerations in reaching this same result.

Appellant, as the majority correctly concludes, holds an assignment rather than an allotment of Indian trust lands. Nevertheless, she has a protected property interest in the 80-acre tract assigned to her. According to section 3 of the Act of December 19, 1980, 94 Stat. 3262, 1/ appellant's

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1/ Section 3 provides:

"Nothing in this Act shall (1) alter, or require the alteration, of any rights under any contract, lease, or assignment entered into or issued prior to enactment of this Act, or (2) restrict the authorities of the Secretary of the Interior under or with respect to any such contract, lease, or assignment."

assignment rights are preserved as is the Secretary of the Interior's authority vis-a-vis that assignment. The question that finally emerges before the Board then, is did the Secretary, through his agent, the BIA, properly exercise his authority in canceling the appellant's assignment?

The historical analysis involving the land in question clearly demonstrates that appellant holds assignment rights rather than an allotment and, consequently, her assignment is subject to cancellation or revocation procedures by the BIA. 2/ However, in issuing its decision to cancel the appellant's 80-acre assignment, save for a 1-acre homesite, the Bureau failed to cite any authority or state any reasons for its actions. 3/ Furthermore,

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2/ Several alternative courses of action with regard to appellant's assignment appear available to the Bureau. Whichever procedure the Bureau undertakes, however, it must have authority for doing so. Assuming the Bureau's authority exists, cancellation or revocation procedures appear the most likely choice. Thus, should the Bureau believe the assignee has violated the express or implied terms of the "assignment," then cancellation would be a proper procedure. Cancellation "[o]ccurs when either party puts an end to the contract for breach by the other and its effect is the same as that of 'termination' except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance." Black's Law Dictionary 187 (5th ed. 1979).

On the other hand, if the Bureau wishes to act on its own initiative, absent a breach of the "assignment" by the assignee, then revocation would be a proper course of action. Revocation is defined in Black's Law Dictionary 1187 (5th ed. 1979) as: "The recall of some power, authority, or thing granted, or a destroying or making void of some deed that had existence until the act of revocation made it void."

If the Bureau wishes merely to void the alleged "lease" of the appellant, then it may do so based on the terms of the assignment certificate.

Regardless of which approach is utilized, the Bureau's actions must comport with the requirements of due process. However, see caveat in note 3, infra.

3/ I wish clearly to register that I express no opinion as to the authority of the Bureau to pursue either cancellation or revocation procedures or, assuming such authority does exist, the correctness of the application of either procedure in this instance. I would hold only that due process requires at a minimum that the appellant be informed as to the action undertaken and be provided with a statement of reasons and authority therefor.

the administrative record of this case is inadequate to determine the exact character of the appellant's relationship with third persons concerning the land, and, in my opinion, the Bureau in its submissions to the Board, has failed to offer sufficient evidence to establish the existence of a "lease" 4/ and its true nature. 5/ In addition, assuming the existence of a true lease, the Bureau failed to cite its authority to cancel the entire assignment because of a lease involving only a portion of the assigned lands. 6/ Finally, the Bureau cites no authority or rationale for its decision requiring appellant to remit to the Bureau the purported $1,730 in lease revenue.

4/ The only evidence of a "lease" offered by the Bureau and included in the administrative record consists of three cancelled checks in the amounts of $10, $20, and $300 issued by Shirley M. Rutt, J. Kenneth Rutt, and David Rutt respectively and made payable to "Mrs. W. Brewer," "Walt Brewer," and "Walter Brewer and Lois Brewer." These checks, made out by persons other than the appellant, indicate they are for "rent." They do not, however, indicate specifically they are "lease" payments or involve the lands in question. The Bureau also asserts that a reasonable interpretation of paragraph 38 of appellant's affidavit dated Nov. 24, 1981, would conclude that appellant admits to the existence of a lease. Appellant denies any such admission and I agree that the statement in paragraph 38 does not justify a factual finding that a "lease" is admitted or exists.

Paragraph 38 reads:

"Your affiant has at all times maintained a relationship with the entire acreage within her allotment. The farming of a portion of the allotment on behalf of your affiant was made necessary because your affiant's husband, who has previously tilled the soil, has suffered a severe back injury, making him unable to perform such work. His physical condition has further deteriorated due to a hernia problem."

5/ As to the critical importance of the nature of the appellant's agreement, if any, with third persons, see Santa Clara Pueblo Land Assignment, I Op. Sol. 888 (1939); see also Tips v. United States, 70 F.2d 525 (5th Cir. 1934), where mere permission to use land with no interest in land conveyed was held to be a license and not a lease.

The exact nature of the appellant's legal relationship with third persons must first be ascertained in order to determine if it constitutes an encumbrance on the land in violation of the assignment.

6/ The certificate of assignment issued to appellant, and quoted by the majority, indicates that the existence of a lease renders the lease void. On its face, however, the certificate does not indicate that the entire assignment is subject to cancellation. Compare United States v. Vig, Civ. No. 3-71-207 (D.C. Minn. Feb. 3, 1972) cited by majority at note 9.

I believe that in the present case, due process requires the Bureau to inform the appellant of its intention and authority for canceling or revoking her assignment; to conduct a thorough fact-finding procedure in order to ascertain the relevant facts (e.g., the existence, nature, and revenue of the purported lease); and to issue reasons justifying its conclusions as to cancellation or revocation and remittitur. This case, therefore, as my colleagues correctly conclude, should be remanded; and I concur.

//original signed
Jerry Muskrat
Administrative Judge