



## INTERIOR BOARD OF INDIAN APPEALS

Charlene M. Wallowing Bull-C'Hair v. Rocky Mountain Regional Director,  
Bureau of Indian Affairs

49 IBIA 120 (04/28/2009)



# 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

CHARLENE M. WALLOWING BULL- )	Order Affirming Decision
C'HAIR, )	
Appellant, )	
)	
v. )	Docket No. IBIA 07-109-A
)	
ROCKY MOUNTAIN REGIONAL )	
DIRECTOR, BUREAU OF INDIAN )	
AFFAIRS, )	
Appellee. )	April 28, 2009

Charlene M. Wallowing Bull-C'Hair (Appellant) has appealed the April 18, 2007, decision of the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirming the October 25, 2006, decision of the Wind River Agency Superintendent, BIA, which advised her of the approval of a 25-year homesite lease (Lease No. 4764H) for George Wallowing Bull (George) on Wind River Allotment No. 3018. Appellant, who is George's sister, raises three issues on appeal, none of which she presented to the Regional Director. Since the Board has a well-established rule of declining to consider arguments raised for the first time on appeal to the Board, and Appellant has not proffered any other grounds for reversing the Regional Director's decision, we find that she has failed to meet her burden of showing error in the Regional Director's decision and affirm that decision.

## Statutory and Regulatory Background

Pursuant to 25 U.S.C. § 2218(a), the Secretary has the discretion to approve a lease or agreement affecting allotted land held in trust or restricted status if

- (A) the owners of not less than the applicable percentage (determined under subsection (b) of this section) of the undivided interest in the allotted land that is covered by the lease or agreement consent in writing to the lease or agreement; and

(B) the Secretary determines that approving the lease or agreement is in the best interest of the owners of the undivided interest in the allotted land.

*See also* 25 U.S.C. § 415 (granting the Secretary the discretion to approve leases for, inter alia, residential purposes). Subsection (b)(1) of 25 U.S.C. § 2218, *as amended by* sec. 6(a)(10) of Pub. L. No. 108-374, 118 Stat. 1084 (Oct. 27, 2004), sets out the applicable percentages based on the number of owners:

(A) If there are 5 or fewer owners of the undivided interest in the allotted land, the applicable percentage shall be 90 percent.<sup>[1]</sup>

(B) If there are more than 5 such owners, but fewer than 11 such owners, the applicable percentage shall be 80 percent.

(C) If there are more than 10 such owners, but fewer than 20 such owners, the applicable percentage shall be 60 percent.

(D) If there are 20 or more such owners, the applicable percentage shall be a majority of the interests in the allotted land.

The number of owners and their interests are to be determined based on Departmental records that identify the owners and their interests, including the number of owners, on the date the lease or agreement is submitted to the Secretary. 25 U.S.C. § 2218(b)(2)(A).

Departmental regulations addressing the issuance of leases and permits for interests in trust lands are found at 25 C.F.R. Part 162, with the specific rules for non-agricultural leases, including residential leases, set out in §§ 162.600 - 162.623.

### **Factual and Procedural Background**

On June 13, 2005,<sup>2</sup> George, who has an undivided 20% trust interest in Wind River Allotment No. 3018, submitted an application for a homesite lease for 2.5 acres of land

---

<sup>1</sup> Prior to the 2004 amendments, this percentage was 100 percent.

<sup>2</sup> Although the application is undated, the pre-application checklist for the application indicates that the Realty Specialist reviewed the application on June 13, 2005, and the Table of Contents accompanying the administrative record identifies the date of the application as June 13, 2005.

within that Allotment, described as the NW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>NW<sup>1</sup>/<sub>4</sub>, sec. 34, T. 1 N., R. 1 E., Wind River Meridian, Fremont County, Wyoming. After reviewing the application and providing George with a copy of the routing checklist for the proposed homesite for his signature, BIA forwarded consent forms for the proposed homesite lease to him, instructing him to obtain signatures from the other landowners signifying their consent to issuance of the homesite lease and to return the signed forms to BIA for further processing. Letter from BIA Realty Officer to George, Sept. 9, 2005.<sup>3</sup> As directed, George mailed consent forms to the other landowners and received the consent of the holders of 67.87% of the undivided trust interest in the Allotment.<sup>4</sup> Appellant, who also owns a 20% undivided trust interest in the Allotment, and who had been issued a homesite lease in 1982 for 2.5 acres on the Allotment adjacent to George's proposed homesite, declined to consent to the proposed homesite lease. She returned the consent form sent to her marked with the words "null and void" and accompanied by a note, dated October 11, 2005, stating "George, pertinent information not available. NULL AND VOID."

On October 23, 2006, the Superintendent approved Lease No. 4764H, granting George a 25-year homesite lease for the requested 2.5 acres. The terms of the lease included the payment of \$10 annual rental to Appellant and the posting of a \$560 improvement bond covering the construction of 80 rods of new fencing. The lease also contained various other provisions addressing, inter alia, improvements, liens, and limitations on the use of the property. By letter dated October 25, 2006, the Superintendent advised Appellant of his approval of the homesite lease. While acknowledging Appellant's ownership of an undivided 20% trust interest in the Allotment, the Superintendent noted that George also had an undivided 20% trust interest in the Allotment, which he had exercised his right to use, and that he had obtained consent from the owners of 68% of the interests in the Allotment for his proposed homesite. Since the majority of the interest owners had consented to the leasing of 2.5 acres to another interest owner, the Superintendent approved the lease, advising Appellant that her share of the rental would be placed in her Individual Indian Money (IIM) account.

Appellant appealed the Superintendent's decision to the Regional Director. In her Statement of Reasons (SOR) to the Regional Director, she raised 13 issues related to George's age, health, and finances. She asserted that: (1) George was 76 years old and, therefore, it was uncertain how long he would be able to occupy the homesite; (2) he might

---

<sup>3</sup> According to the Title Status Reports, there are a total of 26 owners of undivided interests in Allotment No. 3018.

<sup>4</sup> The 67.87% includes George's 20% interest in the Allotment.

need constant care and permanent medical treatment in the future because of his age and current medical conditions; (3) he could become disabled and not be able to carry out his personal affairs or maintain the homesite; (4) he had lived with and financially supported his ex-wife's family and might not have sufficient funds to continue to support them in addition to himself; (5) he had other places to reside; (6) he had been unable to obtain a permanent residence for himself throughout his life; (7) he was entitled to, and would have to rely on, tribal services to care for him; (8) his failure to previously apply for a homesite suggested that he was being wrongfully pressured to obtain a homesite now; (9) he had been occupying the Allotment since September 2003 without a lease and had allowed another party to use the Allotment; (10) he would not be able to care for the entire Allotment; (11) he had wrongfully collected money from their mother's estate almost 20 years earlier; (12) BIA had failed to take action against trespassers using the Allotment; and (13) George, therefore, was not a good candidate for a homesite lease on the Allotment. SOR at 1-2.

In his April 18, 2007, decision, the Regional Director discounted the issues raised in Appellant's SOR, explaining that these personal, age, health, and financial matters were not the types of concerns considered as criteria in approving a homesite lease to a co-owner. He noted that the administrative file demonstrated that George had complied with the homesite procedural requirements by acquiring the consent of the owners of 68% of the interests in the Allotment, and apparently was residing in the existing dwelling on the homesite. Citing 25 C.F.R. § 162.601, the Regional Director determined that a lease of a fractionated tract could be granted by the owners of the majority interest, and that the terms of such a lease could either be negotiated by the landowners to the satisfaction of the Superintendent or be negotiated by the Superintendent. He further advised Appellant that her share of the homesite lease rental would be deposited to her IIM account. Therefore, based on his review of the record, he affirmed the Superintendent's decision to approve George's homesite.

Appellant filed a timely notice of appeal and submitted an opening brief. George, as an interested party, filed a brief replying to Appellant's opening brief. The Regional Director has not appeared in this appeal. Briefing is now complete and the case is ripe for review.

### **Standard of Review**

A BIA decision to approve a lease of Indian land involves an exercise of discretion. *Kearney Street Real Estate Co. v. Sacramento Area Director*, 28 IBIA 4, 17 (1995); *see Seymour Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). The Board does not substitute its judgment for BIA's judgment in discretionary decisions.

*Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006); *Cass County v. Midwest Regional Director*, 42 IBIA 243, 246 (2006). An appellant bears the burden of proving that BIA did not properly exercise its discretion. *Anderson*, 44 IBIA at 225; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246. Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. *Anderson*, 44 IBIA at 225; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246-47. In reviewing appeals from discretionary decisions, the Board's role is limited to determining whether an appellant has demonstrated that BIA's decision is not in accordance with law, is not supported by the record, or is not adequately explained. *Anderson*, 44 IBIA at 225.

Unless manifest error or injustice is evident, the Board is limited in its review to those issues raised before the Regional Director and does not consider arguments raised for the first time on appeal to the Board. 43 C.F.R. § 4.318; see *Isaac A. Bunney and Cheri L. Bunney*, 49 IBIA 26, 31 (2009); *Jackson County v. Southern Plains Regional Director*, 47 IBIA 222, 228 (2008); *Arrow Weinberger v. Rocky Mountain Regional Director*, 46 IBIA 167, 173 (2008); *Anderson*, 44 IBIA at 226.

### Discussion

Appellant raises three issues in her appeal brief. First, she contends that the Superintendent failed to comply with 25 U.S.C. § 2218 because he neglected to identify all of the interest owners; failed to ensure that all the owners and only those owners received the consent forms; failed to provide all the proposed lease terms with the consent forms, thus preventing the owners from learning and possibly objecting to some of those terms; neglected to specify what percentage of ownership interest was required to consent to George's homesite lease; and accepted two allegedly inadequate documents as valid consents. Second, she avers that BIA breached its trust responsibility to her by failing to ensure that she retained adequate access over George's homesite to her adjacent homesite. Finally, she asserts that BIA failed to require a satisfactory surety bond to ensure George's performance of the contractual obligations under the lease. None of these issues was presented in her SOR to the Regional Director.

As noted above, as a general matter, the Board does not consider claims raised for the first time before the Board. *Weinberger*, 46 IBIA at 173. We see no reason to depart from that rule here, and decline to consider these issues. Since Appellant has proffered no

other reasons for challenging the Regional Director's decision, she has failed to meet her burden of showing error in the Regional Director's decision.<sup>5</sup>

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 decision.

I concur:

          // original signed            
Sara B. Greenberg  
Administrative Judge\*

          // original signed            
Debora G. Luther  
Administrative Judge

\*Interior Board of Land Appeals, sitting by designation.

---

<sup>5</sup> The scope of this appeal is limited to reviewing the Regional Director's decision. *Helen Dorene Goodwin v. Pacific Regional Director*, 44 IBIA 25, 29 (2006). Thus, to the extent Appellant may be attempting to raise issues outside of the approval of the homesite application, including trespass by another homesite lease-holder, those issues are beyond the scope of this appeal and will not be addressed.