



INTERIOR BOARD OF INDIAN APPEALS

Nemont Telephone Cooperative, Inc. v. Acting Rocky Mountain Regional Director,
Bureau of Indian Affairs

55 IBIA 75 (05/23/2012)



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

NEMONT TELEPHONE)	Order Affirming Decision in Part,
COOPERATIVE, INC.,)	Vacating in Part, and Remanding
Appellant,)	
)	
v.)	
)	Docket No. IBIA 10-077
ACTING ROCKY MOUNTAIN)	
REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	May 23, 2012

Nemont Telephone Cooperative, Inc. (Appellant), appeals to the Board of Indian Appeals (Board) from a February 18, 2010, decision of the Acting Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), denying Appellant’s applications to renew certain rights-of-way (ROWs) for buried cable across Indian trust lands on the Fort Peck Reservation and four Turtle Mountain public domain allotments. Collectively, these lands are part of Appellant’s East Froid Exchange Project. In his decision, the Regional Director affirmed the 2009 decision of BIA’s Fort Peck Agency Superintendent (Superintendent), in which the Superintendent rejected Appellant’s applications because the landowner consents provided by Appellant were — by the time BIA took action — more than 10 years old and therefore not “current.” Appellant asserts that BIA either approved or assured Appellant it would approve the renewal of the ROWs, and then lost its records. Additionally, Appellant maintains that because the landowner consents were timely when they were originally submitted to BIA with an application in 1998, and because it was not Appellant’s fault that BIA failed to act promptly and then lost the records, it should not be Appellant’s burden to obtain new consents.

We affirm in part, vacate in part, and remand this matter to the Regional Director. We agree with the Regional Director that there is no showing that final action was taken on Appellant’s original renewal applications in 1998 and 1999, and we reject any argument by Appellant that BIA assurances that it would approve the ROW mean that it either did so or can be ordered to do so at this time. And with respect to the renewal of ROWs across tribal lands, the record supports the Regional Director’s conclusion that BIA lacked

authority to grant the ROW. Therefore, we affirm the Regional Director's decision as to these issues.

However, we part company with the Regional Director over BIA's insistence that Appellant start the consent process over for individually owned lands. BIA *assumed* that it lacked authority to grant the ROW because the ownership consents were now 10 years old and ownership of some of the lands had changed. The Regional Director rejected the application solely on this basis. We conclude that it was arbitrary and capricious for BIA to dismiss consideration of and deny Appellant's applications on this ground without making tract-specific findings on whether the necessary consent was no longer present. Once the necessary consents were in place, BIA had authority to grant the ROW renewal, and the burden fell on BIA to explain the basis for its conclusion that its jurisdiction had lapsed, and to support that conclusion in the record. Thus, we remand this matter to BIA for further consideration with respect to the individually owned tracts within the East Froid Exchange.

Facts

Appellant is a non-profit, member-owned cooperative that provides communication services to Indian and non-Indian customers in northeastern Montana. Beginning in the 1960's, Appellant began acquiring ROWs for buried cable across various Indian allotments. By 1977, Appellant had established at least four "exchanges." BIA's decision on an application to renew the ROW for one of these exchanges, the East Froid Exchange, is the subject of this appeal. Appellant's East Froid Exchange ROW was approved in 1987 "for a term of twenty-five years ending on May 17, 2001." Grant of Easement for Right-of-Way, Document No. 206-26136, at 2 (unnumbered) (AR Tab 8 at 3);¹ Title Status Reports (TSRs) for Turtle Mountain public domain allotments nos. 918, 1310, 2329, and 2358 (AR Tab 3) (showing that Appellant was granted a "perpetual" easement in 1977 and citing document no. 226-2614).

¹ If the grant of easement had run from the date of approval in 1987, the easement would expire in 2012. However, a note typed on the grant states that, "[t]he reason for the difference in dates [is] that the Easement was not completed at the time of the submittal of application." Grant of Easement for Right-of-Way, Document No. 206-26136, at 2 (unnumbered) (AR Tab 8 at 3). It appears that BIA gave written approval in 1976 to commence construction, AR Tab 7, but did not formally approve the ROW until completion of construction.

In 1998, Appellant submitted an application to BIA to renew its ROW across individually owned Indian lands in the East Froid Exchange. Included with the application were landowner consents from owners with a combined ownership interest of more than 50 percent in each parcel. The following year, Appellant submitted an application to renew its ROW across trust lands in the East Froid Exchange owned by the Assiniboine and Sioux Tribes (Tribe). It does not appear from the record or from the parties' briefing that Appellant submitted any written consent by the Tribe for the renewal of the ROW across these lands. According to Appellant, BIA failed to take action on the applications, despite Appellant "check[ing] on the easements" over the ensuing 3 years. Affidavit of Paul Sansaver, Mar. 16, 2010, at ¶ 2 (Notice of Appeal, Ex. B) (Sansaver Affidavit).²

On August 19, 2009, BIA notified Appellant that several of its ROWs, including the ROW for the East Froid Exchange, had expired. In October 2009, Appellant submitted another application for the East Froid Exchange ROWs, and relied on the previously submitted owner consent forms executed in 1998. In its cover letter, Appellant stated that the application originally was submitted to BIA on March 9, 2000. *See* Letter from Appellant to BIA, Oct. 8, 2009 (AR Tab 1); Sansaver Affidavit (Notice of Appeal, Ex. B); *but see* Notice of Appeal at 1 ("Applications were timely submitted on April 15, 1998 and August 30, 1999").³

By letter dated October 28, 2009, the Superintendent informed Appellant that BIA could not accept the consent forms executed in 1998. The Superintendent explained that "[b]ecause the 1998 consent forms are no longer the current owners of record for the majority of the tracts of land [in the East Froid Exchange], we cannot accept the 1998 consent forms." Superintendent's decision at 1 (AR Tab 10). Citing 25 C.F.R. § 169.3(b), the Superintendent stated that BIA could not approve an application without "the prior *current* written consent of the *current owners*." *Id.* The Superintendent also asserted that BIA "found no record of a [prior] renewal application or approved renewal." *Id.*

² Apparently, Appellant never availed itself of its remedies under 25 C.F.R. § 2.8, pursuant to which Appellant could have insisted that BIA take action in response to its renewal applications.

³ The record does not contain an ROW application dated on or about March 9, 2000.

Appellant then appealed to the Regional Director. With its appeal, Appellant included copies of the two applications that it had submitted to BIA in 1998 and 1999.⁴ Appellant asserts that when the owner consents were submitted at that time to BIA, BIA told Appellant that “they were not able to process the[] applications” due to litigation in *Cobell v. Norton*, Civ. No. 96-1285 (D.D.C.). Notice of Appeal to Regional Director at 4 (unnumbered) (AR Tab 12). Appellant further explained that once certain restraining orders were lifted in *Cobell*, BIA told Appellant that it was “having difficulties getting the [ROW] to ‘come through’ from the old [computer] system to the new system.” *Id.*⁵ Appellant concluded that the renewal of the ROW “had occurred but was simply delayed by the computer issues related to the *Cobell* li[tig]ation.” *Id.* at 5 (unnumbered).⁶

In his decision, the Regional Director found that the 1998 and 1999 applications “were not acted upon” by BIA and that the ROW was not renewed. Regional Director’s

⁴ The first application is stamped “received” by BIA on April 15, 1998, and covers the renewal of Appellant’s ROW across individually owned allotments. The second application, stamped “received” by BIA on August 30, 1999, sought to renew the ROW across tribal lands.

⁵ Litigation in *Cobell* began in 1996 as a challenge to BIA’s accounting for Indian trust funds. The litigation spawned numerous decisions, both in the district court and the appellate court. Among the issues raised in *Cobell* were concerns about BIA’s computer systems and whether adequate security measures were in place to protect data stored on the computers. *See, e.g., Cobell v. Norton*, 310 F. Supp. 2d 77 (D.D.C. 2004).

⁶ Appellant appears to refer to the recording of the renewals in BIA’s computer system when it says that the renewal “was delayed by the computer issues.” According to Appellant’s employee, the “impression” was that “due to the Cobell litigation the computer system was frozen so that the applications could not be entered or processed.” Sansaver Affidavit at ¶ 2. After BIA got a new computer system, Appellant asserts that “the existing easements and applications did not properly convert to the new system,” and Appellant’s employee personally “assisted [the local BIA office] in the reconstruction of their approved easement records as well as assisting them in reconstructing what applications they had which had not been acted upon.” *Id.* at ¶¶ 2, 3. Appellant also asserts that it has “proof” that 20 easements were approved but not entered into BIA’s computer system while approximately 25 applications had not been acted upon. *Id.* at ¶ 3. Appellant does not claim that its easement applications for the East Froid Exchange were among the easements for which it has proof of approval.

Decision at 1. The Regional Director stated that “[m]any of the numerous tracts involved in this right-of-way will not have the same owners as they did over 10 years ago. [Appellant] must obtain the consent of the current landowners before an approved Grant of Easement for Right-of-Way can be completed.” *Id.* at 2. The Regional Director upheld the Superintendent’s decision, and impliedly found that the previously obtained consents were no longer valid as authorization for BIA to grant the ROW.

This appeal followed. Appellant submitted the affidavit of its employee, Paul Sansaver, with its notice of appeal. Appellant subsequently submitted an opening brief. The Regional Director has not submitted a brief in this appeal.

Discussion

We affirm the Regional Director’s decision in part, vacate in part, and remand. We affirm the Regional Director’s conclusion that Appellant does not presently have an approved ROW for its East Froid Exchange. There is nothing in the record or Appellant’s submissions that allows us to conclude differently. We also affirm the Regional Director’s decision as applied to tribal lands because the record does not contain any evidence that the Tribe’s consent was obtained in 1999 or any time thereafter. However, we vacate the Regional Director’s decision with respect to the ROW across individually owned Indian lands. The Regional Director assumed that none of the owner consents for the individually owned allotments remained valid, an assumption that is not supported by the record. When Appellant submitted the application in 1998 with the necessary consents for individually owned lands, BIA then became vested with authority to grant the ROW. BIA’s sole reason for not doing so in 2009 was its belief that the consents were no longer valid. Without more, this conclusion is in error. Therefore, we remand this matter to the Regional Director for further consideration and a new decision.

1. Standard of Review

We review the Regional Director’s decision to determine whether it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *See Matt v. Rocky Mountain Regional Director*, 53 IBIA 259, 264-65 (2011); *Cloud v. Alaska Regional Director*, 50 IBIA 262, 269 (2009). We review *de novo* legal determinations and the sufficiency of the evidence. *O’Connor v. Rocky Mountain Regional Director*, 54 IBIA 308, 313 (2012). Appellant bears the burden of showing that the Regional Director committed error in his decision. *See Cloud*, 50 IBIA at 269. If we find that the Regional Director has

erred, we will not substitute our judgment for his, but will remand this matter for further consideration. *See Matt*, 53 IBIA at 265.

2. Appellant Did Not Have an Approved Right of Way

We begin with Appellant's contention that "it was told by [BIA] officials that the easements were approved." Notice of Appeal at 2. Nothing in the record supports this statement.⁷ None of the TSRs in the record for the affected allotments show that there is a current approved easement in favor of Appellant for buried cable, and the applications themselves do not bear any notations suggesting that they were approved. In his decision, the Regional Director found that the 1998 and 1999 applications "were not acted upon by the Fort Peck Agency and an approved Grant of Easement for [ROW] was never completed." Decision at 1. And in Appellant's appeal and statement of reasons to the Regional Director, Appellant appears to acknowledge that fact, and only contended that it had the "impression" or "understanding" that they had been or would be approved by BIA. *See* Statement of Reasons to Regional Director, ¶¶ 5, 7 (AR Tab 12).

Similarly, we find no evidence to support Appellant's allegation that BIA told Appellant that the East Froid Exchange ROWs would be approved. Even if there were such evidence of assurance, the law disfavors the application of estoppel against the United States, especially in its capacity as trustee for the Indians. *Emm v. Western Regional Director*, 50 IBIA 311, 318 (2009).

Based on this record, we agree with BIA that it failed to take action on Appellant's application and there is no approved ROW for the East Froid Exchange at the present time.

3. Landowner Consents to the Renewal of Appellant's ROW

Next, we turn to the Regional Director's rejection of Appellant's ROW application(s) for lack of *current* landowner consents, and we affirm in part and vacate in part.⁸ The renewal of ROWs is expressly addressed in 25 C.F.R. § 169.19 and provides in pertinent part that

⁷ Even Appellant's employee, Sansaver, does not assert that the East Froid Exchange ROW was approved.

⁸ BIA does not suggest any reason other than the lack of current consents for rejecting Appellant's ROW applications.

[i]f the renewal involves no change in the location or status of the original right-of-way grant, the applicant may file with his application a certificate under oath setting out this fact, and the Secretary, with the consent required by [25 C.F.R.] § 169.3, may thereupon extend the grant for a like term of years, upon the payment of consideration as set forth in § 169.12.

Where the land is trust land owned by a tribe, the prior written consent of the tribe must be obtained before an ROW can be granted. 25 C.F.R. § 169.3(a). Where the land is individually owned trust land, consent must be obtained from the owner or owners of a majority of the interests in the land. *Id.* § 169.3(c)(2). The Secretary of the Interior (or his designee) is authorized to consent on behalf of owners who are minors, who are *non compos mentis*, who are deceased and for whom probate proceedings have not concluded, who cannot be located and a majority of the remaining owners have consented, or who are so numerous that it is determined to be impracticable to obtain their consents. *Id.* § 169.3(c).

The Regional Director's decision is exceedingly sparse. After acknowledging that BIA apparently had received and misplaced Appellant's original application in 1998 for the individually owned lands, the Regional Director rejected the application in two terse sentences: "Many of the numerous tracts involved in this [ROW] will not have the same owners as they did over 10 years ago. [Appellant] must obtain the consent of the current landowners before an approved Grant of Easement for [ROW] can be completed." Decision at 2 (unnumbered). The Regional Director then quoted a line from our decision in *Lira v. Acting Pacific Regional Director*, 38 IBIA 36, 39 (2002), to conclude that Appellant had no right to have the ROW approved "without the consent of the current landowners." *Id.* The Regional Director does not mention the 1999 application for the renewal of ROWs across tribally owned lands.

The Regional Director relied on our decision in *Lira* to find that BIA somehow lost jurisdiction to consider the ROW application because, with the passage of time, the consents expired or were impliedly revoked. The Regional Director reads *Lira* too broadly. In *Lira*, the appellant claimed that he had submitted an application 18 years before for an ROW across several tracts of trust property. But the appellant could not produce a copy of his application, and while he did produce consents signed by four owners, two of the owners had revoked their consents before BIA acted on the application. In addition, there was no suggestion that the appellant ever pursued his application with BIA. Under these circumstances, we agreed with BIA that there was no approved ROW and concluded that "BIA's failures in 1982 [to process the application] do not give Appellant a present right to have the [ROW] approved without a proper application and without the consent of the

current landowners.” *Lira*, 38 IBIA at 39. Ultimately, the fact that two landowners had *revoked* their consents to the ROW effectively divested BIA of authority to grant the application because each was a majority landowner in his respective tract of land. As we explained in *Lira*, just as an Indian lessor may change his mind with respect to a lease of his trust land before the transaction is approved by BIA, so too may a landowner withdraw his consent to an ROW before it is approved by BIA. *Id.* at 38-39.

Lira is inapposite to the present case. Here, it is undisputed that Appellant *did* present a timely application with consents from individual landowners for renewal of its East Froid Exchange ROW well in advance of its expiration in 2001. And there is no evidence showing that any landowner has revoked consent. The mere passage of time, without more, cannot support a finding of implied revocation, especially where the term of the renewal for which consent was given in 1998 has not expired. Nor are we willing to presume that a change of ownership necessarily constitutes revocation. *Cf. Wishkeno v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 11 IBIA 21, 32 (1982) (BIA authority to retroactively approve gift deed after grantee’s death). Finally, it appears that Appellant provides a significant public service to the landowners — telecommunications services — which also augurs against finding that the consents have expired.

This case falls somewhere between our decisions in *Lira* and in *Gullickson v. Great Plains Regional Director*, 38 IBIA 90 (2002). In *Gullickson*, two landowners objected in 2000 to BIA’s approval of an ROW for an electrical line for which the application had been submitted in 1972 with consent forms signed by their predecessors-in-interest. Although BIA could not locate any record showing that the ROW application had been approved, it did find documentation confirming BIA’s receipt and acknowledgment of payment for the ROW, together with records that suggested that the payment was passed on to the landowners. Therefore, the BIA superintendent approved the initial ROW over the objections of two landowners who were successors-in-interest to two parcels. The regional director affirmed the decision, “admitt[ing] that BIA erred in not approving the right-of-way in a timely manner, but held that, because the [grantee] had met the requirements for obtaining a right-of-way, the only thing remaining to be done was actually approving the right-of-way.” *Gullickson*, 38 IBIA at 92. On appeal to the Board, we affirmed on the grounds that the appellants had not met their burden of showing error in BIA’s decision.⁹

⁹ One appellant made no arguments in support of his appeal. The second appellant argued that one of her predecessors-in-interest returned the consent form but did not indicate on
(continued...)

Critically, BIA did not find that it lacked jurisdiction to determine whether to approve the 1972 application even after nearly 30 years had passed. Thus, the Regional Director's assumption here — that BIA lacks jurisdiction to consider Appellant's 1998 and 1999 applications without "new" owner consents — conflicts with BIA's decision at issue in *Gullickson*. BIA must make a reasoned decision, on a parcel-by-parcel basis, whether to approve the ROW, and if BIA has reason to conclude that owner consent was revoked, either expressly or impliedly, BIA must make specific findings to support that conclusion.

Therefore, with respect to the individually owned allotments, we vacate the Regional Director's decision and remand this matter to BIA to reconsider its denial of Appellant's application for renewal of its ROW.¹⁰ The burden rests with the Regional Director to support his decision, and this burden is not met by simply asserting, without more, that the consents obtained by Appellant in 1998 have been revoked simply due to the passage of time and, thus, BIA somehow lost jurisdiction to take action on Appellant's ROW application. On remand, BIA may want to give consideration to, e.g., how many and which allotments actually experienced a turnover in ownership;¹¹ whether relevant changes in ownership resulted from heirship determinations, sales, exchanges, or gifts of interests and how, if at all, the transfer of ownership interest affects BIA's consideration of Appellant's applications; and whether any owners have informed BIA that they are opposed to a renewal of the ROW across their land. If, following its analysis, BIA concludes that it lacks authority to grant an ROW over one or more allotments, it must provide Appellant

⁹(...continued)

the form whether he objected or consented to the easement. In addition, the appellant also asserted that there was no evidence that BIA actually forwarded payment for the easement to the landowners. We rejected both of these arguments.

¹⁰ We note that not a single landowner requested to remain on the distribution list for this appeal when given the opportunity to do so. While there is no obligation by the landowner to remain on the distribution list and while the choice to remain off the list is not itself evidence of consent to an ROW, it may well be indicative of a lack of objection to the ROW.

¹¹ According to the TSRs in the record, the landowners who executed written consents in 1998 are still majority landowners of the following 24 allotments in the East Froid Exchange: nos. 89A, 123A, 175, 193, 279A, 409A, 542, 595B, 673, 674A, 675, 833A, 900A, 1892, 2158A, 2158B, 2313A, 2670A, 2942B, 2968A, 3501A, 3745, and 3886, all on the Fort Peck Reservation, and Turtle Mountain public domain allotment no. 2358.

with clear findings of fact and conclusions of law that will permit Appellant either to cure the alleged defect or appeal the decision.

Notwithstanding the above, it is undisputed that the Tribe did not consent to the renewal of the ROWs across tribally owned lands. Nothing in the record or in Appellant's brief suggests otherwise. Therefore, we affirm the Regional Director's decision with respect to Appellant's 1999 application, and that part of the 2009 application, for an ROW across tribal lands located in the East Froid Exchange. Appellant must obtain the consent of the Tribe to renew its easement across those lands owned by the Tribe.

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 February 18, 2010, decision is affirmed in part, vacated in part, and remanded to him for further consideration and issuance of a new decision.¹²

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹² The absence of an approved ROW could cause a disruption in service if Appellant is unable to access its buried cables to perform necessary repairs. Therefore, Appellant, landowners, and BIA alike could best be served by cooperating to expedite resolution of this matter on remand and by avoiding further delay. We note that Appellant has sought renewal of the ROW based on landowner consent rather than through a condemnation action under 25 U.S.C. § 357. Thus, a cooperative approach among landowners, Appellant, and BIA would appear to be in the best interests of all parties.