MR. AND MRS. W. A. MERRILL
v.
PORTLAND AREA DIRECTOR BUREAU OF INDIAN AFFAIRS

IBIA 90-44-A Decided November 23, 1990

Appeal from a decision finding that a business lease of tribal land did not include an option to renew.

Affirmed.

1. Indians: Leases and Permits: Generally

Under 25 U.S.C. § 415 (1988), leases of trust or restricted land must be approved by the Secretary of the Interior or his authorized delegate. A provision which is specifically omitted from a lease before approval is granted is not part of the lease and cannot be made part of the lease by unilateral action of the Indian lessor.

APPEARANCES: Dustin D. Deissner, Esq., Spokane, Washington, for appellants; Colleen Kelley, Esq., Office of the Solicitor, Pacific Northwest Region, U.S. Department of the Interior, Portland, Oregon, for the Portland Area Director; Bruce Didesch, Esq., Nespelem, Washington, for the Confederated Tribes of the Colville Reservation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Mr. and Mrs. W. A. Merrill seek review of a December 6, 1989, decision of the Portland Area Director, Bureau of Indian Affairs (BIA; Area Director), finding there was no option to renew contained in Business Lease No. 2428, Contract No. 14-20-0503-1306 (Lease 2428), covering a portion of secs. 22 and 27, T. 32 N., R. 35 E., Willamette Meridian, Ferry County, Washington, containing 14.6 acres, more or less. The leased land is held in trust for the Confederated Tribes of the Colville Reservation (tribes). For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Area Director's decision.

Background

The land at issue here is located along the shore of South Twin Lake. It was leased to Mr. and Mrs. G. Gerald Nixon in 1957 under Business Lease No. 6709, Contract No. 14-20-503-223 (Lease 6709), apparently for the same

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purpose as under Lease 2428, i.e., for the construction, operation, and maintenance of summer cabins and recreation facilities. Lease 6709 was to expire on March 31, 1977, but was cancelled by mutual consent on August 28, 1969, in favor of Lease 2428.

Late in the term of Lease 6709, the Nixons indicated their desire to assign the lease to Ray Johnson and E. A. Eberth. In lieu of an assignment and extension of Lease 6709, on April 1, 1969, the tribes entered into Lease 2428 with Johnson and Eberth. Lease 2428 was for a term of 20 years, expiring on March 31, 1989. The lease was authorized by Tribal Resolution 1969-279, which stated in the "Whereas" section at item 2: "[T]he said lease shall be renewable for a period of an additional period of 20 years at the option of the lessee at prevailing terms and conditions." The provision for a renewal option was not, however, incorporated into the lease itself. The lease was approved by the Superintendent, Colville Agency, BIA (Superintendent). The Superintendent transmitted the lease to the Area Director by letter of August 7, 1969, stating: "The resolution [1969-279] has been reviewed, and we made one exception that the option to renew for additional twenty (20) years be denied. The Business Council has been contacted, and they were fully aware that it would be denied but they insisted that the option be inserted as of record."

On August 21, 1971, the lease was assigned without change to John T. and Lou Ann Sohns and Vernon and Carolyn Craig Gustafson. This assignment was approved by the tribes in Tribal Resolution 1971-540 and by the Superintendent on September 13, 1971. The resolution did not mention the renewal option, nor was such an option included in the assignment.

On March 1, 1974, the lease was assigned to appellants. This assignment, which again did not alter the terms of the lease, was approved by the tribes in Tribal Resolution 1974-109 and by the Superintendent on July 17, 1974. Two copies of Tribal Resolution 1974-109 appear in the administrative record. Each copy of the resolution is two pages long. One copy is marked "corrected copy" on the first page, but not on the second page. One version of the second page of the resolution states: "Lease No. 2428 to expire March 31, 1989, and Item 2 of resolution 1969-279 be amended to remove the lease renewal option clause reserved by the lessee as the Tribes may wish to operate their own facilities at that time." The other copy of the second page of the resolution does not contain this language. The copy of the second page of the resolution that deletes the reference to the renewal option is connected to the copy of the first page that is marked "corrected copy." An April 15, 1974, letter from the Superintendent to appellants' attorney indicates that the copy of the resolution deleting the reference to the renewal option was the later copy. There is no further evidence in the record concerning the tribal council's intentions, the identity of the person(s) authorizing the "correction," or the reason why a "correction" was required. See Potter v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 33 (1982), for an example of problems inherent in apparently conflicting tribal council actions.

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Sometime in 1984, appellants sought permission to assign the lease to Sharon and Albert Collins, their daughter and apparently their son-in-law. Although the possibility of an assignment was considered, assignment was never approved. Subsequently, sometime in 1988, appellants sought to exercise the option to renew which they contended was contained in the lease by virtue of Resolution 1969-279 and corrected Resolution 1974-109. They were orally informed that the tribes would not renew the lease for an additional twenty years, but were willing to negotiate a shorter lease. Appellants refused this offer and requested formal written notice of the denial of renewal. In a letter dated November 3, 1988, the Superintendent stated:

> Please be advised that Tribal Resolution Nos. 1969-279 and 1974-109 were never incorporated into the actual lease contract approved by the Bureau of Indian Affairs, therefore, the Tribe feels they are not legally obligated to honor the renewal option for an additional twenty (20) years and that you will have ninety (90) days from date of expiration of the lease to remove all buildings and/or improvements from the premises.

Appellants were not informed of any right to appeal this decision. No appeal was filed. 1/

By letter dated January 13, 1989, appellants notified the Superintendent that they "fully expect[ed] the Colville Indian Tribe to abide by the terms of its original contract with them. By this letter they hereby again exercise any and all options that are available on the contract."

By letter dated April 6, 1989, the Superintendent notified appellants that the lease had expired and they had 90 days from receipt of his letter to remove all buildings and improvements they had made on the leasehold. The Superintendent further stated that any buildings and/or improvements remaining after that time would become the property of the tribes. This

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1/ When this letter was issued, BIA appeal regulations in 25 CFR Part 2 did not require BIA officials to inform parties of their appeal rights. Parties dealing with BIA were presumed to know the regulations and the time limitation on appeals. See, e.g., Baker v. Anadarko Area Director, 17 IBIA 218, 221 (1989). For purposes of this discussion, the Board will assume, without holding, that appellants were not required to appeal this letter.

BIA's appeal regulations were amended effective Mar. 13, 1989. See 54 FR 6478 (Feb. 10, 1989). 25 CFR 2.7(c) now provides that "[a]ll written decisions * * * shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal." Section 2.7(b) further provides that "[f]ailure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section."

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letter did not contain appellants' appeal rights. By letter dated August 11, 1989, the Superintendent informed appellants of their appeal rights.

Appellants' notice of appeal to the Area Director is dated August 25, 1989. Appellants argued that "the 20 year renewal option was to be at their option and that no approval of the Colville Indian Tribe or the Bureau of Indian Affairs is required. The Bureau's 'decision' to not renew the lease is therefore wrongful and in breach of the agreement between the parties" (Notice of Appeal at 1).

The Area Director affirmed the Superintendent's decision on December 6, 1989. The Board received appellants' notice of appeal from this decision on January 16, 1990. Briefs were filed by appellants, the Area Director, and the tribes.

Discussion and Conclusions

Business leases of land held in trust or restricted status for an Indian tribe or individual are governed by 25 U.S.C. § 415 (1988), 2/ which states in pertinent part:

> (a) Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for * * * business purposes * * *. All leases so granted shall be for a term of not to exceed twenty-five years * * *. Leases for * * * business purposes * * * with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years, and all leases and renewals shall be made under such terms and regulations as may be prescribed by the Secretary of the Interior.

Regulations governing the leasing and permitting of trust and restricted lands appear in 25 CFR Part 162. 25 CFR 162.8(a) repeats that leases for business purposes "may include provisions authorizing a renewal or an extension of one additional term of not to exceed 25 years."

Appellants state at pages 1-2 of their opening brief:

> It is the position of the Appellants that the Colville Indian Tribe induced [them] to enter into the lease agreement and to do substantial improvements to the subject property by an assertion that there would be a renewal provision in the lease. It is the further position of the Appellants that the tribe should be estopped to deny the existence of this provision and that the requirement of approval by the Secretary of the Interior does not apply in this case.

2/ All further references to the United States Code are to the 1988 edition.

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Appellants raise four alternate arguments: (1) Corrected Resolution 1974-109, which unambiguously sets forth a renewal option, must be implemented; (2) when it was written in 1969, Lease 2428 was intended to have a renewal option. Because they were induced to accept the assignment of the lease through tribal representations that such an option was included, such general contract law doctrines as incorporation of contemporaneous documents, misrepresentation, and/or mutual mistake must be employed to reform the lease to include the renewal option; (3) approval of the renewal option by the Secretary was not required because "the approval of a lease which can be construed to have included provision by operation of equity, is not expressly covered in the Code of Federal Regulations 25 CFR 162.5 or 162.12" (Opening Brief at 6). 3/ Therefore, "the question is one of the construction of the lease which is permissible under 25 U.S.C. 415" (ibid.), and the tribes must be held responsible for their business representations; (4) the lease should be viewed as executory because the tribes breached their obligation to seek approval of the renewal option from the Secretary and, accordingly, the tribes should be required to submit the lease with the renewal option to the Secretary for retroactive approval.

[1] Each of appellants' arguments is based on the same fallacious premise; i.e., that the tribes were able to include a provision in a lease without the approval of the Secretary and, therefore, in violation of 25 U.S.C. § 415. Leases of trust or restricted land involve three parties: the Indian lessor, the lessee, and the Secretary. An Indian landowner cannot lease, assign, or renew a lease of trust or restricted land without the approval of the Secretary or his authorized delegate. 25 U.S.C. § 415(a). A lease which is not approved is void ab initio, and grants no rights to either the attempted lessor or lessee. Smith v. Acting Billings Area Director, 17 IBIA 231, 235 (1989). A provision which is specifically omitted from the lease before Secretarial approval is granted is not part of the lease, is void ab initio, and has no force or effect. Furthermore, the Indian lessor lacks authority to unilaterally add a provision to a lease when that provision was not part of the lease as approved.

The administrative record shows that the Superintendent specifically considered and disapproved the inclusion of a renewal option in Lease 2428 when it was approved in 1969. See August 7, 1969, memorandum from the Superintendent to the Area Director, quoted supra, and Lease 2428. All parties were fully aware that the renewal option had been disapproved. Neither the tribes nor Johnson and Eberth appealed the decision to omit the renewal option. 4/ Instead, the tribes merely indicated that they wanted to memorialize the possibility of a renewal option through a tribal resolution.

3/ Section 162.5 provides special requirements and provisions relating to format and content of leases of trust or restricted land; section 162.12 concerns subleases and assignments of such leases.

4/ It is thus more than merely arguable that present appellants lack standing to argue that a renewal option was incorporated into the lease by Resolution 1969-279 when the omission was not timely challenged by their

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The inclusion of a renewal option was apparently again discussed when the lease was assigned to appellants. However, no renewal option was placed in the lease or assignment document that was approved by the Superintendent. Accordingly, the Area Director correctly determined that Lease 2428 did not include a renewal option. 5/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 6, 1989, decision of the Portland Area Director is affirmed.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

fn. 4 (continued)
predecessors-in-interest. See 25 CFR 2.10(a) (1968). Again, for the purposes of this discussion, the Board assumes, without holding, that appellants' argument is not time-barred.
5/ The short answers to each of appellants' arguments are: (1) the tribes cannot unilaterally alter the terms of a lease approved by the Secretary through either the passage of a tribal resolution or other means; (2) contemporaneous documents show that there was no misrepresentation or mutual mistake in the exclusion of the renewal option in 1969; (3) the inclusion of a renewal option is permissive, and subject to the Secretary's discretionary determination of what is in the best interest of the Indian landowner; and (4) the tribes sought approval of the renewal option; approval was denied.

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