



INTERIOR BOARD OF INDIAN APPEALS

James Birdtail III v. Rocky Mountain Regional Director,
Bureau of Indian Affairs

45 IBIA 1 (05/02/2007)



United States Department of the Interior

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

JAMES BIRDTAIL III,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 05-67-A
ROCKY MOUNTAIN REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	May 2, 2007

Appellant James Birdtail III appeals the March 7, 2005, decision of the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director reversed the June 1, 2004, decision of the Superintendent of the Fort Belknap Agency (Superintendent; Agency) concerning whether Almeda Bearchum and her family may use a road that crosses Appellant's Allotments Nos. 1014-A and 1014-B to reach Bearchum's house, located on Allotment No. 1015-B, all of which are located on the Fort Belknap Reservation in the State of Montana. The Superintendent had determined that Bearchum did not own, or have a lease to reside on, Allotment No. 1015-B. The Superintendent also determined that Bearchum did not possess easement rights to cross Allotment No. 1014-A to reach her house because the road easements had terminated. Bearchum appealed the Superintendent's decision and the Regional Director reversed, finding that the road in question is part of BIA's road system, that the road has been designated as BIA Route 152, and, therefore, that the road is open to the general public. Additionally and alternatively under 25 C.F.R. § 169.20(b) and (c), the Regional Director concluded that the two road easements across Appellant's property had not been terminated.

Because it is undisputed in this appeal that the road currently is included in BIA's road system, we affirm the Regional Director's decision on that ground alone: With limited exceptions not relevant here, roads in BIA's road system must be open and available for public use. We also briefly address the Regional Director's reliance on the road easements

as a basis for his decision. We decline, however, to rely on the easements as a separate basis to affirm the Regional Director's decision regarding Bearchum's use of the road because the record before us is insufficient to permit a determination of whether or to what extent Bearchum is entitled, as a successor-in-interest, assignee, or other beneficiary, to use either or both of the easements across Appellant's property.

Facts

In the early 1970s, George Birdtail, Sr. and George Birdtail, Jr. both entered into separate leases with the Fort Belknap Housing Authority (Housing Authority) of small tracts of land on Allotment No. 1015-B.¹ The purpose of the two leases was to enable George Sr. and George Jr. to obtain homes built under the Mutual Help Housing Project financed by the U.S. Department of Housing and Urban Development (HUD) pursuant to the Housing Act of 1937, Pub. L. No. 412, 50 Stat. 888 (Sept. 1, 1937). George Jr. signed his lease with the Housing Authority in 1972 for a 0.459-acre tract of land situated in the SE¼ NE¼, Sec. 26, T. 27 N., R. 24 E., P.M.M. in Blaine County, Montana; George Sr. signed his lease with the Housing Authority in 1974 for a 0.386-acre tract of land situated in the NE¼, Sec. 26, T. 27 N., R. 24 E., P.M.M. in Blaine County, Montana. Both parcels are located in the southeast corner of Allotment No. 1015-B.

Allotment No. 1014-A abuts Allotment No. 1015-B to the south and is situated in pertinent part in the S½, Sec. 26, T. 27 N., R. 24 E., P.M.M. in Blaine County, Montana. A road apparently was constructed that travels through Allotment Nos. 1014-A and 1014-B, both of which parcels are owned by Appellant and others.² This road apparently is or was used to access the homes built by George Jr. and George Sr. on Allotment No. 1015-B. In or prior to 1980, this road was added to BIA's road system and was designated BIA

¹ The parties do not provide the Board of Indian Appeals (Board) with any information as to the ownership of Allotment No. 1015-B at the time George Sr. and George Jr. entered into their leases with the Housing Authority, except that BIA's Title Status Report suggests that George Jr. did not become an owner of Allotment No. 1015-B until 1984.

² Allotment No. 1014-B is a 40-acre square parcel situated within Allotment No. 1014-A. The road that is the subject of this dispute passes diagonally through Allotment No. 1014-B from its southeast corner to its northwest corner.

Route 152.³ The parties do not dispute that the road that is the subject of this appeal is BIA Route 152 and part of BIA's road system.

In 1981, the United States, on behalf of the "heirs of Birdtail," granted a "road right-of-way" across Allotment No. 1014-A⁴ to George Birdtail, Jr. and his heirs, devisees, successors, and assigns for a period of 25 years. In 1982, another road right-of-way was granted by the United States, on behalf of the "Heirs of Al. 1014-A," to the "Fort Belknap Housing Authority, Fort Belknap Agency, Harlem, MT, its assigns or devisees"⁵ for an "access road 30' wide to the George Birdtail home[si]te located in the SE¼ NE¼, Sec. 26, T. 27 N., R. 24 E., P.M.M."⁶ The easement was granted for "so long as said easement shall be actually used for the purpose . . . specified." No other road easements appear in the

³ The only documents in the record concerning the inclusion of the road in BIA's road system are a letter and a memorandum from 1980. At that time, a dispute arose between Appellant's father and BIA over BIA's use of Allotment No. 1014-A for its vehicles and equipment while improving and widening BIA Route 152. James Birdtail, Jr. wrote BIA to complain about the damage to his land caused by the work being done on the road, including a "large hole . . . where . . . earth and topsoil was removed." Letter from James Jr. to BIA, July 10, 1980. James Jr. also "question[ed] the right of anyone to use this property as a roadway." *Id.* Also included in the record is a memorandum to the file concerning "Jim Birdtail[']s Road." This memorandum states that the road was part of BIA's road system, that the road was "presently known as BIA Route 152," and that BIA assumed responsibility for the road "through right of prescription." Memorandum from BIA to file, July 15, 1980, at 1.

⁴ The record does not contain a history for the ownership of Allotment No. 1014-A, but Appellant signed the road right-of-way along with his guardian, Emerson Birdtail (who also signed on behalf of Appellant's two brothers), and his father, James Birdtail, Jr. Therefore, we presume that Allotment No. 1014-A was then owned by these four individuals.

⁵ The grant also closes with the statement, "[t]he conditions of this easement shall extend to and be binding upon and shall inure to the benefit of the heirs, representatives, successors, and assigns of the Grantee."

⁶ The property description attached to the grant of easement to the Housing Authority is the legal description for George Jr.'s 0.459-acre parcel.

record for Allotment Nos. 1014-A or 1014-B.⁷ The record also contains a road easement granted in 1983 by George Jr. to Floyd Birdtail across a portion of Allotment No. 1015-B. This easement was approved by BIA.

With this background in mind, we turn to the facts of the present-day dispute. In March 2004, Appellant sent a letter to the director of the Lodgepole Head Start program (Head Start), asking Head Start to stop using the road “[u]nless [Head Start had] the tribe maintain [the] road only for [Head Start’s own] use.” Letter from Appellant to Lodgepole Head Start Director, undated. Apparently, Head Start had a bus that was “digging ruts in the gravel” as it traveled on BIA Route 152 across Appellant’s allotments to transport Bearchum’s grandchild to and from school. *Id.* At that time, Bearchum’s daughter and grandchild apparently lived in a house built on George Sr.’s parcel.⁸

The Agency received a copy of Appellant’s letter to Head Start. In response, the Superintendent wrote to Bearchum and advised her that “there is no longer a valid right[-]of-way across Allotment No. 1014-A or 1014-B, therefore you no longer have access across this road.” Letter from Superintendent to Bearchum, June 1, 2004, at 1. The Superintendent made this determination based on his conclusion that the existing right-of-way “was intended for the homesite of George Birdtail, Jr., . . . which . . . has since been abandoned.” The Superintendent stated that Bearchum’s house was also located on Allotment No. 1015-B and that she lacked both a road easement to access the house as well as a lease from the current owner to reside on the allotment.

⁷ The record does not contain any separate grant of a road right-of-way across Appellant’s Allotment No. 1014-B. However, it appears from the legal description of the road easements granted by the heirs of Allotment No. 1014-A that access was granted across Allotment No. 1014-B as well as across Allotment No. 1014-A. It is unclear from the record, however, whether the heirs of Allotment No. 1014-A were also the owners of Allotment No. 1014-B at the time the rights-of-way were granted and, thus, able to grant access rights.

⁸ Although it is far from clear, it appears that George Sr. transferred his rights as lessor of the 0.386-acre parcel and his rights in the HUD house to Ruben Birdtail. Ruben also signed an agreement with the Housing Authority to participate in its Mutual Help Housing Project, presumably as successor to George Sr.’s interests. When Ruben died in 1999, his brother, Henry Birdtail, succeeded to Ruben’s interests in the HUD house. *Estate of Ruben Birdtail*, No. CV-99-65 (Fort Belknap Tribal Court Aug. 29, 2000). Henry’s interest then apparently passed to his sister, Almeda (Birdtail) Bearchum, who also signed a HUD agreement with Housing Authority.

Bearchum appealed the Superintendent's decision to the Regional Director to have "the public access road leading down to the George, Ruben, and Henry Birdtail place . . . kept open to let traffic through." Statement of Reasons. She further advised that her daughter currently resided in the house and that Bearchum intended to move into the house in another year when she retired. *Id.*

The Regional Director reversed the Superintendent's decision. First, the Regional Director noted that sometime prior to July 15, 1980, the road was added to BIA's road system and, therefore, is a public road for which public funds have been expended for the maintenance of the road. In addition, the Regional Director determined that the road was neither abandoned nor had it been out of use for a consecutive two-year period, both of which would be grounds under 25 C.F.R. § 169.20 for terminating an easement. The Regional Director therefore concluded that George Jr.'s house was abandoned, but not the right-of-way to access his homesite.

On April 4, 2005, Appellant filed his Notice of Appeal with the Board in which he sets forth his reasons for appealing the Regional Director's decision. No briefs were submitted.

Discussion

We affirm the Regional Director's decision on the grounds that it is undisputed that the road is part of BIA's road system and, pursuant to 25 C.F.R. § 170.120, required to be open to public use. Based on the record before us, it also appears that the Regional Director correctly concluded that the road easements granted to the Housing Authority and to George Jr. have never been terminated by BIA. We decline, however, to reach the issue of whether Bearchum also would be entitled to use the road, as an assignee or successor or otherwise of the easements, because the record is insufficient for us to determine just what easement rights Bearchum might have.

A. Standard of Review

Appellant bears the burden of proving error in the decision rendered by the Regional Director. *Chuchua v. Pacific Regional Director*, 42 IBIA 1, 5 (2005); *Carrywater v. Rocky Mountain Regional Director*, 38 IBIA 116, 118 (2002). The Board will review the Regional Director's decision to determine whether it is arbitrary, capricious, or not in accordance with the law. *See Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). We review questions of law and the sufficiency of evidence de novo. *See Chuchua*, 42 IBIA at 5.

B. Public Road

Although Appellant raises several arguments, he does not dispute the one fact that we find dispositive to his appeal: BIA Route 152 is part of BIA's road system.⁹ What Appellant does dispute is whether BIA Route 152 is open to the public. Appellant contends that the road "is solely made for B.I.A. and tribal maintenance and for the sole purpose of access for gravesites." Notice of Appeal. However, Appellant cites no authority for such a restricted use and we know of none.¹⁰

Pursuant to 25 C.F.R. § 170.120, "Indian Reservation Roads (IRRs) must be open and available for public use." Virtually the same regulation was in place in 1980 at the time of the documentation submitted by BIA in support of its conclusion that the road is part of BIA's road system. 25 C.F.R. § 162.8 (1980) (predecessor regulation to § 170.120) ("Free public use is required on roads eligible for construction and maintenance with Federal funds under [25 C.F.R. Part 162]"). The record reflects that federal funds were being expended in 1980 to repair or construct the road.

In *Carrywater*, also an appeal from the Fort Belknap Reservation, the Doney family built a home with assistance under the Mutual Help Housing Project on Allotment

⁹ The record before us is limited as it pertains to the road's addition to BIA's road system. We note that in 1980, BIA did not articulate a concise explanation for how or when BIA Route 152 came to be included in BIA's road system. The internal BIA memorandum provided to the Board states only that "[t]his roadway is assumed by BIA, and Tribal identity, a public road, through right of prescription." Memorandum from BIA to File, July 15, 1980, at 1. This statement is far from clear and BIA does not provide us with an explanation of this "right of prescription" or any legal authority supporting BIA's acquisition of roads through "right of prescription." *See, e.g., Estate of Joseph Baumann*, 43 IBIA 127, 141 n.21 (2006) ("[W]e note that the regulations do not appear to contemplate easements by prescription or easements by necessity over trust or restricted land"). Because the issue in this appeal is not how this road came to be included in BIA's road system but, rather, the proper use of the road, we accept that BIA did not deem it necessary to include a full record relating to its addition of the road to its road system.

¹⁰ Tribes are authorized to designate BIA roads on tribal lands as "cultural access roads" for sacred and other purposes and to limit their use. 25 C.F.R. § 170.122. However, Appellant does not claim that the road has been designated as a "cultural access road" or that its access has been restricted by the Fort Belknap Indian Community (Tribe).

No. 1006-A. In order to access their homesite, the Doney's used a road that crossed an allotment belonging to Benjamin Carrywater. As in the present appeal, BIA in *Carrywater* approved rights-of-way, which were granted by Carrywater, for the Doney's to use the road across Carrywater's allotment. BIA also added the road, known as Carrywater Ridge Road, to its road system. Apparently, the two families eventually had a falling out and Carrywater sued the Doney's in tribal court over the right-of-way. Carrywater also appealed the Superintendent's decision that the road was a public road, which came to light during the tribal court proceeding. The Regional Director affirmed the Superintendent's decision. Carrywater appealed to the Board. This Board affirmed the Regional Director's decision. The Board observed, "[i]n none of his filings on appeal has Appellant challenged the Regional Director's conclusion that . . . the right-of-way is now a public road as part of the BIA road system." *Id.*

So it also is in the appeal presently before the Board. Appellant does not dispute that the road used by Bearchum and her family is part of BIA's road system and has been designated BIA Route 152. Appellant also does not claim that the Tribe or BIA has restricted the use of the road or closed the road. Because the road is presently a BIA IRR, we therefore conclude, pursuant to 25 C.F.R. § 170.120, that the road is a public road that may be used by any member of the public, including Bearchum and her family.

C. Right-of-Way/Easement for Road

Although our determination that the road is an IRR is dispositive of this appeal, some discussion may be appropriate of the Regional Director's decision concerning the road easements. The Regional Director determined that the road easements have not been terminated by BIA and the record supports that determination as correct.¹¹ In addition,

¹¹ Termination of an easement is governed by 25 C.F.R. § 169.20, which provides:

All rights-of-way granted under the regulations in this part may be terminated in whole or in part upon 30 days written notice from the Secretary [of the Interior] mailed to the grantee at its latest address . . . for any of the following causes:

- (a) Failure to comply with any term or condition of the grant or the applicable regulations;
- (b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted;
- (c) An abandonment of the right-of-way.

two easements have terms extending into 2008¹² and one — to the Housing Authority, its heirs, representatives, successors, and assigns — is perpetual so long as it is “actually used for the purpose . . . specified.” Therefore, it would appear that these easements have not yet expired on their own terms.

What is not clear from the Regional Director’s decision is the extent, if any, to which he relied on the easements as a basis for determining that Bearchum is authorized to use the road independent of its IRR status, and we are unable to conclude from the record that she is entitled to rely on any of these easements. The easements are not granted to Bearchum personally and the record is confusing, at best, as to whether she is entitled to use the easements that were granted to the Housing Authority and to George Jr. In addition, although the Regional Director’s decision does state his finding that the easements have not been abandoned because of Bearchum’s use, it is unclear whether the Regional Director also determined that Bearchum is entitled to use the road pursuant to these easements. Therefore, based on this record, we conclude only that Bearchum is entitled to use the road across Appellant’s property so long as the road remains part of BIA’s road system and is open to the public.¹³

¹² The easement across Allotment No. 1014-A granted by the “Heirs of Birdtail” to George Jr., his heirs, representatives, successors, and assigns is for a period of 25 years, commencing June 24, 1983. A second easement across Allotment No. 1015-B, granted by George Jr. to Floyd Birdtail, his heirs, representatives, successors, and assigns, is for a period of 25 years, commencing on August 1, 1983. Both of these two easements expire in 2008 and, thus, remain valid unless BIA has given notice of the termination of the easements in accordance with the terms of the easement grants and 25 C.F.R. § 169.20.

¹³ In his notice of appeal, Appellant also inquires into the availability of “severance damage” under 25 C.F.R. § 169.14. “Severance damage” refers generally to payment for any diminution in value to the servient tenement caused by being burdened with an easement. *Utu Utu Gwaitu Paiute Tribe v. Sacramento Area Director*, 17 IBIA 78, 84 (1989). Such funds, if any, are collected at the time the applicant applies for the right-of-way. 25 C.F.R. § 169.14. The issue of severance damage is raised for the first time in Appellant’s appeal to this Board, for which reason we do not address it. *Arizona State Land Dep’t v. Western Regional Director*, 43 IBIA 158, 165 (2006). The issue before the Board and which was the subject of appeal to the Regional Director concerns the use of BIA Route 152 and/or the road easements.

Conclusion

We affirm the Regional Director's decision that Almeda Bearchum and her family are entitled to use BIA Route 152. It is a public road and, therefore, open to all members of the public unless or until its use is restricted or the road is closed by BIA or the Tribe, as provided by 25 C.F.R. §§ 170.120(a), 170.122 or 170.813.

We express no opinion on whether Bearchum is or would be eligible to cross Allotment Nos. 1014-A and 1014-B pursuant to road easements granted to the Housing Authority and to George Jr. The record is not sufficiently developed for us to determine that Bearchum is entitled to rely on the easements as her means of accessing Allotment No. 1015-B.

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 Board affirms the Regional Director's March 7, 2005, decision.

I concur:

 // original signed
Debora G. Luther
Administrative Judge

 // original signed
Steven K. Linscheid
Chief Administrative Judge