



INTERIOR BOARD OF INDIAN APPEALS

Kenneth Gullickson and Gloria R. Fischer v. Great Plains Regional Director,
Bureau of Indian Affairs

38 IBIA 90 (09/09/2002)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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KENNETH GULLICKSON, Appellant	:	Order Affirming Decisions and Remanding Matter
and	:	
GLORIA R. FISCHER, Appellant	:	Docket Nos. IBIA 01-93-A IBIA 01-94-A
v.	:	
GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	September 9, 2002

Kenneth Gullickson and Gloria R. Fischer (collectively, Appellants) each seek review of separate, but essentially identical, decisions issued by the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning a request by Mor-Gran-Sou Electrical Cooperative, Inc. (MGS), for a right-of-way across the Standing Rock Sioux Reservation for an electrical transmission line. The decision sent to Appellant Gullickson was dated January 24, 2001; the one sent to Appellant Fischer was dated January 23, 2001. For the reasons discussed below, the Board of Indian Appeals (Board) affirms those decisions. This matter is remanded to the Regional Director for the action indicated below.

In December 1971, an agent for MGS wrote to affected landowners on the Standing Rock Sioux Reservation, requesting their consent to the granting of a right-of-way across their lands for the construction of an electrical transmission line. One such letter went to Rebecca Scott No Moccasin, the owner at that time of the land now owned by Appellant Gullickson. This land is described as Allotment 2076, Lots 1 and 2, S $\frac{1}{2}$ SE $\frac{1}{4}$, sec. 1, T. 132 N., R. 80 W., 5th Principal Meridian, North Dakota. For purposes of the right-of-way application, this allotment was designated as Plot No. 11. On December 17, 1971, No Moccasin signed and returned the consent form, but did not explicitly indicate whether she consented or objected to the right-of-way.

Other letters went to John Elk and Sam Two Hearts, the owners at that time of the lands now owned by Appellant Fischer. Elk's land was described as Allotment 3108, NW $\frac{1}{4}$, sec. 16, T. 133 N., R. 79 W., 5th Principal Meridian, North Dakota, and was designated as Plot No. 4. Elk signed and returned the consent form on December 14, 1971, also without

explicitly indicating whether he consented or objected to the right-of-way. Two Hearts' land was described as Allotment 3794, SW¼, sec. 16, T. 133 N., R. 79 W., 5th Principal Meridian, North Dakota, and was designated as Plot No. 5. Two Hearts signed and returned his consent form on February 9, 1972. He indicated that he consented to the right-of-way.

On November 15, 1972, MGS submitted the right-of-way application package to BIA. The administrative record does not contain an approval document from BIA. Neither has MGS presented one during this proceeding. However, on January 16, 1973, BIA acknowledged receipt of a check dated December 29, 1972, from MGS as payment for the right-of-way. The right-of-way payment was based on the number of poles placed on each plot. The Regional Director states that disbursements were made from MGS's payment to the appropriate landowners. ^{1/} The administrative record contains a one-page payment schedule, showing the individuals to whom disbursements were to be made. It is possible that this payment schedule is not complete, because several allotments shown as being crossed by the right-of-way do not appear on the schedule, and the total disbursements shown on the schedule do not equal the amount MGS tendered. As pertinent to these appeals, a payment is indicated for Two Hearts in regard to Plot No. 5. Plot No. 4, which was owned by Elk and is now owned by Appellant Fischer, does not appear on the payment schedule. However, the plot diagram for this allotment states that no poles were placed on this plot. Thus, it is possible that no payment was due to Elk. Plot No. 11, which was owned by No Moccasin and is now owned by Appellant Gullickson, is also not shown on the payment schedule. Although there is no explanation for the markings on the plot diagrams, if the Board is reading the diagram for Plot 11 correctly, it appears that poles were placed on this plot. Separate documents prepared by MGS on January 4, 1973, show that MGS made payments for the plots belonging to Two Hearts and No Moccasin.

It is not clear how the present proceeding began. The administrative record contains a May 30, 2000, letter from MGS to BIA, transmitting a copy of the original right-of-way application. This letter suggests that it is in response to a request from BIA, but no such request is in the record.

On September 15, 2000, the Superintendent, Standing Rock Agency, BIA (Superintendent), wrote MGS stating: "As you know, there is no approved easement on [the transmission] line." The Superintendent continued:

^{1/} These facts distinguish this case from the recent decision in Lira v. Acting Pacific Regional Director, 38 IBIA 36 (2002), in which the Board held that a right-of-way had not been approved. In Lira, the complete application package was not part of the record, and the appellant was unable to provide copies of key documents, including the actual application. Here, the complete application package is part of the record. Furthermore, in Lira, BIA took no action consistent with a conclusion that it had approved the right-of-way. Here, BIA accepted payment for the right-of-way and made disbursements from that payment to the landowners.

Your company has provided us with documents that include maps, landowner consents and payments made by your company. We have researched our records and have found other documents relating to this matter. Payments were made by your company based on the number of poles placed on a particular tract. There was an upgrade to the line made in 1993 due to the construction of the Prairie Knights Casino. Additional poles were placed at that time.

Based on these documents, an easement with certain provisions will be issued for the line. This easement will cover the original construction and will be based on the number of poles placed at that time.

Since the 1993 construction involved the placing of additional poles, you will be required to contact and negotiate with the landowner of record in 1993 for damage amounts and their consent prior to approval of the easement. All negotiated damage amounts must be reviewed by [BIA] prior to approval.

By letters dated October 13, 2000 (Fischer), and October 19, 2000 (Gullickson), Appellants objected to the Superintendent's September 15, 2000, letter. The Superintendent forwarded the letters to the Regional Director, who issued the decisions presently under appeal. The Regional Director found that by signing and returning the consent forms, accepting payment, and not objecting to the construction of the transmission line, the owners consented to the right-of-way. The Regional Director admitted that BIA erred in not approving the right-of-way in a timely manner, but held that, because MGS had met the requirements for obtaining a right-of-way, the only thing remaining to be done was actually approving the right-of-way.

Appellants each appealed to the Board. Although their appeals were consolidated for briefing purposes, each Appellant was informed of his or her right to file a brief and of the responsibility to prove the error in the Regional Director's decisions.

Neither Appellant filed a brief. ^{2/} The Regional Director also did not file a brief. MGS filed a brief responding to Appellants' notices of appeal.

^{2/} Appellant Gullickson cited 43 C.F.R. § 4.332(c) in requesting the appointment of counsel to represent him. In an order dated May 22, 2001, the Board denied the request, noting that it had previously held that subsection 4.332(c) requires BIA to serve appeal documents and to allow access to Government records and documents, but does not require BIA to obtain an attorney for a party, or to act as the party's attorney by preparing his/her appeal documents or otherwise advising the party on the merits of the appeal. Evans v. Sacramento Area Director, 28 IBIA 124, 127 (1995).

Appellant Gullickson made no arguments in his notice of appeal. The Board has frequently held that an appellant who makes no allegation of error in a BIA official's decision, let alone any arguments in support of such an allegation, has failed to carry his burden of proof. See, e.g., Johnson v. Rocky Mountain Regional Director, 38 IBIA 64 (2002), and cases cited there. Appellant Gullickson has failed to carry his burden of proving error in the Regional Director's decision in his case. Therefore, the Regional Director's January 24, 2001, decision as to Appellant Gullickson is affirmed.

Appellant Fischer included arguments in her notice of appeal. She argues that the consent forms signed by Elk and Two Hearts do not identify the type of right-of-way or the person seeking the right-of-way, as is required by 25 C.F.R. §§ 169.4 and 169.5. 25 C.F.R. § 169.4 relates to permission to survey and is not applicable here. 25 C.F.R. § 169.5 details the information that must be included in an application for a right-of-way submitted to BIA. It does not establish the information which must be included on a consent form. Because the regulation specifies what information must be included in the application, rather than on the consent form, the form cannot be read in isolation from the remainder of the application package for purposes of determining whether the requirements of section 169.5 have been met. The forms here were accompanied by a letter from MGS's agent which indicated that MGS was seeking a right-of-way for the construction of a transmission line. The Board finds no grounds for invalidating the right-of-way because the information relating to the identity of the requestor and the nature of the right-of-way was not stated on the consent forms.

Fischer contends that Elk neither objected nor consented to the right-of-way on the consent form and therefore his consent cannot be assumed. The Board disagrees. Although all questions would have been removed had Elk actually indicated on the consent form that he consented to the right-of-way, he did sign and return the form. Had Elk objected to the right-of-way, it is extremely likely that he would either not have signed and returned the form or indicated that he objected to the right-of-way. Under the circumstances, the Board finds that Elk's consent can be presumed.

Fischer asserts that there is no evidence that payment for the right-of-way was ever made to the landowners. The record shows that MGS made payment for the right-of-way and that BIA accepted and acknowledged that payment. Although the record further suggests that BIA disbursed that payment to the landowners, it does not contain sufficient information to allow a conclusion that the disbursements were actually made. However, the possibility that BIA might not have properly disbursed MGS's payment does not invalidate the right-of-way. The question of whether or not disbursement was properly made is a matter between BIA and the landowner, not between MGS and the landowner. 3/

3/ Fischer has not made any showing in this proceeding that she has the right to receive information relating to payments made to Elk and/or Two Hearts. The Board strongly encourages BIA to seek advice from the Solicitor's Office if it receives a request for such information.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's January 23 and 24, 2001, decisions are affirmed. 4/ This matter is remanded to BIA for any further action required in regard to the additional construction which occurred in 1993.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

//original signed

Anita Vogt
Administrative Judge

4/ Any arguments made but not specifically addressed were considered and rejected.