



INTERIOR BOARD OF INDIAN APPEALS

Scott J. Shelbourn v. Acting Great Plains Regional Director, Bureau of Indian Affairs

54 IBIA 75 (09/29/2011)



United States Department of the Interior

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

SCOTT J. SHELBOURN,)	Order Dismissing Appeal
Appellant,)	
)	
v.)	
)	Docket No. IBIA 09-133
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	September 29, 2011

We dismiss for lack of standing this appeal by Scott J. Shelbourn (Appellant) from a July 9, 2009, decision (Decision) of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). In her Decision, the Regional Director instructed BIA's Rosebud Agency (Agency) to discontinue the approval process for a proposed grazing lease for Appellant for Allotment Nos. 1023.5, 1023.5A, and 1023.5B (collectively, Rangeland) on the Rosebud Indian Reservation in South Dakota, and to renegotiate the lease or re-advertise the Rangeland for lease. The fact that Appellant had negotiated the terms of a new but still unapproved lease with BIA, and the fact that he had made improvements to the Rangeland during prior leases, did not give rise to any legally protected interest that was adversely affected by the decision to reopen the leasing process. Neither of these facts gave him a right to have the negotiated lease approved or given further consideration by BIA, nor did they give him preferential status in negotiating a lease with BIA. Therefore, when the Regional Director decided to re-start the leasing process, Appellant had no legally protected interest that was adversely affected, and he thus lacks standing to appeal the Decision.

Background

The Rangeland¹ is owned in varying fractions by the Rosebud Sioux Tribe (Tribe) and approximately 50 individual owners, none of whom include Appellant or the

¹ The Rangeland covers the SW¹/₄ (Allotment No. 1023.5), N¹/₂SE¹/₄ (Allotment No. 1023.5B), and S¹/₂SE¹/₄ (Allotment No. 1023.5A) of Section 21, T. 36 N., R. 30 W., Sixth Principal Meridian, South Dakota, and collectively consists of 320 acres.

Rangeland's past lessees, Danielle Walking Eagle-Tinant (Danielle) and Travis Tinant.² Apparently, the Tinants were long-time lessees of the Rangeland.³ Because the Rangeland was immediately adjacent to their property, the Tinants did not fence the boundary between their land and the Rangeland, and the Tinants utilized wells on their own land rather than construct wells on the Rangeland. Therefore, when Appellant first leased the Rangeland in 2002 for 5 years, he expended significant sums to fence the boundary along the Tinants' land and to construct wells, which he was expressly permitted to do under the terms of his lease. The lease terms also informed him that he would have 30 days to remove any improvements after the termination of his lease or the "improvements . . . become the property of the lessor." Lease No. 57639, ¶¶ 10, 23 (AR, Tab 1). Although Appellant subsequently lost the lease to Danielle in 2007 in a sealed bid contest, he regained the lease the following year for a 1-year period for \$20 per acre. Appellant asserted that he was able only to utilize the Rangeland during the latter lease for 2 weeks of the 1-year lease period because the fencing that he had previously installed had been removed, the wells were not usable (one had been filled with bentonite⁴), and a winter blizzard occurred. Appellant asserts that he used materials furnished by BIA and the Tribe, and utilized his own funds and labor to restore the fencing and salvage the well.⁵

In 2009, despite advertising the Rangeland for bid, the Superintendent negotiated a lease with Appellant, this time for 5 years at \$12.75 per acre, and pulled the Rangeland from the bidding process on the last day of bidding. Danielle, who asserts that she submitted a bid at \$17.50 per acre for the Rangeland, appealed the Superintendent's decision to pull the Rangeland from the bidding process. At the time of Danielle's appeal to the Regional Director, the Superintendent had not approved Appellant's lease. Upon receipt of the appeal, the Regional Director instructed the Superintendent not to take

² According to the Title Status Report, dated June 2009, the only owner with an ownership interest in more than one of the allotments comprising the Rangeland is the Tribe. At that time, the Tribe owned 17.5% of Allotment No. 1023.5, 85.3% of Allotment No. 1023.5A, and 16.5% of Allotment No. 1023.5B. *See* Administrative Record (AR), Tab 9.

³ Danielle represented that Gayle Tinant, her father-in-law, leased the Rangeland for 15 years before Appellant succeeded to the lease in 2002. Danielle apparently leased the Rangeland for the first time in 2007.

⁴ According to the Regional Director, bentonite is "a clay substance often used to seal or plug the annulus of water wells, virtually making the well tank unusable." Decision at 2.

⁵ Danielle asserted that BIA permitted her to remove the fencing that Appellant had erected. She denies that she caused any damage to the wells.

further action on Appellant's lease until the appeal was decided. The Regional Director informed Appellant that Danielle had appealed, *see* Decision at 1, but it is not apparent that Appellant was provided with a copy of her appeal or provided the opportunity to respond.

On July 9, 2009, the Regional Director issued the decision that is now before the Board. In response to the merits of Danielle's appeal, the Regional Director observed that, during her tenancy, Danielle had removed fencing belonging to the Rangeland's owners and the wells were rendered unusable. But the Regional Director also determined that while the Superintendent was authorized to negotiate leases on behalf of the Rangeland's owners, he was also required to obtain fair annual rental⁶ for the land. The Regional Director noted that the Agency believed the fair annual rental to be \$15 or more per acre.

The Regional Director also acknowledged that the improvements to the Rangeland were restored through BIA's and Appellant's efforts, and determined without explanation that "the issue of just compensation to [Appellant] is moot." Decision at 5-6. She went on to characterize the Superintendent's actions toward Appellant as "noble," but reminded him that "BIA's responsibility lies with the lessor." *Id.* at 6. The Regional Director held that none of the regulatory provisions that allowed for less than fair annual rental appeared to apply to Appellant and, therefore, "if" the Agency's own valuation of fair annual rental were accepted, the Agency had not demonstrated that Appellant could be awarded the lease at the lower, negotiated price of \$12.75/acre. The Regional Director remanded the matter to the Superintendent with instructions to abandon the lease agreement with Appellant, and restart the lease process from scratch. In particular and in the event the landowners did not negotiate their own lease, the Regional Director directed the Superintendent to re-advertise the land "to obtain the highest responsible bid at or above fair annual rental, preferably for a five year lease." *Id.* The Regional Director also noted that "maintenance of the land and accompanying improvements will be the responsibility of the lessee" and directed that in the event of damage to the Rangeland, it must be repaired at the end of the lease, and if not, damages would be collected from the bond posted for the lease. *Id.*⁷

This appeal followed.

⁶ "Fair annual rental" is defined as "the amount of rental income that a leased tract of Indian land would most probably command in an open and competitive market." 25 C.F.R. § 162.101 (definition of "fair annual rental").

⁷ The Regional Director did not address whether Danielle had standing to appeal from the Superintendent's decision to pull the Rangeland from the bidding process.

Discussion

Simply put, Appellant did not have an approved lease for the Rangeland and, thus, he lacks any entitlement or right to approval of the negotiated lease for the Rangeland. Our consideration of Appellant's arguments on their merits merges with the threshold consideration of whether he has standing to challenge the Regional Director's decision. Because Appellant has not demonstrated an entitlement to approval of his negotiated lease, he lacks a legally protected interest in leasing the Rangeland. Therefore, we conclude that Appellant lacks standing to prosecute this appeal.⁸

1. Standard of Review

Whether an appellant has standing is a legal question that we review *de novo*. *Northern Cheyenne Livestock Ass'n v. Acting Rocky Mountain Regional Director*, 48 IBIA 131, 135-36 (2008). It is Appellant's burden to establish his standing to bring an appeal. *Hardy v. Northwest Regional Director*, 51 IBIA 152, 158 (2010).

2. Standing

The Regional Director maintains that Appellant lacks standing to pursue this appeal because he has not been injured by the Regional Director's decision, and he lacks a legally enforceable right. We agree. In this case, Appellant's "merits" arguments are inextricably intertwined with the issue of standing. Thus, although we ultimately dismiss the appeal, we must address Appellant's arguments in order to reach that result: Appellant's claim is that he has a legally enforceable right to have BIA approve the terms that he negotiated with BIA, or, at least, that BIA is required to consider approving those terms. But, it is only if that right is, in fact, legally enforceable that gives Appellant standing to challenge the Regional Director's decision. In that sense, the "merits" of this appeal merge with the standing analysis.

To determine an appellant's "standing" to pursue an appeal before the Board is to determine whether the appellant is entitled to be heard on the merits of his appeal and entitled to a decision on those merits from the Board. *Hawley Lake Homeowners' Ass'n v. Deputy Secretary-Indian Affairs (Operations)*, 13 IBIA 276, 281 (1985). "Any interested party affected by a final administrative action or decision" by a Regional Director may appeal to the Board. 43 C.F.R. § 4.331. An "interested party" is one whose interests could be adversely affected by the decision being appealed. *See* 25 C.F.R. § 2.2 (incorporated by

⁸ Because we agree with the Regional Director that Appellant lacks standing, we do not reach her alternate arguments for dismissal on other jurisdictional and ripeness grounds.

reference in the Board's regulations at 43 C.F.R. § 4.330(a)). For purposes of appeals before the Board, "adversely affected interest" means "an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest." *Rosebud Indian Land & Grazing Ass'n. v. Acting Great Plains Regional Director*, 50 IBIA 46, 53 (2009). And a "legally protected interest" can arise in several ways: It can be "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." *Hawley Lake Homeowners' Ass'n*, 13 IBIA at 284 (quoting *Tenn. Power Co. v. TVA*, 306 US 118, 137-38 (1939)).

Appellant appeals the Regional Director's order to the Superintendent to discontinue the approval process for the lease for the Rangeland at \$12.75/acre because, as he contends, he undisputedly had an agreement with BIA to lease the Rangeland for 5 years at that rate. And it is further undisputed that the Agency was prepared to approve the lease but for the Regional Director's order to discontinue the approval process. Appellant contends that his agreement with BIA was a contract, and because of that contract, he is entitled to have the lease approved. We disagree. A prospective lessee gains no contractual right to obtain approval of a lease merely by reaching an agreement with BIA on the terms of a new lease. It is well established that unless and until the lease is approved, any terms offered or even agreed-upon by BIA (and landowners) may be withdrawn, and the prospective lessee obtains no legally protected interest in the interim. *Roman v. Rocky Mountain Regional Director*, 41 IBIA 70, 72 (2005) ("[u]ntil the lease was approved by the Superintendent, it was not effective or enforceable."); *Brooks v. Muskogee Area Director*, 25 IBIA 31, 34 (1993) ("an unapproved lease of trust or restricted property is void and grants no rights to any party."), *recon. denied*, 25 IBIA 96 (1994). At most, the prospective lessee gains an expectancy, which is not a legally protected right. See *Porcupine Grazing Ass'n v. Acting Billings Area Director*, 24 IBIA 243, 244 (1993).

The approval of a lease is not simply a ministerial act, but an integral component of a valid lease of trust or restricted Indian land. Thus, the terms of the lease agreement and the approval of that agreement are two consecutive steps of a single process, required by law, for obtaining a valid lease of trust or restricted land. *David v. Acting Great Plains Regional Director*, 47 IBIA 129, 131 (2008). The approval step is not separate or distinct from the terms of a lease agreement such that a potential lessee may challenge BIA's decision not to approve a lease. *Id.* BIA is authorized to negotiate or grant grazing leases on behalf of certain classes of Indian landowners. 25 C.F.R. § 162.209. However, its *approval* of leases requires BIA to consider such criteria as whether the rent is a fair annual rental, whether there are environmental considerations, and whether the intended use of the land is compatible with the uses in the surrounding area. *Id.* §§ 162.214, 162.222. Especially considering that BIA must allow landowners 3 months to negotiate their own lease of their land before BIA may finalize a lease on their behalf, *see* 25 C.F.R. § 162.209(b)(1), the criteria for approving a BIA-negotiated lease at the end of that time period takes on added

significance inasmuch as circumstances for approval may have changed between the time of negotiation and the time of approval. Nothing in the law or in BIA's approval regulations absolves BIA of complying with the distinct requirement for written approval of leases that it has negotiated on behalf of the landowners nor do the regulations merge or conflate the negotiation and approval processes when BIA is negotiating a lease on behalf of the landowners. Therefore, the fact that Appellant may have reached an agreement with BIA on the terms of a lease for the Rangeland does not, without more, entitle him to approval of the lease.

Appellant next argues that he was adversely affected by the Decision because he has expended considerable personal funds and labor in constructing 1¼ miles of fencing, drilling one well, and installing a bottomless tank on the Rangeland. These improvements benefitted the owners and because he negotiated a fair rental, Appellant argues that he is entitled to BIA's approval of his lease. Under the terms of Appellant's first lease for the Rangeland (2002-2007), he paid \$6.75/acre, and he bore the cost of installing fencing and a well with a tank and a windmill. The lease entitled Appellant to remove these improvements, and gave him 30 days to do so after his lease ended. Lease No. 57639, ¶ 23 (AR, Tab 1). If the improvements were not removed, they became the property of the owners at the end of the lease. *Id.*, ¶ 10. Here, Appellant elected to leave the improvements on the Rangeland after his lease ended, and they then became the property of the landowners 30 days thereafter.⁹ Nothing in the terms of Appellant's leases vested any rights, preferences, or future entitlement to lease the Rangeland by virtue of the improvements that he placed on the land and chose not to remove. See *Hall v. Great Plains Regional Director*, 43 IBIA 39, 45 (2006) ("The fact that permittees may have made certain improvements that are impossible or impracticable to remove does not, either through the terms of prior permits or through the regulations give them a legally protected interest that is adversely affected by a rate decision for a new permit period."). In fact, both leases expressly state that "[t]his lease does not grant preference right[s] to future leases or any right of renewal." Lease Nos. 57639 and 61012, ¶ 17 (AR, Tabs 1, 3).

Next, Appellant argues that he is a good tenant who cares for the land. That Appellant is a good steward of the Rangeland and pays his rent in a timely manner¹⁰ gives

⁹ Notably, while Appellant's second lease of the Rangeland, Lease No. 61012, also contained ¶ 23, the space for identifying those improvements that the lessee could remove at the end of the lease stated, "None."

¹⁰ The administrative record does not contain any documents concerning Appellant's rent payments or stewardship of the land. We accept his assertions concerning his tenancy as true for purposes of this appeal.

him no rights or entitlement to approval of the lease or a preference for negotiating a new lease. The lease terms required him to pay rent in a timely manner, *see* Lease Nos. 57639 and 61012, ¶¶ 2, 24 (AR, Tabs 1, 3); to conduct his grazing operations in accordance with recognized principles of good practice and prudent management, *id.* ¶ 30; and to abide by the land use and conservation plans attached to and made a part of the lease, *id.* Any exemplary conduct by Appellant as a lessee might well cause the landowners to prefer to lease their lands to him rather than to another potential lessee, but such conduct does not create any rights in Appellant. Any interest that Appellant previously had in the Rangeland under the terms of his prior two leases expired when the terms of those leases ended, and Appellant had no entitlement to a new lease.

Finally and contrary to Appellant’s argument, nothing in 25 C.F.R. §§ 162.209 or 162.222 gives Appellant any legally enforceable right to lease the Rangeland, much less to compel BIA to approve the lease it negotiated with him. Section 162.209(a) authorizes BIA to grant agricultural leases on behalf of several classes of Indian landowners, including individual Indian owners of a fractionated tract when necessary to protect their interests. Section 162.209(b) expressly requires that, before BIA may grant a lease on behalf of all of the owners of a fractionated tract, BIA must first give notice of its intent to grant the lease to each owner of the proposed leasehold and may only grant the lease if the landowners “are unable to agree upon a lease during a 3-month negotiation period immediately following such notice [or other period of time established by tribal law].”

Section 162.222 concerns the payment of rent for an agricultural lease, including whether and when rent may be less than a fair annual rental. Appellant argues that he is eligible for a lease at less than fair annual rental because he is a member of the Tribe and a voting shareholder of the Tribal Land Enterprise. But § 162.222(c)(2) — which permits a cooperative or other legal entity that includes among its members the owners of the leasehold, who must directly participate in the income earned by the entity, to lease their trust land for less than fair annual rental — does not apply where, as here, the lessee is a single individual (Appellant) and not an entity. Ultimately, while the leasing regulations permit BIA to negotiate and approve a lease with Appellant, neither regulation vests any rights in Appellant to compel the approval of a lease that BIA might negotiate with him.¹¹ The approval of a lease of trust or restricted land is the final, but still integral, step in the contract process. *See* 25 C.F.R. § 162.214. And until that final step of approval occurs,

¹¹ Appellant also maintains that he has the right to negotiate a lease. There is no contention here that BIA cannot negotiate with Appellant or that Appellant is not eligible to negotiate a lease of trust land. The deciding factor for the Regional Director was her concern that \$12.75/acre is not fair annual rental for the Rangeland.

Appellant does not have a legally protected interest in leasing the Rangeland and, thus, lacks standing to prosecute this appeal.

As we explain above, Appellant has not demonstrated an entitlement to approval of the lease he negotiated with BIA or any other legally protected interest that was affected by the Decision. Whether he negotiated a fair annual rental with BIA is not relevant nor would he have standing to challenge the Regional Director's determination that his negotiated rental price of \$12.75/acre was less than the fair annual rental estimate from the Agency.

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 dismisses this appeal for lack of standing.¹²

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹² Although the issue is not presented directly in this appeal, we are compelled to comment on the apparent inconsistency between (1) the Regional Director's consideration on the merits of Danielle's appeal from the Superintendent's decision to pull the Rangeland from the bidding process, and (2) her argument in this appeal that Appellant lacks standing. On the record before the Board, there is no apparent basis upon which Danielle would have had legal standing to "appeal" to the Regional Director from the Superintendent's decision to pull the Rangeland and negotiate a lease with Appellant, and it appears that the Regional Director erred in failing to dismiss that appeal accordingly. That said, however, to the extent that Danielle brought information to the Regional Director's attention that was relevant to BIA's duty to the *landowners*, e.g., information raising questions on whether the price negotiated with Appellant was for fair annual rental value, it was not error for the Regional Director to separately consider that information and take action in the exercise of her supervisory authority over the Superintendent.