



INTERIOR BOARD OF INDIAN APPEALS

Delma Redneck, et al. v. Acting Billings Area Director, Bureau of Indian Affairs

31 IBIA 192 (10/14/1997)



# United States Department of the Interior

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

DELMA REDNECK and DEANA McNABB, : Order Affirming Decision in Part  
Appellants : and Reversing it in Part, and  
 : Remanding Matter for Further  
v. : Consideration  
 :  
ACTING BILLINGS AREA DIRECTOR, : Docket No. IBIA 96-41-A  
BUREAU OF INDIAN AFFAIRS, :  
Appellee : October 14, 1997

Appellants Delma Redneck and Deana McNabb seek review of a December 11, 1995, decision issued by the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning a road across Blackfeet Allotment No. 3052. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision in part and reverses it in part, and remands this matter for further consideration.

Allotment 3052 is owned jointly by six individuals and the Blackfeet Tribe (Tribe). Each co-owner owns an undivided 1/7 interest. The allotment consists of 320 acres, more or less.

The current lessee of Allotment 3052 is Lorraine Rumney. Rumney states that beginning at least in 1934 and extending until 1974, Wright and Grace Hagerty owned and operated a cattle ranch on the Reservation, and that Grace Hagerty leased Allotment 3052 as part of her operations. The Hagerty ranch apparently adjoined Allotment 3052 on three sides. Rumney states that she purchased approximately 16,000 acres of land from Hagerty in 1974, 1/ and that, as part of this land purchase, she acquired the then-existing lease on the allotment. 2/ She states that since 1977, Allotment 3052 has been leased to her.

There is no dispute that a road crosses Allotment 3052. Appellants state that the present road did not exist in 1978 when they visited the allotment, and that, in 1987, they first noticed that "a professionally built road with the dimensions of 20 feet across and 20 feet roadbeds

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1/ The Area Director's decision indicates his belief that Rumney purchased the ranch in 1978. A chronology of events prepared by BIA as part of the table of contents on appeal states that "[s]ale records indicate that Mrs. Rumney purchased the Hagerty ranch in 1978."

2/ Nothing in the administrative record shows that BIA approved an assignment of Hagerty's lease to Rumney. Hagerty's grazing permit was modified on Jan. 1, 1975. This modification was signed by Hagerty as permittee and Rumney as witness. Bill No. 00000343 was issued to Hagerty for the 1976 rental. On Jan. 2, 1976, the Superintendent, Blackfeet Indian Agency, BIA (Superintendent), wrote Hagerty stating that the 1976 rental had not been paid. The bill shows that the 1976 rental was paid by Rumney.

existed on Allotment #3052; a road which had to be constructed using heavy road construction equipment." Opening Brief at 2. They assert that Rumney was using this road for access to her property, and state that they notified BIA of the road's existence in 1987, but that BIA failed to recalculate the value of the lease due of the changed condition of the property. Appellants further contend that neither they nor any of the other co-owners consented to the construction of the road or agreed to the granting of a right-of-way across the allotment.

On March 26, 1992, the Superintendent wrote to the Rumneys, stating that the Agency had been unable to find a recorded right-of-way for the road either in its own records or in the records of Glacier County. The Superintendent stated: "The Rumney Ranch is the primary user of said road for access. To insure the continued use, our Agency request[s] that you obtain a Right-of-Way through the Indian Trust land the road is located on." The same day, the Superintendent wrote to Appellant Redneck, informing her of his letter to Rumney; noting that there was no evidence as to who built the road or the source of gravel for the road; informing her that all gravel on the allotment was owned by the Tribe; and stating that Rumney had a 5-year lease of the allotment after agreeing to pay the landowners \$3 per acre, as they requested. <sup>3/</sup>

From materials in the record, it appears that Rumney attempted to negotiate a right-of-way across the allotment, as instructed by the Superintendent. At least Appellant Redneck refused to grant a right-of-way until "the issue of the road you built across this land (without approval of the landowners, and in violation of the conditions of the lease), has \* \* \* been properly addressed." Letter of May 22, 1992.

The present lease, No. L-6619, was entered into on November 12, 1992, and runs from January 1, 1993, until December 31, 1997. The original rental rate for this lease was \$2.40 per acre. At the landowners' request, and with Rumney's consent, the lease was modified in or about May 1993, to provide a rental rate of \$3.00 per acre. A March 24, 1993, letter from Appellant Redneck to the Superintendent states: "At the present time we are attempting to address the building of this road, which was a clear violation of [Rumney's] lease. There is also no right-of-way for the Rumneys on this land. I believe that B.I.A. is a party to this violation by failing to make regular compliance checks."

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<sup>3/</sup> The record contains a copy of Lease No. L-2858, which leased Allotments 3052 and 3419 to Rumney. The lease was entered into on Aug. 20, 1987, for a term not immediately clear, due to discrepancies in the term provision. The provision states that the lease is for a one-year term, but shows beginning and ending dates indicating that the lease was for a longer term. Furthermore, both dates have been altered. As originally prepared, the lease appears to have had a term beginning on Jan. 1, 1987, and ending on Dec. 31, 1988. As altered, the lease shows a term beginning on Jan. 1, 1988, and ending on Dec. 31, 1992. The record copy of the lease does not include BIA approval or owner consent.

Lease No. L-2858 contains a hand-drawn outline of Allotment 3052, showing a "gravel road" crossing the allotment. This drawing corresponds with the road's present location and contours.

Appellants, then represented by counsel, wrote the Superintendent on October 26, 1994, stating:

Prior to [the 1977] lease, the parcel of land in question had no improvements. At some point, the Rumneys, on their own initiative, built a 20' road with 20' roadbeds on either side across the property. The Rumneys had ingress/egress access to their ranch via an alternate route but presently utilize the constructed road. \* \* \* Correspondence between your office and [Appellants] indicate this road was built without any consent or obtaining any proper right-of-way easements.

Records obtained from your office further indicate that [BIA] was oblivious to the road construction, until the issue was brought to BIA's attention by [Appellants].

It is apparent that the BIA's continued allowance of construction for the road without seeking permission from the allottees or compensation for the use and/or attempted takings of their trust lands in regards to allotment no. 3052 was a clear breach of [BIA's] trust responsibility and fiduciary duty owed to [Appellants].

\* \* \* The suggested resolution by BIA in no way either acknowledges the very real damages done to this allotment, its uncompensated use or BIA's lack of attention to its fiduciary duties. As a result, no reasonable resolution that accounts for [BIA's] misconduct and [Appellants'] injury has resulted.

Further, it appears to [Appellants] that the BIA personnel who have been involved in this matter have had at least superficial conflicts of interest in their administration of this allotment. \* \* \*

On behalf of [Appellants], we propose that a flat \$2500.00 amount be paid to the owners of allotment no. 3052 for damage to the land for each year since 1987, the date the road was discovered. \* \* \* Further, that \$2500.00 be added to the current yearly lease amount and any future lease amount for the use and enjoyment of the illegally built road.

Letter of Oct. 26, 1994, at 1-2.

By letter dated March 8, 1995, Appellants responded to information provided by the Superintendent which tended to show that the road had been in existence at its present location since at least 1974. Appellants stated that they did "not see how [the Superintendent's] establishment of the road in 1974 changes our claim that [BIA] breached trust responsibility to the owners of allotment 3052."

On August 15, 1995, the Superintendent issued a formal decision in which he stated:

Our Agency researched old lease records and U.S. Dept. of Agriculture aerial photos. The aerial photos revealed that the

road was built before 7/14/74. Agency records determined that the lessee was Grace Hagerty during the time period of 7/14/74. Mrs. Hagerty is now deceased and her estate has been settled.

Our Agency inquired at the Glacier County Roads Department and the B.I.A. Roads Department and could not find any records of the construction of the road.

The Agency has contacted Mrs. Lorraine Rumney, the current lessee, and informed her she would have to obtain a Right-of-Way for the access road through this land.

The Superintendent had the allotment appraised on April 20, 1995. The value of the land was 320.00 acres of grazing land at \$74.32 per acre = \$23,782.40. The road encumbers approximately 3.64 acres of the tract. In consideration of the appraisal the land taken for the road is valued at approximately \$270.53.

Appellants appealed to the Area Director, challenging three determinations: (1) the road existed in its present location in 1974, (2) Rumney was responsible for obtaining a right-of-way, and (3) the BIA appraisal was relevant to their claim. Their October 12, 1995, Statement of Reasons for Appeal states at page 1: Appellants "forwarded a demand letter to your office on October 26, 1994, requesting damages from the [BIA] for the breach of trust responsibility in the management of their trust land." Appellants further stated that a BIA representative with whom they met "did not ever appear to understand that our claim was that his office had breached its trust responsibility for management of allotment #3052." Id. at 2. Appellants again contended that the Superintendent's statement "that the road existed since 1974, however false, does not change our claim that BIA's allowance of the road construction constitutes a breach of trust responsibility." Id.

On December 11, 1995, the Area Director issued the decision now under review. That decision states:

Based upon the record from the Superintendent, there is no evidence to substantiate who constructed the road or justify [Appellants'] demand for a \$2,500 lease rental increase.

The Agency, Glacier County Courthouse, and Glacier County Road Department records were researched and nothing was found. Without a third party to sue, the BIA has no factual evidence to go on and, therefore, cannot initiate trespass action. Even if we knew the third party, for the purposes of argument, a statute of limitations would run with the discovery of the road by [Appellants] in 1987.

The records indicate the Rumneys have negotiated in good faith to acquire a ROW [right-of-way]; however, [Appellants] will not consent. We have no information as to whether the remaining owners have consented to the ROW.

\* \* \*

The appraisal value as calculated by the Agency would be the value of the ROW. However, a landowner could always request more during the negotiation process with the applicant (see 25 CFR §169).

\* \* \* We conclude the lease was properly approved by the Superintendent and negotiated at an annual rental agreed upon by the landowners (which proves to be much higher than the bid amount originally submitted by the lessee during the advertisement process).

We conclude there was no breach of trust responsibility. The scope of the limited trust responsibility in the context of the BIA general leasing authority has been discussed extensively by the Court of Federal Claims in Brown v. United States, 32 Fed. Cl. 509 (1994) and Wright v. United States, 32 Fed. Cl. 54 (1994).

\* \* \* \* \*

Therefore, we are remanding this decision to the Superintendent with instructions to: (1) not allow the lessee use of the road without a proper ROW or another arrangement that is agreeable with the landowners, (2) block off the road by reasonable means (i.e., kelly humps, etc.), (3) initiate trespass action if the lessee continues to use the road as an access road to her adjoining real estate.

Area Director's Dec. 11, 1995, Decision at 6-7.

Appellants appealed this decision to the Board and filed an Opening Brief. The Area Director did not file a brief. When the Board began consideration of this appeal it noted for the first time that Appellants had failed to serve Rumney. The Board ordered Appellants to serve their Opening Brief on Rumney, and gave her an opportunity to respond. Rumney filed an Answer Brief and Appellants filed a Reply Brief. Because of an apparent discrepancy between the relief Appellants were requesting in their Opening Brief and in their Reply Brief, the Board asked for a concise statement of the relief they were requesting. Appellants provided this statement.

In their Opening Brief, Appellants presented only very general arguments and did not include any evidence in support of their appeal. However, they presented both additional and expanded arguments and new evidence with their Reply Brief. The Board has consistently held that it is not required to consider evidence and arguments made for the first time in a reply brief. See, e.g., Winlock Veneer Co. v. Juneau Area Director, 28 IBIA 149, 157, recon. denied, 28 IBIA 220 (1995), and cases cited therein. Therefore, the Board is not required to address Appellants' new arguments and issues here.

However, for the reasons discussed below, the Board concludes that this case must be remanded to the Area Director for further consideration. Because the Board's decision will not resolve this matter, and because the Area Director will be authorized to review all pertinent information, arguments, and evidence on remand, the Board has considered Appellants' new arguments and evidence.

It is evident from all of their filings that Appellants believe BIA breached its trust responsibility to them and that they are seeking damages for this alleged breach of trust. In early correspondence with BIA, Appellants clearly sought damages from BIA for a breach of trust responsibility. In their October 26, 1994, letter to the Superintendent, Appellants are not clear whether they are seeking \$2,500 per year for past years from BIA or Rumney, although they clearly indicate that Rumney's rent for future years should be increased by \$2,500. In later filings, including those before the Board, Appellants raise trust responsibility arguments, but couch their claim for relief in terms of increased rent--including back rent--to be paid by Rumney. Appellants' mixture of arguments concerning violation of BIA's trust responsibility with requests for compensation from Rumney was the basis for the Board's order to clarify the relief they sought, and continues even in their response to that order.

The Board is not a court of general jurisdiction and has only that authority which has been delegated to it by the Secretary of the Interior. It has not been delegated authority to award money damages against BIA. See, e.g., Toyon Wintu Center, Inc. v. Sacramento Area Director, 29 IBIA 290, 295 (1996), and cases cited therein. To the extent Appellants seek money damages from BIA, the Board lacks jurisdiction over their appeal.

For the remainder of this decision, the Board gives Appellants the benefit of the doubt by assuming that they believe \$2,500 per year is the value of the right-of-way or the amount of damage to the land caused by the road; in other words, the Board assumes that they are not seeking increased past and future rent from Rumney in the belief that the case law might not support money damages against BIA for breach of trust. However, Appellants have presented nothing to support this valuation. Appellants bear the burden of proving the error in the Area Director's decision. The Board concludes that Appellants have failed to provide any support for their claim for \$2,500 per year, and thus have failed to show error in the Area Director's decision not to increase Rumney's past or future rent by this amount. The Board affirms that part of the Area Director's decision which concluded that Appellants have not justified their request for an additional \$2,500 per year for past and/or future use of the road.

The Area Director concluded that Rumney should be prevented from using the road until a right-of-way agreement is executed. The Board disagrees. Rumney's present lease was executed in 1992. The road, in its present location, clearly appears in an aerial photograph attached to that lease. Even though there was a dispute in 1992 as to the value of the road and right-of-way, the landowners did not make the execution of the lease contingent upon an agreement on that point, <sup>4/</sup> and the lease did not prohibit the use of the road. Unless the use of improvements is specifically prohibited by a lease, a lessee is entitled to use any improvements located on the leasehold during the time she holds the lease. Accordingly, the Board concludes that Rumney is entitled to use the road during the remainder of her leasehold, and reverses that part of the Area Director's decision which instructed the Superintendent immediately to prevent Rumney from using the road.

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<sup>4/</sup> As noted above, the landowners did become involved with this lease by requesting a modification of the rental rate from \$2.40 to \$3.00 per acre.

These holdings, however, in no way resolve this controversy. The bottom line here is that there is a road across Allotment 3052 and there is no evidence on record that this road was opened, located, relocated, and/ or improved with owner consent and/or BIA approval. The question is what action needs to be taken at this time.

The Board concludes that this matter must be remanded to the Area Director for further investigation. The Area Director might wish to consider requesting assistance from the Solicitor's Office in addressing this matter, because several of the issues needing investigation are mixed questions of fact and law. On remand, BIA shall address, at a minimum, the following questions:

1. When, under what circumstances, and by whom was a road first located across this allotment?

The Board realizes that it may be difficult, if not impossible, to obtain conclusive evidence on this issue because of the passage of time. However, the present record fails to provide any documentation of BIA's search of its own records and those of Glacier County on this issue, including evidence of how far back BIA searched. The BIA needs to document its efforts to locate any information relating to the location of a road across the allotment and to show whether there is any evidence of owner consent at any time for such a road, even if without BIA approval. It might be possible that a road was first opened by an owner(s) for his/her own use.

However, at this time, it appears that the answer to question 1 may ultimately not be as important as the answer to question 2.

2. When, under what circumstances, and by whom was the road relocated and/or improved?

In general summary, copies of aerial photographs submitted by BIA and Appellants indicate that the initial road was relocated sometime between July 18, 1966, and July 14, 1974. The copy of the 1974 photograph is not clear enough to show the state of improvement of the road on July 14, 1974. The record does not show who owned the allotment between 1966 and 1974, or provide any information as to whether that owner(s) might have consented to the relocation and/or improvement of the road, even if without BIA approval.

Appellants assert that the road was relocated and improved by Rumney after 1978. However, they have submitted nothing which proves either this assertion or that the 1974 aerial photograph is incorrect.

Rumney contends that the road has been in continuous use since at least 1935, states that she has not done any road construction or maintenance except for leveling of ruts in the spring, and does not address the road's relocation. However, because the issue of the road's relocation was first raised in Appellants' Reply Brief, Rumney has not had an opportunity to address the issue in her filings in this case.

Rumney also fails to give a precise date for her 1974 purchase of the Hagerty Ranch. There is also a question here because BIA states that sale records indicate Rumney purchased the Hagerty ranch in 1978.

3. Was a gravel pit illegally opened on the allotment?

With their Reply Brief, Appellants submitted photographs which they took in 1996 of a feature which they identified as a gravel pit. Appellants marked a location along the initial road on a 1982 aerial photograph which they identified as the pit. Although the Superintendent mentions gravel in one letter, stating that the gravel was owned by the Tribe, nothing else specifically addresses the existence of a gravel pit, indicates when such a pit might have been opened or where the gravel from it might have been used, or shows whether any approval might have been given for removing gravel from the allotment.

4. What is the present applicability of certain Departmental documents related to the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976 (Dec. 30, 1982), 28 U.S.C. § 2415 note (1994)?

Documents related to the Indian Claims Limitation Act were mentioned in and attached to a 1995 appraisal of Allotment 3052. Rumney's statement of facts in this case appears to track an April 2, 1982, memorandum written by the Solicitor. *Inter alia*, these documents concern whether certain "beneficial," but unapproved, road and utility rights-of-way should be validated under BIA regulations.

It is clear that the appraiser believed these documents were still applicable. The Area Director did not mention or discuss these documents. The Solicitor's Office did not appear for the Area Director here, and has therefore also not commented on the documents. Thus, the Board has no way to determine whether the documents are still applicable.

Furthermore, even if the documents are applicable, no determination has been made as to whether the road at issue here is a "beneficial" right-of-way within their meaning. Such a determination must be made in the first instance by BIA. Even if the documents are still applicable and even if the road at issue here is deemed to be a "beneficial" right-of-way within their meaning, owner consent may still be necessary for "validation" of the right-of-way under BIA regulations, now found in 25 C.F.R. Part 169.

5. If it is determined that a road was located and/or relocated across the allotment without owner consent and/or BIA approval, what actions should be taken in regard to past use of the road by Hagerty, Rumney, and/or third parties?

The answer to this question may depend in part on the determination of who located and/or relocated the road across the allotment. Hagerty is deceased and her estate has apparently been settled. If she located and/or relocated the road in trespass and/or in violation of her lease, there may be little that can be done at this time. If Rumney relocated the road in trespass and/or in violation of her lease, there may be actions that can be taken at this time, although there may also be a problem with a statute of limitations.

If the road is also, as alleged by Rumney, used by third parties as a public road, and perhaps maintained in some respect by the County, other issues may arise.

6. How will the existence of the road be addressed in future leases of the allotment? Does the existence of the road increase, decrease, or have no effect on the value of the allotment to potential lessees?

The 1995 appraisal report specifically states at page 3 that the allotment was appraised "as though the road is non-existent" based on the appraiser's understanding of the applicability of the documents related to the Indian Claims Limitation Act. Therefore, the existence of the road has not been considered in an appraisal.

7. Did BIA personnel concerned with this case have a conflict of interest?

Appellants make an unsubstantiated allegation that unidentified BIA personnel involved with this case are related to the Rumneys and therefore have a conflict of interest. The Board does not normally address unsubstantiated allegations of conflict of interest. However, because of the Board's disposition of this case, on remand the Area Director should ensure that all employees involved in the decisionmaking process are in compliance with Departmental regulations in 43 C.F.R. Part 20 concerning conflicts of interest. Shoshone-Paiute Tribes of the Duck Valley Reservation v. Phoenix Area Director, 18 IBIA 423, 429 (1990).

The Board's listing of these questions should not be construed as all-encompassing. The Area Director should also address any additional questions which arise during the course of this investigation.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the December 11, 1995, decision of the Acting Billings Area Director is affirmed in part, reversed in part, and remanded for further consideration of the issues set forth above and any other matters that arise during the course of further consideration that are relevant to a resolution of this matter.

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Kathryn A. Lynn  
Chief Administrative Judge

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//original signed  
Anita Vogt  
Administrative Judge