TERRY LEE THOMPSON and	:	Order Vacating and Remanding
VELVA JO WAITES	:	Decision in Part, and Dismissing
Appellants	:	Appeal in Part
	:	
v.	:	
	:	Docket No. IBIA 93-31-A
ACTING ABERDEEN AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	March 24, 1993

Appellants Terry Lee Thompson and Velva Jo Waites seek review of an October 27, 1992, decision issued by the Acting Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning Lease 31145, Allotment 155, on the Lake Traverse Reservation of the Sisseton-Wahpeton Sioux Tribe in South Dakota (lease).

The lease was entered into on December 8, 1969, between Caleb Hill and Maurice J. Rabenberg (lessee), and was approved by the Superintendent, Sisseton Agency, BIA, on December 23, 1969. The lease had a term of twenty-five years, beginning October 1, 1969, with an option to renew for an additional twenty-five years. 1/ The primary term of the lease is thus due to expire on September 30, 1994. The property was leased for "lake shore residential sites," and contains 21.2 acres, with approximately 1,450 feet of lakeshore frontage. 2/

1/ The renewal option was added on the first page of the form lease, with a reference to Protective Covenant 14.S, which provides:

"The lessee shall have the option to renew this lease for an additional term of not more than 25 years, provided that the lessee has performed and complied with all of the obligations of this lease, and that no later than six months prior to the expiration of the initial term, the lessee gives the lessor (lessors) written notice of the exercise of the option. The renewal option shall not contain any further option to renew."

2/ Protective Covenant 14.A provides:

"The lessee may sublease any or all platted lots. The lessee shall be responsible for the enforcement of the protective covenants listed hereafter.

"It is understood and agreed that subleases of platted lots, as provided in paragraph A above may be made without further approval of the landowners or the Secretary, but subleases so made shall not serve to relieve the sublessor from any liability, or diminish any supervisory authority of the Secretary provided for under the approved lease.

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The initial rental was $800 per year. Protective Covenant 14.T of the lease provided: "It is understood and agreed that the leased acres shall be re-evaluated at the end of each five year period, beginning October 1, 1974 for rental adjustment if necessary due to change of economic condition." 3/

Hill died intestate in 1976. Although no copy of the order appears in the administrative record, there does not appear to be any dispute that appellants were determined to be Hill's heirs in a February 28, 1978, order by Administrative Law Judge Vernon J. Rausch.

Appellants do not appear to be contesting any rental adjustment that might have been made prior to 1987. At that time, BIA appraised the leasehold at a fair market value of $5,800. In his answer brief, the Area Director states that, by letter dated May 14, 1987, the Superintendent notified the lessee that the rental was being adjusted to $5,800, but that the rental was subsequently readjusted to $5,000. No copies of these notification letters appear in the record.

On January 16, 1992, appellants wrote the Superintendent requesting all records and documents in connection with the lease, questioning the rental rate, and asking that the Superintendent advise the lessee that the lease would not be extended at the end of its primary term.

On March 6, 1992, the Superintendent provided appellants with documents relating to the lease, but did not take any of the requested actions. Appellants renewed their requests on March 30, 1992. By letter of April 29, 1992, the Superintendent informed appellants that he had referred the matter to the Office of the Field Solicitor.

Footnote 2 continued:

"The superintendent of the Bureau of Indian Affairs, Sisseton Agency, reserves the authority to review, and, if necessary, rescind decision of lessee in regard to the application of these covenants."

Protective Covenants 14.B-.R set forth covenants which are apparently intended for the protection of the property and of persons who might sublease lots, while 14.S sets forth the renewal option and 14.T provides for review and adjustment of the rental rate.

The record indicates that ten houses and three mobile homes are presently located on the leased property. Appellants indicate that the lessee receives rental income from these subleases.

3/ 25 CFR 162.8 provides in pertinent part:

"[U]nless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions at the time, exclusive of improvement or development required by the contract or the contribution value of such improvements. Any adjustments of rental resulting from such review may be made by the Secretary where he has the authority to grant leases, otherwise the adjustment must be made with the written concurrence of the owners and the approval of the Secretary."

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Dissatisfied with this response, on July 21, 1992, appellants invoked 25 CFR 2.8 to force the Superintendent to issue a decision. 4/ By letter dated July 24, 1992, the Superintendent informed appellants that he believed he did not have the authority to decline to permit the lessee to exercise the renewal option or to adjust the rent retroactively.

Appellants appealed to the Area Director, who issued the October 27, 1992, decision presently under review. That letter indicated that BIA had complied with appellants' requests for a new appraisal of the leased property and for obtaining appellants' written concurrence in the rental adjustment. The Area Director stated that BIA had no mechanism at the Agency or Area Office levels for recovering rentals in excess of the rental rate stated in the lease, and had no authority to rewrite the lease to require the concurrence of appellants for extension of the lease beyond the primary term.

Appellants appealed this decision to the Board. Both appellants and the Area Director filed briefs on appeal. Appellants request that the Area Director's decision be reversed and the matter remanded to him with appropriate orders to (1) adjust the rental rate for 1987-1991 retroactively, (2) conduct an appraisal which takes into consideration all of the economic elements and maximizes the income to appellants, (3) readjust the rental rate for the period 1992-1994 and obtain the written concurrence of appellants for any retroactive and future rental adjustments, and (4) advise the lessee that appellants have instructed BIA to rescind the lessee's option to renew the lease unless the Indian owners are satisfied with all of the terms and conditions of any renewal.

Apparently referring to the 1987 adjustment, the Area Director acknowledges that

> [t]he file does not indicate that the superintendent obtained the concurrence of the owners with the adjustment, nor the basis for her authority to act on behalf of the owners. It further does not contain any documentation of the basis for the superintendent's deviation from the appraised fair market value in the lease rental adjustment.

4/ Section 2.8 provides in pertinent part:

"(a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of an appeal as follows:

"(1) Request in writing that the official take the action originally asked of him/her;

* * * * * *

"(3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part."

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(Answer brief at 2). The Area Director further "admits that the administrative file contains insufficient information to affirm the decision of the Area Director with respect to the lease rental adjustment and therefore, requests the Board to remand that issue back to [him] for his reconsideration" (Answer brief at 3-4). However, after discussing the appraisal on which the 1992 rental rate adjustment was based, the Area Director states: "The Board should confirm the current adjustment, because it is supported by the evidence and in accordance with the law" (Answer brief at 7). It appears that the Area Director is now contending that, despite his earlier position that he could not retroactively readjust the rental rate for the period of 1987-1991, that question should be remanded to him, but that the 1992 adjustment should be affirmed. 5/

The Board interprets the Area Director's request for remand to encompass both the 1987 and the 1992 adjustments. Appellants are entitled to a clear statement of the Area Director's position as to both the adjustments. Therefore, that portion of the October 27, 1992, decision concerning the 1987 rental rate adjustment is vacated and remanded to the Area Director for further consideration. In addition, the Area Director is instructed to issue a clear statement of his position concerning the 1992 rental rate adjustment.

Appellants have also requested that BIA inform the lessee that the lease provision allowing him an option to renew will be rescinded unless appellants are satisfied with all of the terms and conditions of the renewal. The Area Director argues that any decision on this matter is premature because the lessee has not attempted to exercise the renewal option and may not exercise it. Alternatively, the Area Director contends that the provision of Protective Covenant 14.A upon which appellants rely applies only to Protective Covenants 14.A-.R, and not to Protective Covenant 14.S, which sets forth the renewal option.

The Area Director's October 27, 1992, letter contains what the Board construes to be a decision that conditioning the lessee's option to renew on the written concurrence of appellants would constitute a rewriting of the lease. This is a decision that is within the Board's review authority.

Under the circumstances of this case, however, the Board declines to address this matter at this time. The primary term of the lease does not

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5/ The Board disagrees with the Area Director to the extent he contends that appellants' acceptance of the 1992 appraisal and/or rental rate adjustment precludes further discussion. Appellants' acceptance of the appraisal and/or rental rate adjustment was conditional, without waiver of any arguments raised in this appeal. A Sept. 29, 1992, letter from counsel for appellants to the Superintendent states: "Please be advised that the said acceptance (of the rental adjustment) is executed without prejudice or waiver of any rights of [appellants] in connection with their pending appeal to the Area Director concerning the subject lands." Additionally, appellants dispute receiving a copy of the appraisal upon which the 1992 adjustment was based before being asked to concur in the adjustment.

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expire until September 30, 1994. If the lessee determines to exercise the option to renew, he must so inform appellants on or before March 31, 1994. The lessee, being represented by counsel in the present appeal, is aware of appellants' concerns. There is ample time before March 31, 1994, in which the parties can attempt to resolve this matter amicably, without the necessity of Board, or other judicial, involvement. The Board notes that appellants' right to negotiate a lease of their trust property, set forth in 25 CFR 162.3(l), includes the right to negotiate a modification of an existing lease. If the parties fail to resolve the matter, the party aggrieved will have an opportunity to appeal at that time.

Appellants also contend that they are due damages for BIA's failure to discharge its responsibilities to them in obtaining a proper rental beginning in 1987. To the extent that this issue is not addressed in the Board's remand, appellants are advised that the Board is not a court of general jurisdiction, but has only that authority delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against BIA. See, e.g., Filesteel v. Acting Billings Area Director, 21 IBIA 22 (1991); U.S. Fish Corp. v. Eastern Area Director, 20 IBIA 93, 97, recon. denied, 20 IBIA 163 (1991).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, as discussed in this opinion, the portion of the Acting Aberdeen Area Director's October 27, 1992, decision concerning the rental rate adjustments is vacated, and remanded to him for further consideration. The appeal as to the remainder of the Area Director's decision is dismissed without prejudice, and the parties are encouraged to work together to reach an amicable resolution of the concerns raised. 6/

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge

6/ Any remaining argument raised by appellants but not specifically addressed in this decision is deemed encompassed within the order of remand and/or the suggestion that the parties attempt to resolve this matter.

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