



INTERIOR BOARD OF INDIAN APPEALS

Randall Emm v. Phoenix Area Director, Bureau of Indian Affairs

34 IBIA 260 (03/09/2000)

Related Board cases:

30 IBIA 72

33 IBIA 22



United States Department of the Interior

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

RANDALL EMM,	:	Order Dismissing Appeal as Moot
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 99-21-A
PHOENIX AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	March 9, 2000

This is an appeal from an October 1, 1998, decision of the Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the modification of Walker River Lease 675 to exclude Walker River Allotment 172. The Board dismisses this appeal as moot but, in the unusual circumstances of this case, also discusses the merits of the appeal.

On November 3, 1994, the Superintendent, Walker River Agency, BIA, approved Lease 675, covering Walker River Allotments 153, 156, and 172, with Appellant as lessee. Roger Williams, owner of a 1/3 interest in Allotment 172, appealed from the lease approval, stating that he had been farming approximately 1/3 of the allotment for 15 years.

On June 1, 1995, the Area Director reversed the Superintendent's approval of the lease. He remanded the matter to the Superintendent, holding that Williams' "owner's use" rights to Allotment 172 should have been recognized before the entire allotment was leased to Appellant.

Appellant appealed the Area Director's decision to the Board. On October 30, 1996, the Board affirmed the Area Director's decision, with one modification not relevant here. Emm v. Phoenix Area Director (Emm I), 30 IBIA 72 (1996). 1/

1/ A second appeal from the Area Director's June 1, 1995, decision was filed by William Frank, on behalf of the Frank family, owners of Allotments 153 and 156, as well as 2/3 of Allotment 172. The Emm and Frank appeals were consolidated for purposes of decision.

Following return of the matter to BIA, the Superintendent modified Lease 675 to delete Allotment 172 from the lease. The modification was dated June 2, 1997, and was transmitted to interested parties by letter dated June 3, 1997, with notice of the right to appeal the modification.

Appellant and Frank filed timely appeals with the Area Director. In July 1998, Williams filed an appeal with the Board under 25 C.F.R. § 2.8, alleging that the Area Director had failed to respond to his June 29, 1998, request for a decision in the appeals. Upon inquiry by the Board, the Area Director stated that he expected to issue a decision by October 1, 1998. The Board therefore dismissed Williams' appeal in order to allow the Area Director to "continue to address, and perhaps resolve, [Williams'] concerns." Williams v. Phoenix Area Director, 33 IBIA 22 (1998).

On October 1, 1998, the Area Director affirmed the Superintendent's modification of the lease. Appellant then appealed to the Board. Frank did not appeal; nor has he participated in Appellant's appeal.

Lease 675 expired on December 31, 1999. This appeal is therefore subject to dismissal as moot. Under the unusual circumstances of this case, however, and particularly because of an apparent need to clarify an important aspect of the Board's decision in Emm I, the Board will address the merits of this appeal and will attempt to clarify Emm I.

Appellant's only argument on appeal is that the Area Director had no authority to modify Lease 675 without the consent of all the parties to the lease. In support of this argument, he cites 25 C.F.R. § 162.12(a), which provides:

Except as provided in paragraphs (b), (c) and (d) of this section, a sublease, assignment, amendment or encumbrance of any lease or permit issued under this part may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties.

The Area Director contends that 25 C.F.R. § 162.12(a) is inapplicable here because the Superintendent's decision to approve Lease 675 never became final. The Area Director's argument is based upon BIA's appeal regulations and the Board's procedural regulations, both of which provide that a BIA decision is stayed pending appeal. 25 C.F.R. § 2.6, 43 C.F.R. § 4.314(a). See, e.g., Wadena v. Acting Minneapolis Area Director, 30 IBIA 130, 137-139 (1996).

The Area Director is correct. Although the Superintendent approved Lease 675 on November 3, 1994, his act of approval was timely appealed by Williams. The Area Director reversed the Superintendent's approval decision, and the Board affirmed the Area Director's decision. Thus, the Superintendent's approval of Lease 675 never became final. Appellant

has never had an approved lease to which 25 C.F.R. § 162.12 could apply. 2/ This is true even though BIA has evidently permitted Appellant to farm the property as if he had an approved lease.

The Board rejects Appellant's argument and concludes that BIA's modification of Lease 675 was not subject to 25 C.F.R. § 162.12.

Appellant has made no other argument. For the reasons noted above, however, the Board finds that it should exercise its authority under 43 C.F.R. § 4.318 to discuss a point not raised by Appellant.

The record indicates that, following the Board's decision in Emm I, the Agency initially intended to modify Lease 675 to remove only the portion of Allotment 172 which was being farmed by Williams. Ultimately, however, after discussions between Agency and Area Office staff, the Superintendent removed all of Allotment 172 from the lease. It appears that the decision to remove the entire allotment may have been based on an interpretation of Emm I, in particular footnote 11, to require that result. 3/

Discussing Emm I in an April 17, 1997, memorandum to the Superintendent, the Area Director stated:

In a footnote [i.e., footnote 11], the Board indicated that Mr. Williams' "owner's use" rights would extend to the entire allotment * * *.

* * * * *

2/ Cf. Brooks v. Muskogee Area Director, 25 IBIA 31, 34 (1993), and cases cited therein, holding that an unapproved lease grants no rights to any party.

3/ Footnote 11 states:

"Because there is no statutory or regulatory basis for recognizing the informal partition of Allotment 172 which was effected by Williams, * * * if the co-owners of the allotment continue to be unable to agree on its use, it might be best in the long term for them to consider ways in which ownership could be consolidated. The Area Director has suggested a formal partition, and Williams has suggested a sale among the co-owners.

"In the short term, however, the Board noted in Lower Peoples Creek Cooperative v. Acting Billings Area Director, 23 IBIA 297 (1993), that a co-owner claiming "owner's use" of trust or restricted land is required to compensate the other co-owners. Cf. proposed 25 C.F.R. 162.2(b), 61 FR [30560,] 30565 [June 17, 1996], and proposed 25 CFR 162.14(b), 61 FR at 30566."

30 IBIA at 80-81 n.11.

* * * Your office has suggested that Mr. Williams' "owners' use" rights should extend only to the acreage he previously farmed; although we essentially agreed with that position in our June 1, 1995, decision on Mr. Williams' original appeal, it does not appear that the Board would accept a view of "owner's use" which is limited by the claimant's past use.

Area Director's Apr. 17, 1997, Memorandum at 1-2. 4/ See also June 6, 1997, E-mail message from the Superintendent to the Area Director: "The appeal [in Emm I] ended with [the Board] ruling that even though Mr. Williams had a minority interest in Allotment WR-172 he was entitled to exercise 'Owners Rights' to the entire allotment."

The Board did not intend in Emm I to suggest that BIA was required to recognize Williams' "owner's use" rights to the entire acreage of Allotment 172. The Board's decision did not specifically discuss the geographic scope of Williams' "owner's use" rights. However, the decision which the Board affirmed (the Area Director's June 1, 1995, decision) approved the modification of the lease to remove only the land Williams was farming. In affirming the Area Director's decision, the Board necessarily approved the Area Director's conclusion on this point. 5/

In other cases, the Board has recognized that the "owner's use" rights of a fractional interest owner may be limited to a portion of the allotment. This was the situation in Lower Peoples Creek Cooperative, supra, which was cited in footnote 11 of Emm I and which concerned, inter alia, a landowner who had established a homesite on a 2.5-acre tract within an allotment in which he held a fractional interest. The Board there held that the 2.5-acre tract was not properly included within a lease of the allotment to another party and that the landowner using the 2.5-acre tract was required to pay compensation to his co-owners for his use of that tract. 23 IBIA at 303-04.

The Board reaches no conclusion here as to whether BIA acted properly in removing all of Allotment 172 from Lease 675 under the circumstances of this case. 6/ The Board undertakes here only to clarify that Emm I does not require that the "owner's use" rights of

4/ In a May 29, 1997, memorandum, however, the Area Director seemed to interpret Emm I differently, i.e., as permitting the limitation of Williams' exercise of "owner's use" rights to the land he was actually farming.

5/ The Area Director's June 1, 1995, decision made no mention of the possibility of removing all of Allotment 172 from the lease. Thus, that possibility was not before the Board for review.

6/ The record indicates that Williams may have sought to claim "owner's use" rights to the entire allotment after failing to persuade his co-owners to lease to him. His brief in this appeal, however, indicates that he sought only to use the land he was already farming.

a fractional interest owner be recognized as extending to the entire tract in which the landowner holds an interest.

For the reasons discussed 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, this appeal is dismissed as moot.

//original signed

Anita Vogt
Administrative Judge

//original signed

Kathryn A. Lynn
Chief Administrative Judge