



INTERIOR BOARD OF INDIAN APPEALS

Alonzo S. Gallegos et al. v. Southwest Regional Director,
Bureau of Indian Affairs

41 IBIA 286 (10/18/2005)



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

ALONZO S. GALLEGOS, DOLORES G. : Order Vacating and Remanding
BACA, VICTOR M. GALLEGOS, : Decision
GEORGE G. GALLEGOS, PATRICK :
A. GALLEGOS, GLORIA G. :
GORMLEY, LUCIA M. GALLEGOS, :
and MARIA L. GALLEGOS, :
Appellants, : Docket No. IBIA 03-117-A
v. :
SOUTHWEST REGIONAL DIRECTOR, :
BUREAU OF INDIAN AFFAIRS, :
Appellee. : October 18, 2005

Appellants Alonzo S. Gallegos, Dolores G. Baca, Victor M. Gallegos, George G. Gallegos, Patrick A. Gallegos, Gloria G. Gormley, Lucia M. Gallegos, and Maria L. Gallegos appeal from a May 20, 2003 decision of the Southwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), canceling a rangeland grazing lease with the Pueblo of Cochiti (Pueblo). As discussed below, the Board vacates the Regional Director's decision and remands the case to him for further consideration.

Background

On March 28, 1994, Appellants entered into rangeland grazing lease number M20704210010037 with the Pueblo, which BIA's Southern Pueblo Agency approved on July 12, 1994. The lease includes 2,630 acres in Sandoval and Santa Fe counties, New Mexico within the Pueblo's Santa Cruz Springs tract. It is for a term of 30 years, retroactively

commencing July 9, 1984. 1/ The lease allows Appellants a total of 554 Animal Unit Months (AUMs) per year. 2/

The lease contains a two-tier rental provision. Annual rental for 267 AUMs is to equal the rate charged each year by the United States Forest Service for grazing land under its control. Lease Part I, p. 2. Annual rental for the remaining 287 AUMs is to equal the fair market value for grazing of private rangelands, as determined by a BIA appraiser. Id. BIA is to re-evaluate the rental rate for the 287 AUM portion of the lease every five years, starting in 1999. Id.

The process for billing and collecting rent is specified in Part II:

1. Bill for Collection: Each year prior to the beginning of the grazing season, the designated tribal treasurer will send the Lessee a bill for collection specifying the kind, number and class of animals allowed to graze, the period of use and the total grazing fees (annual rental) due.

2. Payment of Annual Rental: The Lessee will deposit his payment for annual rental with the designated tribal treasurer not later than the date specified in the bill for collection. The Lessee will not allow his livestock on the premises until the annual rental specified in the bill for collection is paid in full.

Lease Part II, ¶¶ 1 and 2, pp. 2 - 3. Enforcement provisions of the lease provide as follows:

2. This lease may be canceled in whole or in part for failure to comply with any of the provisions and requirements specified in Parts I and II hereof, or any of the regulations of the Secretary on which this lease is based, or for failure to comply with applicable, state, federal or tribal laws or regulations.

Lease Part IV, ¶ 2, p. 5.

1/ The lease is evidently designed to relate back to the date Public Law 98-344, 98 Stat. 315, was passed. That law transferred the Santa Cruz Springs tract from the United States Forest Service to the United States in trust for the Pueblo.

2/ Current 25 C.F.R. § 166.4 defines “ Animal Unit Month” as “the amount of forage required to sustain one cow or one cow with one calf for one month.” Although not always defined by regulation, AUMs have had this well-established meaning since long before the parties entered into the lease. See, e.g., Fort Berthold Land & Livestock Ass’n v. Aberdeen Area Director, 8 IBIA 230, 234 (1981).

There is no dispute with respect to rent due before the date the lease was signed. The Pueblo acknowledged that Appellants 3/ paid all annual rental due from July 9, 1984 through the date of lease execution, March 28, 1994. Lease Part I, p. 2. Likewise, there is no indication of any problem with Appellants' rental payments before late 1999, when a revised rental rate for the 287 AUM portion of the lease came into effect. Rental payments to be made after that date are the problem.

In August 1999, BIA appraiser Randolph Long prepared a "Consultation Statement," specifying a range of rates for grazing for the Superintendent's use to determine a new annual grazing fee. Apparently, the Superintendent settled on a rate in the middle of the appraiser's range, which was \$10.74 per AUM for the 287 AUM portion of the lease. 4/ Appellants almost immediately objected to the BIA calculation, and asked about canceling the 287 AUM portion of the lease, while keeping the 267 AUM portion of the lease calculated at the Forest Service rate. Appellants also asked about appealing the BIA calculation. BIA apparently provided Appellants with some verbal advice on appealing the rate increase, but Appellants never pursued an appeal.

On November 23, 1999, the Pueblo sent Appellants an invoice for the grazing season commencing November 1, 1999, using the new BIA figure. The invoice showed a Forest Service rate of \$1.98 per AUM for the 267 AUM portion of the lease, totaling \$528.66. The invoice also showed a new BIA rate of \$10.74 per AUM for the remaining 287 AUM portion of the lease, totaling \$3,082.38. Altogether, the invoice came to \$3,611.04.

Appellants paid no portion of the new bill within ten days, as required by the Pueblo's invoice and the terms of the lease. Instead, on December 3, 1999, Appellants wrote to the Superintendent requesting a meeting to discuss "some discrepancies" Appellants believed to exist in BIA's appraisal. Appellants eventually paid \$528.66 in February 2000, representing acceptance of the 267 AUMs charged at the Forest Service rate, but they did not pay the rest of the Pueblo's invoice.

The Pueblo sent Appellants another invoice for annual rental on January 25, 2001. The invoice again totaled \$3,611.04. It did not reflect the fact that \$3,082.38 remained unpaid from the previous year, for a total debt of \$6,693.42.

3/ The lease gives Alonzo S. Gallegos sole power of attorney to act on behalf of all Appellants. Lease Part IV, ¶¶ 9(b) and (d), p. 6. For purposes of this order, the Board will refer to Appellants as a whole even when Alonzo S. Gallegos alone is the party involved in the action or communication under discussion.

4/ The Regional Director's decision says the "appraisal determined" the \$10.74 rate, but that rate does not appear in the appraiser's report.

Appellants claim that on March 3, 2001, they tendered a check to the Pueblo in the amount of \$6,693.42. The Pueblo denies this. On March 19, 2001, the Pueblo sent the Superintendent a letter outlining the failure of Appellants to pay the full amount of the annual rental called for under the terms of the lease, and asked the Superintendent “to send a notice of default and cancellation of the Lease pursuant to 25 C.F.R., Part 162.14 [2000].” ^{5/}

Appellants met with Pueblo representatives on April 18, 2001, to discuss a possible lease modification that would cancel Appellants’ rights and responsibilities concerning the 287 AUM portion of the lease. The Pueblo did not agree to any lease modification then, or at any other time relevant to this appeal. Appellants claim again to have tendered a check in the amount of \$6,693.42 to the Pueblo on April 18, 2001, representing the total late rent due for leasing years commencing in 1999 and 2000. Again, the Pueblo disputes that such a payment was tendered.

On August 24, 2001, the Superintendent sent Appellants a notice of default for failure to pay the full amount of annual rental due, and gave Appellants 10 days to show cause why the lease should not be cancelled. Appellants responded with a letter dated September 6, 2001, saying that they had met with the Pueblo on April 18, 2001, and had agreed that they “would pay the outstanding fees” while the Pueblo’s Governor took Appellants’ request for a lease modification (to cancel or adjust the appraisal of the 287 AUM portion of the lease) to the Pueblo’s Council for a response. Also on September 6, 2001, Appellants claim to have had a telephone conversation with the Pueblo’s Lt. Governor in which Appellants expressed their desire to pay their outstanding bill. ^{6/} The Pueblo denies that such a telephone conversation took place.

Based upon Appellants’ September 6, 2001 letter, BIA did not immediately issue a lease cancellation letter, but instead asked to be informed when Appellants heard from the Pueblo’s Governor about the proposed lease modification. On December 12, 2001, the Pueblo’s attorney wrote directly to the Superintendent, saying that the Pueblo had rejected Appellants’ proposal to renegotiate the lease and that the lease should be cancelled. The same day, the Superintendent issued a decision that the lease would be cancelled 30 days from Appellants’ receipt of the decision.

Appellants attempted to appeal that decision, but the appeal was misdirected to this Board, rather than to the BIA Southwest Regional Director. By order of the Board, the matter

^{5/} BIA’s leasing regulations were amended on Jan. 22, 2001, 66 Fed. Reg. 7109. The Pueblo’s letter referred to an earlier regulatory provision concerning the violation of a lease.

^{6/} The same check Appellants claim to have previously tendered to the Pueblo (in the amount of \$6,693.42) bears a revised date of Sept. 6, 2001.

was referred to the Regional Director. Gallegos v. Superintendent, Southern Pueblos Agency, 37 IBIA 112 (2002).

In the appeal before the Regional Director, Appellants filed a Notice of Appeal and a Statement of Reasons, but did not file any other pleadings. The Pueblo filed an Answer and a series of affidavits. The Superintendent did not file anything.

On May 20, 2003, the Regional Director issued a decision that affirmed the Superintendent's decision to terminate the lease. This appeal followed. Appellants have relied upon a new Notice of Appeal directed to the Board, but have not filed any further briefs. Neither the Tribe nor the Regional Director have filed briefs.

Procedural Posture

Upon active consideration of this case, the Board noticed that the administrative record did not contain a copy of a written decision from BIA to Appellants for the November 1, 1999 rental increase, providing instructions on how that decision might be appealed in accordance with 25 C.F.R. § 2.7. We therefore issued an Order for Clarification or Completion of Record dated September 8, 2005, asking whether such a decision was ever issued. The Regional Director responded that Appellants were given notice of the rental increase via BIA's August 1999 Consultation Statement, ^{7/} and that Appellants were verbally informed of their right to appeal the rental increase on October 22, 1999. The Board takes this response as confirmation that Appellants were never provided a written notice of the November 1, 1999 rental increase, in accordance with 25 C.F.R. § 2.7.

Discussion and Conclusions

We need not address Appellants' arguments for reversing the Regional Director's May 20, 2003 decision, since we must vacate and remand this case in any event. The basis for the Superintendent's decision to cancel the lease, which the Regional Director's decision affirmed, was that Appellants did not timely pay rentals due for the 287 AUM portion of the lease for the period commencing November 1, 1999. The obligation to make this payment derived from an invoice submitted to the Appellants by the Pueblo on or about November 23, 1999. That invoice, in turn, reflected a rental increase determined by BIA. The record indicates, and the Regional Director now concedes, that BIA never issued a written decision adjusting the rental rate and advising Appellants of their right to appeal the new rate, as required by 25 C.F.R.

^{7/} The Consultation Statement was addressed to the Superintendent; nothing in the record shows how or when a copy was supplied to Appellants. The Consultation Statement does not provide Appellants with information concerning their appeal rights.

§§ 2.7(a) and (c). This is so even though Appellants specifically asked whether they could appeal the rental increase. Oct. 22, 1999, E-mail from Oscar Sedillo to Albert Gonzales. 8/

BIA's failure to issue a written decision as required by 25 C.F.R. § 2.7 tolls the period Appellants have to appeal the rental increase effective November 1, 1999. See 25 C.F.R. § 2.7(b). Yet it is this rental increase that started a chain of events culminating in lease cancellation. Nothing in the record indicates that Appellants ever failed to comply with the terms of the lease beforehand. Based on the record before us, we cannot conclude that the Regional Director would have upheld a decision to cancel this lease if he had clearly understood at the time of his decision that the amount of rental to be paid remained subject to appeal. See 25 C.F.R. § 2.6(b) ("Decisions made by officials of the Bureau of Indian affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed"); Narconon Chilocco New Life Center v. Anadarko Area Director, 25 IBIA 273, 276 (1994) (a Superintendent could not pursue a contractual remedy in reliance upon an Area Director's decision that was not yet effective under 25 C.F.R. § 2.6(b)).

It seems likely that at the time of his decision the Regional Director assumed Appellants had failed to make timely payment of a new, properly established rental rate. The Regional Director's decision specifically says, "Mr. Gallegos never appealed the BIA's rate increase or the appraisal upon which that increase was based." Regional Director's Decision at 2. This

8/ The Regional Director correctly observes that the Board has on occasion forgiven the failure of BIA to provide proper appeal rights, when an appellant manages to appeal the adverse decision anyway. See, e.g., Shoshone-Paiute Tribes of the Duck Valley Reservation v. Director, BIA, 39 IBIA 103, 104 (2003); Hunter v. Acting Navajo Regional Director, 40 IBIA 61, 66 n.4 (2004). Those cases do not apply in this instance, however, since in Shoshone-Paiute Tribes and Hunter the appellants argued in their appeals the same issue that BIA should have covered with a proper notice of appeal rights. Here, Appellants have confined their arguments to BIA's lease cancellation decision, presumably because that is the nature of the notification they received. They have not argued about the amount of the 1999 rent increase, and have never properly been told that they could. Adjusting the rent and cancelling the lease were two distinct BIA decisions. BIA had the duty to notify Appellants of their right to appeal in both instances. Had Appellants specifically argued the merits of the Nov. 1, 1999, rent increase in their appeals before the Regional Director and the Board, we might agree that a lack of proper notice under 25 C.F.R. § 2.7(c) was harmless error. But it apparently did not occur to Appellants that they might still appeal the amount of the rent increase, so they did not do so.

It is not up to Appellants to save the government the trouble of issuing proper notices under 25 C.F.R. § 2.7. Pursuant to 25 C.F.R. § 2.7(b), Appellants can still appeal the amount of the November 1, 1999 rent increase until BIA gives Appellants proper notice of that decision, and the time for filing an appeal has expired.

statement displays no awareness that Appellants' failure to appeal might have been owing to BIA's noncompliance with 25 C.F.R. § 2.7.

Providing notice and clear appeal instructions in accordance with 25 C.F.R. § 2.7 is not difficult. See Begaye v. Navajo Regional Director, 41 IBIA 109, 111 n.2. The Board has repeatedly stressed the importance of this fundamental step, and the consequences when it is overlooked. See, e.g., LeCompte v. Superintendent, Cheyenne River Agency, 38 IBIA 62 (2002) ("Although a considerable period of time has passed since the Superintendent issued his decision, the decision may still be appealable to the Regional Director because the Superintendent did not include appeal instructions in his decision.")

Because proper notification of the rental increase was never provided in this case, at a minimum it appears that Appellants still have a right to appeal the new rental for the 287 AUM portion of the lease. Absent a final and effective determination of the new rental, we lack a cohesive explanation of the basis upon which the Pueblo could request, or BIA could pursue, cancellation for its nonpayment.

Upon remand, the Superintendent or Regional Director must in any event notify Appellants of the new rental rate in a written decision that includes appropriate appeal rights under 25 C.F.R. § 2.7. Irrespective of that notification, if BIA officials still believe there are one or more legally and factually supportable bases for cancelling the lease, they may so notify the Appellants in compliance with 25 C.F.R. § 2.7.

Conclusion

For the reasons stated above, and 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 vacates the Regional Director's May 20, 2003 decision and remands the case to him for further consideration.

I concur:

// original signed
David B. Johnson
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge