



## INTERIOR BOARD OF INDIAN APPEALS

Nulankeyutmonen Nkihtaqmikon; David Moses Bridges; Vera J. Francis; Hilda Lewis;  
Deanna Francis; Reginald Joseph Stanley; Mary Basset v. Eastern Regional Director,  
Bureau of Indian Affairs  
and  
Quoddy Bay LNG v. Acting Eastern Regional Director, Bureau of Indian Affairs

56 IBIA 127 (01/25/2013)



# 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

NULANKEYUTMONEN	)	Order Vacating the Regional
NKIHTAQMIKON; DAVID MOSES	)	Director's June 1, 2005, Decision and
BRIDGES; VERA J. FRANCIS; HILDA	)	Dismissing Appeals
LEWIS; DEANNA FRANCIS;	)	
REGINALD JOSEPH STANLEY;	)	
MARY BASSET,	)	
Appellants,	)	
	)	
v.	)	
	)	
EASTERN REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	Docket Nos. IBIA 09-07-A
	)	IBIA 10-138
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QUODDY BAY LNG,	)	
Appellant,	)	
	)	
v.	)	
	)	
ACTING EASTERN REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	January 25, 2013

These two related appeals<sup>1</sup> to the Board of Indian Appeals (Board) both concern a ground lease (Lease) between the government of the Pleasant Point Reservation of the Passamaquoddy Tribe (Tribe) and Appellant Quoddy Bay LNG (Quoddy Bay) intended to be the site of a liquified natural gas (LNG) terminal facility. In Docket No. IBIA 09-07-A, Appellants Nulankeyutmonen Nkihtaqmikon (NN), et al., appealed from the June 1, 2005, decision of the Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to approve the Lease. In Docket No. IBIA 10-138, Quoddy Bay appeals from the

<sup>1</sup> These appeals are now consolidated for purposes of this final decision.

July 29, 2010, decision of the Acting Eastern Regional Director<sup>2</sup> not to reconsider his decision to cancel the Lease, which occurred at the request of the Tribe and after a limited remand from the Board in NN's appeal.

We now dismiss both of these appeals. We dismiss Quoddy Bay's appeal on abandonment grounds. The Board recently sent an Order for Supplemental Briefing on possible mootness not only to Quoddy Bay's address of record, but also to three additional addresses. The Postal Service returned each of these mailed items to the Board marked "undeliverable," and, of course, no response to the order was received from Quoddy Bay. We therefore conclude that Quoddy Bay has abandoned its appeal.

We also dismiss NN's appeal because we are not convinced that any actual case or controversy still exists regarding the Regional Director's approval of the Lease. In addition to Quoddy Bay's de facto failure to pursue its own appeal concerning cancellation of the Lease, Quoddy Bay asserted as part of its notice of appeal that BIA's approval was defective and incomplete, such that the Lease could not—absent additional action by BIA—become an enforceable agreement that created any obligations for the parties. Viewed in that context, the Tribe's request for BIA to cancel the Lease was, effectively, a revocation of the Tribe's consent, thus rendering moot any decision by BIA to approve the Lease. In the interest of clarity, we vacate the Regional Director's June 1, 2005, decision to approve the Lease, which necessarily lays to rest NN's concerns that Quoddy Bay could somehow resurrect the controversy and leave NN without recourse.

### **Background**

On June 1, 2005, the Regional Director approved the Lease between the Tribe and Quoddy Bay for "the development, construction, operation, maintenance, repair, removal and demolition of an LNG terminal facility and associated improvements." Lease at 1 (AR<sup>3</sup> 1). NN appealed the Regional Director's approval to the Board, and we immediately stayed the appeal during the pendency of parallel proceedings in Federal court<sup>4</sup> and, thereafter, due to the related appeal filed by Quoddy Bay.

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<sup>2</sup> We will refer to both the Eastern Regional Director and the Acting Eastern Regional Director as the Regional Director.

<sup>3</sup> We will refer to the administrative record as "AR." All citations herein to the AR refer to the administrative record received by the Board in Docket No. IBIA 10-138.

<sup>4</sup> NN's appeal to the Board was preceded by litigation in the Federal courts. See *Nulankeyutmonen Nkiltaqmikon v. Impson*, 462 F.Supp. 2d 86 (D. Me. 2006), *aff'd in part, rev'd in part*, 503 F.3d 18 (1st Cir. 2007), *dism'd on remand* 573 F.Supp. 2d 311 (D. Me. 2008), *aff'd*, 585 F.3d 495 (1st Cir. 2009).

During the pendency of NN's appeal, the Tribe requested BIA to cancel the Lease.<sup>5</sup> On April 23, 2010, the Regional Director canceled the Lease. AR 2. No appeal was taken to the Board from the cancellation decision although Quoddy Bay did request reconsideration from the Regional Director. On July 29, 2010, after addressing Quoddy Bay's arguments, the Regional Director denied reconsideration of his decision to cancel the Lease. Quoddy Bay then appealed the July 29 decision to the Board. With its notice of appeal, Quoddy Bay enclosed correspondence to the Regional Director in which Quoddy Bay argued that it could not have violated the Lease because a combination of actions "resulted in [BIA] not approving the lease as required by the Lease Agreement." Letter from Quoddy Bay to Regional Director, Apr. 28, 2010 (AR 3). In that and related correspondence, Quoddy Bay argued BIA's approval was incomplete and insufficient to constitute the type of approval envisioned by the parties to trigger the obligations required by the Lease. Thereafter, the Board set a briefing schedule. Quoddy Bay did not submit an opening brief; the Regional Director filed an answer brief that responded to the limited arguments raised in Quoddy Bay's notice of appeal; Quoddy Bay did not file a reply.

On October 4, 2012, the Board lifted the stay in NN's appeal and issued an order for supplemental briefing by the parties in both appeals on whether the appeals are moot because the Tribe's request for cancellation of the Lease arguably constituted a revocation of consent to the Lease. Briefs were due from all parties on November 1, 2012, with optional answer briefs due on November 19, 2012.

The order for supplemental briefing that was sent to Quoddy Bay's address of record in Oklahoma was returned to the Board by the Postal Service with a label identifying a forwarding address in Colorado. The Board then sent its order not only to the Colorado address provided by the Postal Service but to two additional addresses provided by Quoddy Bay's former counsel.<sup>6</sup> Each of these three mailings was returned to the Board by the Postal Service as "undeliverable." The Board has not received notice of any address change from Quoddy Bay.

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<sup>5</sup> Upon receipt of the Tribe's request, BIA sought a remand from the Board of NN's appeal. The Board granted a limited remand to allow the Regional Director to determine whether to cancel the Lease, assuming, solely for purposes of the remand, that BIA's earlier approval of the Lease would otherwise be upheld by the Board.

<sup>6</sup> Although counsel did not file the appeal on Quoddy Bay's behalf, he had been listed on the distribution list for the Regional Director's July 29 decision and, therefore, remained on the distribution list for the appeal. In response to his receipt of the Board's order for supplemental briefing, counsel confirmed that he did not represent Quoddy Bay, that he had not had any contact with Quoddy Bay's president for several years, and he provided two additional addresses at which Quoddy Bay or its president might receive mail.

Meanwhile, on November 1, 2012, the Board received briefs from NN and from the Regional Director. The Regional Director and NN do not object to the dismissal of Quoddy Bay's appeal on mootness grounds. In addition and subject to the dismissal of Quoddy Bay's appeal, they do not object to the dismissal of NN's appeal, although NN contends that if its appeal is dismissed, it should be "without prejudice."<sup>7</sup>

## Discussion

### I. Quoddy Bay's Abandonment of its Appeal

Appellants bear the burden of prosecuting their appeals before the Board, which includes the burden of keeping the Board informed of address changes. The Board sent its order for supplemental briefing to Quoddy Bay's address of record as well as to three additional addresses provided to the Board. Each one of these mailings was returned to the Board as undeliverable. Quoddy Bay has not notified the Board of its current address. It is the responsibility of Quoddy Bay to keep the Board informed of its address at all times during the pendency of its appeal. *See* 43 C.F.R. § 4.22(d) (parties must promptly give notice of any change of address to the other parties and to the Board). Because Quoddy Bay has not informed the Board of any address at which it may be reached and because each of four addresses used by the Board to deliver its order for supplemental briefing to Quoddy Bay apparently is invalid, we conclude that Quoddy Bay has abandoned its appeal. Therefore we dismiss its appeal, Docket No. IBIA 10-138.

### II. Mootness

Even if Quoddy Bay did not intend to abandon its appeal, we would dismiss it on mootness grounds because Quoddy Bay has, in effect, failed to satisfy its burden to refute the suggestion of mootness. When a suggestion of mootness for an appeal has been made, the burden falls on parties opposing dismissal to demonstrate why an appeal is not moot. *Van Mechelen v. Northwest Regional Director*, 56 IBIA 111, 112 (2013). Obviously, it appears that Quoddy Bay did not receive the Board's order for supplemental briefing, but that is Quoddy Bay's own fault, and cannot constitute a reason to excuse its de facto failure to demonstrate that its appeal is not moot.

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<sup>7</sup> NN first urges the Board to stay NN's appeal indefinitely on the chance that Quoddy Bay may attempt to overturn the Board's dismissal of its appeal and succeed. Our decision to vacate the Regional Director's approval of the Lease, *see infra*, moots NN's request to continue the stay of its appeal.

In addition, Quoddy Bay's defense to BIA's cancellation of the Lease was premised on the argument that BIA's approval was defective and incomplete, and that some additional approval action by BIA was required before any obligations under the Lease could be triggered. *See* Letter from Quoddy Bay to BIA, Apr. 28, 2010 (AR 3) (a combination of actions resulted in BIA "not approving the [L]ease as required by the Lease Agreement."); *see also* Letter from Quoddy Bay to BIA, Mar. 5, 2010 (AR 3, Attach.) (referring to "lack of approval" of the Lease by BIA and BIA's "failure to approve the [L]ease"). We find it difficult to reconcile Quoddy Bay's contention that BIA's approval remained defective and incomplete with an argument (which of course Quoddy Bay, being absent, has not even made) that the Tribe could not therefore revoke its consent to the Lease, which the Tribe did in seeking cancellation of the Lease.

And, we now conclude, this revocation of consent to the Lease moots both appeals. If, as Quoddy Bay maintained before the Regional Director, the Lease had not been approved, then there was no enforceable agreement, the Tribe was free to withdraw its consent, and, thus, no cancellation action was required by the Regional Director. Given this posture, NN has not convinced us that any actual case or controversy remains over BIA's approval of the Lease. To the extent that NN remains concerned that Quoddy Bay might somehow resurrect its appeal from BIA's cancellation decision and leave NN without a remedy in the face of our dismissal of NN's appeal, we vacate the Regional Director's decision to approve the Lease.

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 vacates the Regional Director's June 1, 2005, approval of the Lease and dismisses the appeals filed by Quoddy Bay and Nulankeyutmonen Nkihtaqmikon.<sup>8</sup>

I concur:

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// original signed  
Debra G. Luther  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge

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<sup>8</sup> Given our disposition of these appeals, NN's request for an extension of the briefing schedule also is moot.