



INTERIOR BOARD OF INDIAN APPEALS

City of King Cove, Alaska v. Acting Alaska Regional Director, Bureau of Indian Affairs

54 IBIA 22 (08/10/2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

CITY OF KING COVE, ALASKA,)	Order Docketing and Dismissing
Appellant,)	Appeal as Premature and
)	Remanding
v.)	
)	
ACTING ALASKA REGIONAL)	Docket No. IBIA 11-146
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	August 10, 2011

The City of King Cove, Alaska (City) has appealed to Board of Indian Appeals (Board) from a June 24, 2011, decision (Decision) from the Acting Alaska Regional Director (Regional Director), Bureau of Indian Affairs (BIA), that a BIA-approved right-of-way (ROW), for which the City is the assignee, “will be terminated” 30 days from the City’s receipt of the notice unless the City provided evidence to BIA that the landowner had agreed to the ROW when BIA approved it in 1977. The Decision advised the City that it had a right to appeal the Decision to the Board, and the City filed a timely notice of appeal.

We docket but dismiss this appeal as premature because BIA’s ROW regulations require a two-step process: (1) notice with opportunity to cure; and (2) a termination decision, with appeal rights. The Regional Director’s Decision erroneously attempted to combine the two steps into one by requiring the City to cure a purported defect in the ROW while at the same time requiring the City to exercise appeal rights from a termination action by BIA that had not yet occurred because it was contingent upon consideration of the City’s response. The Decision was a procedural notice, not a final, appealable BIA decision, and therefore we dismiss the appeal and remand to the Regional Director for further proceedings. On remand, the Regional Director shall provide the City with a new 30-day period in which to respond to any notice of intent to terminate the ROW.

Background

In 1977, BIA granted to BIA’s Roads Division a perpetual ROW, for a public use road, across a portion of Lot 52-A, Village of King Cove, Alaska. In granting the ROW, BIA identified the owner of Lot 52-A, on BIA’s Statement of Owners of Allotted Indian

Lands to Accompany Application for Right-of-Way, as Eugene Dushkin, and BIA obtained his consent.¹ BIA recorded Dushkin's consent and BIA's grant of the ROW. BIA subsequently assigned the ROW to the City.

BIA later determined — the Decision does not say when — that the owner of Lot 52-A in 1977 was Robert E. Newman. According to the Decision, at no time did Eugene Dushkin appear on the title.² The Decision notified the City of the results of BIA's research, stated that “[h]ow or why the easement was granted without prior landowner consent is unknown,” and announced that “[i]n order to rectify this, the ROW will be terminated in thirty (30) days, unless you can provide documentary evidence that the landowner did agree to the Grant of Easement for Right-of-Way in writing.” Decision at 1.

The Decision advised the City that it had 30 days from receipt of the notice to provide the required documentation, but also advised the City that it could appeal “this Termination” and that the City had 30 days from receipt of the Decision to file an appeal with the Board.

Discussion

The Decision erred in advising the City that it had 30 days to appeal to the Board because the Decision was not a final BIA decision and therefore was not appealable to the Board. *See* 43 C.F.R. § 4.331 (an appeal to the Board must be from a “final” administrative action or decision of a BIA official). The Regional Director erred in attempting to combine a notice of cause for termination and opportunity to cure, with a termination “decision” that could, at best, be contingent upon the City's response and BIA's consideration of that response.

Section 169.20 of 25 C.F.R. provides the procedures for terminating a ROW previously granted by BIA over Indian lands. Section 169.20 identifies three grounds upon which a ROW may be terminated “in whole or in part upon 30 days written notice.”³

¹ Section 169.3(b) of 25 C.F.R. provides, with certain exceptions, that “no [ROW] shall be granted over and across any individually owned lands . . . without the prior written consent of the owner or owners of such lands.”

² The Decision identifies the current owner as Marlene Dushkin.

³ In the present case, it appears that BIA relied on § 169.20(a), which provides that a ROW may be subject to termination for failure to comply with the applicable regulations, i.e., failure to obtain prior written consent of the landowner. *See supra* note 1.

Section 169.20 further provides that “[i]f within the 30-day notice period the grantee fails to correct the basis for the termination, [BIA] shall issue an appropriate instrument terminating the [ROW].”

Thus, § 169.20 requires a two-step process. First, BIA must issue a notice setting forth the grounds for terminating a ROW and providing the grantee with an opportunity to cure (or dispute that cause exists to terminate the ROW). If, within the 30-day notice period the grantee fails to cure the basis for termination, § 169.20 states that BIA “shall issue an appropriate instrument terminating the [ROW].” Although that language might be construed as referring to a ministerial action to prepare an instrument of termination for recording, such a construction would lead to the untenable result of requiring a grantee to take steps to respond to BIA’s notice, while simultaneously having to exercise (or lose) appeal rights to the Board, without having a final termination action by BIA. Instead, we construe the regulatory language as requiring BIA to issue an appropriate final decision after the 30-day notice period has expired and after considering the grantee’s response, on whether to terminate the ROW. *See Star Lake Railroad Co. v. Navajo Area Director*, 15 IBIA 220, 224-25 (1987) (two-step process followed by BIA). If BIA decides to proceed with the termination, it must issue a final decision, which must include appeal rights.⁴ Neither the final decision, nor an instrument of termination, are effective during the appeal period, and the filing of an appeal continues the automatic stay of the effectiveness of BIA’s decision. *See* 25 C.F.R. § 2.6; 43 C.F.R. § 4.314.

Because the Decision afforded the City an opportunity to respond, the Decision could not serve as a final, appealable BIA decision; the Board lacks jurisdiction; and the Regional Director erred in advising the City that the Decision was appealable to the Board. We therefore dismiss the appeal and remand the matter to BIA for additional proceedings. In light of the Regional Director’s procedural error, BIA shall provide the City with a new

⁴ The Regional Director may have concluded that, if the City failed to provide evidence of the landowner’s consent in 1977, termination of the ROW would be mandatory, but that would still be a determination and decision that could only be made at the end of the 30-day notice period, after reviewing any submission from the City and BIA’s own records, after which the City would be entitled to a final decision with notice of appeal rights. And, of course, even if the City failed to provide evidence of the landowner’s consent in 1977, but raised other arguments objecting to termination of the ROW, the Regional Director would be required to address those arguments in a final decision, even if he were to conclude that termination was mandatory.

30-day notice and response period, before issuing a final decision on whether to terminate the ROW and addressing any response filed by the City.

Conclusion

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 docketed this appeal but dismisses it for lack of jurisdiction, and remands the matter to the Regional Director for further proceedings.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge