



INTERIOR BOARD OF INDIAN APPEALS

Roger Birdbear v. Acting Great Plains Regional Director, Bureau of Indian Affairs

56 IBIA 87 (12/20/2012)

Related Board case:
51 IBIA 273



United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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ROGER BIRDBEAR,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 11-036
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	December 20, 2012

Appellant Roger Birdbear appeals from an October 6, 2010, decision (Decision) of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which affirmed the Fort Berthold Agency Superintendent’s (Superintendent) decision to approve an assignment of an oil and gas lease for a mineral estate in which Appellant owns an interest. Appellant contends, with no further explanation and without filing a brief, (1) that the Regional Director “did not answer the legality of an assignment clause in a real estate lease,” (2) that the Decision “is not relevant toward responding to” the Superintendent’s approval of the assignment; and (3) that BIA should have enforced the assignment clause in Appellant’s best interest. Notice of Appeal at 1.

We affirm the Decision because it provided a detailed, well-reasoned, and well-supported response to the arguments raised by Appellant in his challenge to the Superintendent’s approval of the assignment. Appellant’s bare allegations fail to demonstrate any error in the Decision.

Background

Appellant owns a 6.25% undivided mineral interest in Fort Berthold Allotment No. M866A (Allotment). On March 7, 2008, with consent from Appellant and 30 other owners who collectively owned more than 79% of the undivided mineral interest in the Allotment, the Superintendent approved an oil and gas lease of the Allotment to Zenergy Properties 6 Ft. Berthold Allottee, LLC (Zenergy). Lease (Administrative Record (AR) Tab 1). The lease was for a 5-year initial term and included a clause in which Zenergy

agreed not to assign the lease, or any interest therein, “except with the approval of the Secretary of the Interior.” Lease, § 3(h).

On March 23, 2009, Zenergy assigned its interest in the lease to Dakota-3 E&P Company, LLC (Dakota-3) for “Ten and 00/100 dollars (\$10.00) and other consideration.” Lease Assignment (AR Tab 2). Dakota-3 was, at least at one time, owned by Zenergy. *See* Mineral Development License (AR Tab 18 at 155). The Superintendent notified the mineral owners of the assignment and approved it on April 10, 2009.

Appellant objected to the assignment, arguing that while “leases are freely assignable unless those leases possess clauses that prohibit assignments,” the lease contains an “assignment prohibition clause[.]” Letter from Appellant to Superintendent, Apr. 14, 2009 (AR Tab 4). Appellant argued that the lease had not been intended to be “broker[ed] for speculation purposes,” and that Zenergy must pay him a share of what it received as compensation from Dakota-3. *Id.* The Superintendent understood Appellant to be asserting that owner consent to the assignment was required. The Superintendent rejected that argument, finding that the lease does not prohibit assignments without owner consent. Superintendent’s Decision, June 24, 2009 (AR Tab 6). Appellant appealed the Superintendent’s decision to the Regional Director.

The Regional Director affirmed the Superintendent’s decision.¹ The Regional Director determined that neither the lease nor the governing regulations require the mineral owners’ consent to an assignment of the lease, or otherwise prohibit assignments. He also determined that the Superintendent’s approval of the lease without seeking additional compensation for the mineral owners was not a breach of BIA’s trust responsibility.²

This appeal followed. Appellant did not file a statement of reasons or submit a brief, and thus his arguments are limited to the assertions contained in his notice of appeal. *See supra* at 87. The Regional Director filed an answer brief.

¹ In an earlier decision, the Regional Director summarily dismissed Appellant’s appeal from the Superintendent’s decision as untimely, *see* AR Tab 9, but after Appellant appealed that dismissal to the Board, the Regional Director asked the Board to remand the matter to him for further consideration, which we did. *See Birdbear v. Acting Great Plains Regional Director*, 51 IBIA 273 (2010).

² The Regional Director also placed the Superintendent’s approval of the assignment into immediate effect, pursuant to 25 C.F.R. § 2.6(a), finding that giving it immediate effect would be in the best interest of the Indian owners. Decision at 1-2.

Discussion

I. Standard of Review

We review questions of law, including interpretations of lease provisions, *de novo*. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011). We apply the same *de novo* standard of review to evaluating the sufficiency of the evidence to support a BIA decision. *Poler v. Midwest Regional Director*, 56 IBIA 6, 11 (2012).

A decision to approve an assignment of a lease is committed to BIA's discretion. *Cf. Jacobs v. Great Plains Regional Director*, 43 IBIA 249, 252 (2006) (approval of assignment of grazing lease is within BIA's discretionary authority). The Board's role in reviewing discretionary decisions is limited to determining whether BIA followed or considered all legal prerequisites to the exercise of its discretionary authority and whether the decision is supported by the record and adequately explained. *Poler*, 56 IBIA at 11.

It is an appellant's burden to demonstrate error in a regional director's decision. *Taylor Drilling Corp. v. Eastern Oklahoma Regional Director*, 53 IBIA 15, 18 (2011). Conclusory objections to, simple disagreement with, or bare allegations regarding a BIA decision will not carry an appellant's burden of proof. *Jackson County, Kansas v. Southern Plains Regional Director*, 47 IBIA 222, 228 (2008).

II. Merits

It is not entirely clear what Appellant means in asserting that the Regional Director "did not answer the legality of an assignment clause in a real estate lease." Notice of Appeal at I. In his appeal to the Regional Director, Appellant never contended that the assignment clause in the lease was not legal, and indeed he had earlier acknowledged that as a general rule, "leases are freely assignable unless those leases possess clauses that prohibit assignments." AR Tab 4.³ But to the extent Appellant is arguing that the Regional Director failed to address his argument that the lease in this case prohibits assignments, he is mistaken. In the Decision, the Regional Director explained that Zenergy had agreed, in the lease, not to assign the lease *without the approval of the Secretary*. Decision at 4-5 (citing

³ It is well-established that clauses allowing or prohibiting assignments of leases are permitted under the common law. *See, e.g.*, Restatement (Second) of Contracts, Ch. 15, Assignment and Delegation (1981).

Lease, § 3(h)).⁴ Thus, to the extent that § 3(h) of the lease—the clause relied upon by Appellant—could be construed as an assignment prohibition clause, it only prohibited Zenergy from assigning the lease without BIA’s approval, which Zenergy obtained in this case. We find no failure by the Regional Director to respond to and clearly address Appellant’s arguments, and we find no error in his explanation or interpretation of the lease and the regulations.

Appellant’s second contention, that the Decision is flawed because it “is not relevant toward responding to” the Superintendent’s approval of the assignment, is too conclusory and vague to satisfy Appellant’s burden to demonstrate error in the Decision. The Decision addressed Appellant’s arguments in detail, carefully explaining why the Regional Director was affirming the Superintendent.

Appellant’s third assertion—that BIA should have “enforced” the assignment clause in Appellant’s best interest—fails to articulate in any respect what error the Regional Director made in concluding that Appellant had not shown that approval of the assignment was *not* in Appellant’s best interest. *See* Decision at 8. The Regional Director suggested that BIA’s failure to approve the assignment might actually be adverse to the landowners’ interest because the assignment might facilitate drilling and the production of royalties. *Id.* On receiving Zenergy’s executed assignment documents, BIA had two choices: It could either disapprove the assignment, leaving Zenergy with the right to develop the minerals, or it could approve the assignment and allow Dakota-3 to develop the minerals. Appellant presented no arguments to the Regional Director, or to the Board, explaining why his economic interest would have been better served if BIA had exercised its discretion by disapproving the assignment.⁵

⁴ The Regional Director also explained that the owners’ consent to the assignment was not required because it was not required by the lease. Decision at 5 (citing 25 C.F.R. § 211.53, as referenced in 25 C.F.R. § 212.53 (“The Indian mineral owner must also consent if approval of the Indian mineral owner is required in the lease.”)). Appellant does not appear to contest that portion of the Decision, but to the extent he intends to do so, we find no error in the Decision.

⁵ “In the alternative,” Appellant “seeks relief in accordance with the original request.” Notice of Appeal at 1. It is unclear what Appellant means by this, but to the extent he seeks a share of the consideration paid to Zenergy for the assignment, we note that the consideration for the assignment was nominal. *See supra* at 88. We are not convinced that any of the “trust responsibility” cases cited by Appellant in the proceedings below required BIA to insist that the consideration for this assignment be distributed to the owners.

Conclusion

The mineral owners agreed to the lease, which only prohibits assignments if they have not been approved by BIA. The Superintendent approved the assignment in this case and Appellant has failed to show any error in the Regional Director's Decision upholding the Superintendent's action.

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 October 6, 2010, decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Debora G. Luther
Administrative Judge