W. WOODROW METZGER
v.
ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 84-37-A Decided November 7, 1985

Appeal by a lessee from a decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) refusing to renew grazing leases held on Indian trust lands on the Pine Ridge Indian Reservation.

Affirmed in part, vacated in part, and referred for evidentiary hearing and recommended decision.

1. Indians: Leases; and Permits: Farming and Grazing

A prior lessee has no preference right to a new lease of Indian trust land for cattle grazing. However, when such lessee has made a timely application for a new lease of land he was previously leasing, he has the right under 5 U.S.C. § 558(c) (1982) to remain on the land until the Bureau of Indian Affairs has determined whether a new lease will be issued to him.

2. Indians: Leases, and Permits: Farming and Grazing

A prior lessee of Indian trust grazing land who agrees to the establishment of an escrow account for the payment of annual rents after the expiration of his leases and until his lease renewal applications can be processed, is not a trespasser on those tracts for which he has sought lease renewals.

APPEARANCES: Alvin R. Pahlke, Esq., Winner, South Dakota, and David Albert Mustone, Esq., Washington, D.C., for appellant. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On June 25, 1984, the Board of Indian Appeals (Board) received a notice of appeal from W. Woodrow Metzger (appellant). Appellant sought review of an April 18, 1984, decision of the Acting Deputy Assistant Secretary--Indian

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Affairs (Operations) (appellee) affirming the denial of appellant's renewal applications for leases on 56 tracts of Indian trust land on the Pine Ridge Indian Reservation in South Dakota (Pine Ridge). For the reasons discussed below, the Board affirms that decision in part, vacates it in part, and refers the matter for an evidentiary hearing and recommended decision.

Background

Since the 1950's, appellant, who is non-Indian, has leased numerous tracts of Indian trust land owned by the Oglala Sioux Tribe (tribe) and individual Indians on Pine Ridge (lessors). In the fall of 1980, appellant began making applications to renew certain leases that were about to expire. Although many of the applications were filed before the expiration of the existing lease, appellant admits that some were filed as long as 5 months after the existing lease had expired.

Appellee's April 18, 1984, decision indicates that much of the land leased by appellant was under 5-year leases, with lease periods extending from November 1, 1975, until October 31, 1980. Appellee states that during this period, approximately 34,524 acres on Pine Ridge were leased to appellant. Negotiations to renew the expiring leases took place from September 1980 to March 1982.

By letter dated January 6, 1981, the Superintendent of the Pine Ridge Agency (Superintendent), Bureau of Indian Affairs (BIA), informed appellant that his lease applications would not be processed further because the tribe had passed a new lease rental resolution setting a minimum leasing charge of $3 per acre for grazing land. Although this resolution applied only to tribally owned lands, the Superintendent also applied it to individually owned lands, because of the requirement of 25 CFR 162.5(b) 1/ that leases be approved at not less than the fair annual rental and his belief that the tribal resolution had established the fair annual rental for this type of land. Appellant's applications proposed a $2 per acre rental payment.

When he received no response to his January 6 letter, the Superintendent again wrote to appellant on February 27, 1981, asking what appellant intended to do in light of the new minimum rental requirement. The record does not contain a response from appellant.

Appellant apparently continued to run cattle on the tracts previously leased to him despite the fact that he did not have current leases. By letter dated July 24, 1981, the Superintendent informed appellant that he and Oppenheimer Industries (Oppenheimer), a Missouri organization for which

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1/ Section 162.5(b) was formerly numbered section 131.5(b). The section was renumbered without substantive change by notice published at 47 FR 13327 (Mar. 30, 1982). The section states: "Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair annual rental."

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appellant worked and which was associated with him in the Pine Ridge grazing operations, were guilty of trespass. Appellee admits that this letter was not mailed to appellant until September 11, 1981, and was not received until September 16, 1981. The letter recited two instances of trespass, one observed on March 16, 1981, and the second on July 22, 1981. By another letter dated September 11, 1981, Oppenheimer was assessed $106,376.14 in trespass damages.

Representatives of appellant and BIA met during August and September of 1981 in an attempt to resolve the matter. A tentative agreement was reached. Appellant agreed to deposit, and deposited, $28,056.78 into an escrow account, which was apparently intended to provide funds for paying any unpaid amounts owing on the lands after October 1980, the expiration date of the leases. Appellant also agreed to provide proof of payment for certain undocumented 1978 lease rental payments that had been made directly to the lessors rather than to BIA. Some of this documentation was later provided.

In late October 1981, BIA informed appellant that he was in arrears approximately $3,900 on payments for lease year 1978. Appellant responded to this accounting in November 1981, stating that he believed he was in arrears only for $291. Appellant tendered a check for $291 to BIA. The record does not disclose whether the check was accepted, but appellant states that it was.

On January 22, 1982, appellant requested an accounting of BIA's allocation of the escrow account among the eligible lessors. BIA informed appellant on February 3, 1982, that it needed additional information before an accounting could be made. A partial accounting was provided to appellant on February 25, 1982. Appellant alleges that this accounting is inaccurate because it includes 24 tracts for which he had not sought lease renewals and because he was assessed twice for three other tracts.

In early 1982, BIA decided that any new leases awarded to appellant would not be retroactive to 1980, but would begin on November 1, 1981. Appellant was informed of this decision by letter dated April 21, 1982. Because of this change, BIA stated that appellant and Oppenheimer would be considered trespassers for the time following November 1, 1980, and would be subject to the penalties established in 25 CFR 166.24(b). 2/ BIA said that any rental payments made would be considered in connection with its trespass actions. The Superintendent warned, however, that if the trespass situation were not resolved in the near future, the matter would be turned over to the

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2/ Section 166.24(b) states in pertinent part: "The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass (except in North Dakota, South Dakota, Nebraska and Minnesota where the penalty shall be $1 per head of cattle regardless of the number of days of trespass), together with the reasonable value of the forage consumed by their livestock and damages to property injured or destroyed, and for expenses incurred in impoundment and disposal."

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Justice Department. 3/ He suggested that another meeting be held, but warned that if the matter were not resolved by May 3, 1982, the tracts would be advertised for lease to the highest bidder. 4/

On April 28, 1982, appellant informed the Superintendent that one more meeting would not be sufficient to resolve the differences between them. He therefore stated his intention to appeal the Superintendent's April 21, 1982, letter. Appellant filed an appeal with the Area Director, who treated the Superintendent's letter as an appealable decision and affirmed it on July 27, 1982. A further appeal was taken to appellee, who affirmed the decisions on April 18, 1984.

Appellant's appeal to the Board was received on June 25, 1984. The administrative record was received from BIA on August 8, 1984. On August 27, 1984, appellant moved for supplementation of the record and a stay of the briefing schedule until such supplementation was made. The motion was granted. The additional materials were received by the Board on December 3, 1984. Appellant filed an opening brief on February 15, 1985. Appellee did not file a brief.

Discussion and Conclusions

On appeal appellant does not seek reinstatement of the leases, but rather a legal determination that BIA erred in refusing to renew them. He raises four issues: (1) Whether there was a legally binding agreement between himself and BIA obligating BIA to approve his lease renewal applications; (2) whether BIA was estopped from refusing to approve his renewal applications once he had complied with the alleged conditions set for their approval; (3) whether BIA violated 5 U.S.C. § 558(c) (1982) when it re-leased the subject lands and assessed him trespass penalties and charges before the completion of Departmental review; and (4) whether the accounting provided for the escrow account was improperly calculated.

Appellant first argues that he and BIA entered into a legally binding oral agreement as to what would be required for approval of his lease renewal applications. Appellant alleges that a contract arose when he agreed to take certain actions in reliance upon BIA's promise to issue the lease renewals.

3/ A new trespass notice was issued to Oppenheimer on June 3, 1982. The notice again informed Oppenheimer that if the outstanding assessment of $106,376.14 were not paid, the matter would be turned over to the United States Attorney for legal action. The current status of this matter is not indicated in the record.

4/ Appellant attempted to delay the advertisement of the tracts by seeking intervention by the Aberdeen Area Director (Area Director) and the United States District Court for the District of South Dakota. Both the Area Director and the court refused to intervene in the proceeding. See letter of May 20, 1982, from Area Director; Metzger v. United States Department of the Interior, CIV 82-5050 (D.S.D. May 28, 1982). The tracts were advertised in early May 1982, and most were subsequently leased to other persons, at rents higher than those offered by appellant.

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The Board has carefully reviewed the record to determine whether appellant and BIA ever reached a meeting of the minds as to the conditions for lease renewal. A primary point over which appellant and BIA disagreed was the rental rate. Appellant wanted to continue paying $2 per acre, while BIA wanted at least $3 per acre. BIA was prepared to allow appellant to pay only $2 per acre, provided he could obtain the written consent of the lessors. Such consent was not obtained before appellant decided to appeal BIA's decision. The Board finds evidence that at all stages the parties anticipated that an agreement would be reached and the leases would be renewed. There is no evidence, however, that a final agreement as to the rental rate was ever reached. As the Board noted in Idaho Mining Corp. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 249, 262, 90 I.D. 329, 336 (1983), "[a]nticipations * * * can be defeated by changed circumstances." Here, the parties' anticipations that the leases would be renewed were defeated by their ultimate failure to reach agreement on the lease terms. Accordingly, assuming arguendo that an oral agreement involving land could have been legally binding under these circumstances, the Board finds that no agreement was ever reached that would require issuing the leases to appellant.

Appellant next contends that BIA is estopped from refusing to approve his lease applications. Appellant correctly states that in order to prove estoppel against the Federal Government:

> [I]t must be shown that the party to be estopped knew the facts and either intended that its conduct be relied upon or acted so as to cause reliance upon its conduct, and that the party asserting estoppel was ignorant of the true facts and detrimentally relied upon the other party's conduct.

Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 214, 219, 90 I.D. 283, 285 (1983), and cases cited therein.

Estoppel cannot be found under the facts of this case. Both appellant and BIA expected that an agreement would be reached under which new leases could be issued to appellant. The fact that BIA worked unsuccessfully toward this goal does not constitute affirmatively misleading appellant to his detriment.

Appellant next argues that the decision to advertise the leases and to award them to other individuals while his administrative appeal was pending violates 5 U.S.C. § 558(c) (1982), which states in pertinent part: “When the licensee has made timely and sufficient application for a renewal * * * license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.” Appellant states that this provision has been interpreted in Pan-Atlantic Steamship Corp. v. Atlantic Coastline Railroad, 353 U.S. 436, 429 (1957), to mean that “there must be a license outstanding; it must cover activities of a continuing nature; there must have been filed a timely and sufficient application to continue the existing operation; and the application for the new or extended license must not have been finally determined.”

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In his dissenting opinion in Pan-Atlantic at 444-445, Justice Burton discussed the background of section 558(c) in terms that echoed and elaborated upon the majority opinion:

> The policy behind the third sentence of [558(c)] is that of protecting those persons who already have regularly issued licenses from the serious hardships occasioned both to them and to the public by expiration of a license before the agency finds time to pass upon its renewal. * * * [558(c)] operates to protect valuable existing rights and avoids unnecessary injury resulting from administrative delay.

[1] Under 25 CFR 162.5(e) "[n]o lease [of Indian trust land] shall provide the lessee a preference right to future leases nor shall any lease contain provisions for renewal, except as otherwise provided in this part." Appellant thus had no guarantee of receiving new leases even if his performance under the old leases was satisfactory. The grazing of cattle is, however, an activity of a continuing nature. Appellant had existing leases and filed timely applications for new leases in at least some cases. Those applications had not been finally determined by the Department. Appellant was, therefore, covered by section 558(c) as to those allotments for which he filed timely applications for new leases, and BIA erred in issuing new leases for those allotments to other persons before appellant's lease applications were finally determined. 5/

Because the administrative record is inadequate to allow a determination of which applications for new leases were timely filed, the Board finds that this factual question can only be resolved through referral for an evidentiary hearing and recommended decision in accordance with 43 CFR 4.337(a).

Finally, appellant argues that BIA's accounting for the disposition of his escrow account was inaccurate. This argument also raises the question of whether appellant and Oppenheimer were properly charged with and assessed damages for trespass. Trespass notices were issued in September 1981. At that time, appellant agreed to the establishment of an escrow account, apparently to cover amounts owing during the period between the expiration of the old leases and the awarding of new ones. On February 25, 1982, the Superintendent wrote to appellant giving an accounting of the amounts owed to the lessors from this escrow account "for the period of November 1, 1980 through October 31, 1981." The total amount owed, according to BIA's figures, was

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5/ In this case, BIA's decision not to grant appellant new leases involved legal issues that allowed him a right of appeal. In most cases, the decision of whether to approve a lease of Indian trust lands is discretionary and would not be subject to Board review. See, e.g., Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146, 154 n.4, 91 I.D. 43, 48 n.4 (1984).

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$36,049.86. Appellant disputes this figure and seeks to have the calculation vacated and remanded for redetermination.

[2] It appears that the escrow account was established to pay annual rental charges on the tracts that appellant had previously leased and on which he had applied for new leases, until a decision was reached on whether his leases would be renewed. In its accounting to appellant, BIA apparently calculated the amounts owed to each lessor as rental payments. A fund for continuing rental payments is inconsistent with a charge of trespass. If, in fact, this was the purpose of the escrow account, appellant and Oppenheimer should not have been charged with and assessed damages for trespass on those tracts upon which appellant had applied for lease renewals. Instead, as to those tracts, the owners should receive rentals out of the escrow account, as supplemented by appellant if the amount originally placed in escrow is insufficient to cover the total rentals that may be found due and owing. Appellant and Oppenheimer may be guilty of trespass if this was not actually the purpose of the escrow account; if they grazed cattle on any tract for which they had not applied for lease renewals; or if they grazed cattle on any other tract not previously leased to them.

Because the record is insufficient to allow the Board to resolve the factual issues related to the purpose of the escrow account, the amounts owed from that account, and whether there is an excess or deficiency in the account, these questions will also be referred for an evidentiary hearing and recommended decision.

The evidentiary hearing shall be conducted in full compliance with the administrative due process standards generally applicable to other hearings proceedings conducted by Administrative Law Judges (Departmental). The present administrative record may be considered as part of the evidentiary record in the hearing.

Pending the completion of the hearing and the issuance of the recommended decision, further procedures will be established by the Administrative Law Judge assigned to this case.

As provided in 43 CFR 4.339, any party may file exceptions or other comments with the Board within 30 days from receipt of the recommended decision. The Board will then inform the parties of any further procedures in the appeal or issue a final decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 18, 1984, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) is affirmed as to the decision not to renew appellant's leases. The determination that appellant and Oppenheimer were trespassers is vacated, and that question and the proper disposition of the funds in the escrow account are referred to the Hearings Division of the Office of Hearings and Appeals for assignment to an Administrative Law Judge (Departmental) for an

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evidentiary hearing and recommended decision. The Administrative Law Judge shall also determine which leases were subject to 5 U.S.C. § 558(c).

Bernard V. Parrette
Chief Administrative Judge

I concur:

Jerry Muskrat
Administrative Judge

6/ Appellant mentions, but does not pursue, the issue of removal or sale of improvements on certain allotments. The Board concludes that appellant was satisfied by appellee's Apr. 18, 1984, remand of this issue to the Area Director.

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