



INTERIOR BOARD OF INDIAN APPEALS

Rose Goodluck-Jones v. Navajo Regional Director, Bureau of Indian Affairs

56 IBIA 257 (03/21/2013)



# 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

ROSE GOODLUCK-JONES,	)	Order Affirming Decision and
Appellant,	)	Referring Lease to Regional Director
	)	for New Decision Under 25 C.F.R.
v.	)	§ 162.013
	)	
NAVAJO REGIONAL DIRECTOR,	)	Docket No. IBIA 11-081
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	March 21, 2013

Rose Goodluck-Jones (Appellant) appealed to the Board of Indian Appeals (Board) from a December 1, 2010, decision of the Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he denied her application for a residential lease on 1 acre of Allotment No. 341859<sup>1</sup> on the Navajo Reservation. The Regional Director denied Appellant's lease application on the ground that she did not obtain the consent of the owners of 91% of Allotment No. 341859. *See* 25 U.S.C. § 2218(b)(1)(A).<sup>2</sup> We affirm the Regional Director's decision not to *approve* the lease based on the lack of consent from Appellant's co-owners. But we nevertheless refer this matter back to him, based upon Appellant's arguments before the Board, to issue a new decision with appeal rights after considering whether to consent to the lease on behalf of the absent owners pursuant to his authority under 25 C.F.R. § 162.013, 77 Fed. Reg. 72440, 72471-72 (Dec. 5, 2012).

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<sup>1</sup> The Title Status Report (TSR) and one document associated with the draft lease refer to the allotment as Allotment No. 341859, *see* Administrative Record (AR) Tabs 6, 10, while the draft lease and other lease documents refer to the allotment as No. 041859, AR Tabs 5, 7-9. We will refer to the allotment by its TSR number.

<sup>2</sup> The Regional Director's decision cited "25 U.S.C. § 2218(A)," but no such subsection exists; it appears that the Regional Director intended to refer to § 2218(b)(1)(A). The Regional Director also erred in stating that the lease required the consent of the owners of 91% of the undivided interest in the allotment. It is 90%. *Id.* The Regional Director acknowledges his error in his answer brief. As we explain *infra*, the error is harmless.

## Background

Appellant owns 50% of Allotment No. 341859, which is located near Lupton, Arizona, on the Navajo Reservation and consists of 160 acres; the remaining 50% ownership of the allotment is divided equally (12.5% each) among Appellant's niece and nephews, Victoria Goodluck (Victoria), Victor Goodluck, Jr. (Victor), Hector Goodluck (Hector), and Christopher Goodluck (Christopher).<sup>3</sup>

Appellant desires to live on Allotment No. 341859 and, to that end, sought the consent of her co-owners to a residential lease for 1 acre of the 160-acre allotment. She successfully obtained Hector's consent, but apparently was unable to obtain the remaining consents. The record contains a copy of Appellant's letter to Christopher and Victor that was returned to her with the Postal Service's notation "[delivery] attempted not known." AR Tab 14. On May 19, 2010, apparently after several years of fruitless efforts to obtain the consent of the remaining owners, Appellant submitted the draft lease to BIA. In the spaces provided for Christopher's and Victor's signatures on the lease, someone wrote "refused to sign." Draft Lease at 5 (AR Tab 5 at 5). In the space for Victoria's signature on the lease there is a handwritten note that says "see attached letter." *Id.*<sup>4</sup> No letter is attached to the draft lease, but elsewhere in the record there is a handwritten note by Victoria's mother, Lucita B. Joe (Lucita), that states that she does not know where Victoria is. AR Tab 11.<sup>5</sup>

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<sup>3</sup> Appellant argues that Victoria was ineligible to inherit an interest in Allotment No. 341859 from Appellant's brother, which apparently is the relationship through which Victoria came to own an interest in the allotment. Because Appellant refers in her writings to Victoria as her niece, *see e.g.*, Letter from Appellant to Board, Feb. 19, 2013, we refer to Victoria as Appellant's niece without expressing any opinion on the heirship arguments raised by Appellant. Heirship is determined through probate proceedings governed by 43 C.F.R. Part 30, not through BIA decisions or administrative appeals from BIA decisions.

<sup>4</sup> It is not clear who made the handwritten entries on the lease and, at least with respect to Christopher's and Victor's purported refusal to sign, there is no additional support in the record for any such refusal. Instead, there is evidence showing that Appellant's correspondence to them was returned to her by the Postal Service as undeliverable. Regardless of the reason why Christopher and Victor did not sign the lease, it remains undisputed that they have not consented.

<sup>5</sup> If, in fact, a letter was attached to or submitted with the draft lease, it should appear *with the lease* under Tab 5 of the administrative record; if no letter was attached to or submitted with the draft lease, BIA should endeavor to note that no letter was attached or that it was

(continued...)

Thereafter, on December 1, 2010, the Regional Director disapproved Appellant's application for a residential lease. Apart from the mandatory appeal instructions, the Regional Director's letter states, in its entirety:

The Regional Real Estate Services reviewed your application for a Residential Lease and found you obtained 0.626 percent (62.5%) consent on an allotment that has five (5) landowners with undivided interest[s] in the allotment. The Indian Land Consolidation Act (ILCA), 25 U.S.C. 2218[(b)(1)]A states, "If there are five or fewer owners of the undivided interest in the allotted land, the applicable percentage shall be 91 [sic] percent". For this reason, your application for a Residential Lease is being returned without action. You must obtain 91.0 percent (91%) [sic] allottee consent to meet the ILCA requirement. Your application is denied and returned to the office of Real Estate Services, Fort Defiance Agency.

Decision at 1. This appeal followed. Enclosed with Appellant's appeal were copies of new letters that she apparently sent to her niece and nephews at the same time as her appeal to the Board, again seeking their consent to her lease of an acre on the allotment. On February 6, 2013, the Board ordered the parties to inform the Board whether the issue of a lease for Appellant remained a live controversy or whether she had obtained a lease. Appellant responded and asserted she had sent her "nephews and niece registered letters two times. All correspondence was returned . . . undelivered." Letter from Appellant to Board, Feb. 19, 2013. The Regional Director also responded to confirm that no lease had been granted.

### Discussion

The Regional Director properly applied 25 U.S.C. § 2218(a) and (b) to decline to *approve* the residential lease requested by Appellant on the grounds that Appellant had not obtained the consent of all of her co-owners. We affirm his decision on that ground. However, based on Appellant's arguments to the Board, it appears that she is requesting that BIA *grant* her a lease notwithstanding the absence of consent from Victor, Victoria, and Christopher. Therefore, we refer this matter back to the Regional Director for

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(...continued)

submitted separately. All documents submitted together as a single package should be kept intact under the same tab in the administrative record so that the parties and the Board can readily determine what the appropriate attachments or enclosures are.

consideration and a new decision under 25 C.F.R. § 162.013(c), found at 77 Fed. Reg. at 72471-72.<sup>6</sup>

## I. Standard of Review

At all times, appellants bear the burden of showing error in a regional director's decision. *Hartman v. Acting Great Plains Regional Director*, 50 IBIA 138, 145 (2009). We will affirm the decision if it comports with the law, is supported by the record, and is not otherwise arbitrary or capricious. *Id.* If we conclude that the Regional Director has erred, we will not substitute our judgment for his but will return the matter to him for further consideration in light of our decision. *See Wallowing Bull-C'Hair v. Rocky Mountain Regional Director*, 49 IBIA 120, 123 (2009).

## II. Analysis

Appellant, who owns 50% of Allotment No. 341859, submitted a draft lease to BIA, to lease and live on 1 acre of this allotment. She had attempted to secure the written consents of her four co-owners, and did succeed in obtaining the consent of one. Thus, together with her ownership interest, Appellant had 62.5% consent to her lease. Appellant asserts that she has attempted repeatedly to contact her remaining co-owners to obtain their consent, but to no avail.

The Regional Director relies solely on 25 U.S.C. § 2218 to support his disapproval of Appellant's lease for land in which she is the single largest owner. As relevant to our decision and where Indian trust land is owned, as it is here, by five or fewer owners, § 2218 authorizes the Regional Director to *approve* a lease of Indian trust land to which the landowners comprising 90% of the undivided interest have consented in writing. *See* 25 U.S.C. § 2218(a)(1) & (b)(1)(A).<sup>7</sup> Appellant does not dispute that she failed to obtain the requisite consent.

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<sup>6</sup> On December 5, 2012, new leasing regulations were published that specifically address residential leases of trust land, adding some new provisions and recodifying others. *See* 77 Fed. Reg. 72440, 72471-72.

<sup>7</sup> In Appellant's circumstances, where each of her four co-owners owns an undivided 12.5% interest in Allotment No. 341859, Appellant cannot reach the 90% consent threshold without obtaining 100% consent: Obtaining the consent of three of her co-owners equals 87.5% of the ownership interest in the allotment (Appellant's 50% + three co-owners' 37.5% (12.5% + 12.5% + 12.5%) = 87.5%).

Appellant argues that § 2218 is antiquated, is directed at assimilating Indians into non-Indian society, and therefore should not be applied to her as she obtained a college degree and has fulfilled the goals of § 2218. She does not argue that the Regional Director misapplied the law nor does she otherwise challenge the law's applicability or interpretation. Neither BIA nor this Board may disregard a valid law regardless of whether we agree with Appellant's opinions. Section 2218 has not been repealed or invalidated, and therefore remains binding on BIA and the Board. Because the Regional Director properly determined that Appellant did not have the requisite percentage of consent from her co-owners, he declined to approve the lease and we affirm his decision. *See Ortiz v. Acting Southern Plains Regional Director*, 41 IBIA 293 (2005).

However, while we affirm the Regional Director's decision not to approve the lease pursuant to § 2218, we note that Appellant makes additional arguments to the Board that invoke the language of 25 C.F.R. § 162.013(c), 77 Fed. Reg. at 72471-72, which authorizes BIA to consent to leases on behalf of landowners in certain prescribed situations.<sup>8</sup> Relevant to Appellant's circumstances, § 162.013, provides in part:

**§ 162.013 Who is authorized to consent to a lease?**

...

(b) The following individuals or entities may consent on behalf of an individual Indian landowner:

...

(4) BIA, under the circumstances in paragraph (c) of this section;

...

(c) BIA may give written consent to a lease, and that consent must be counted in the percentage ownership described in § 162.012<sup>[9]</sup>, on behalf of:

...

(2) An individual whose whereabouts are unknown to us, after we make a reasonable attempt to locate the individual;

...

(6) The individual Indian landowners of a fractionated tract where:

(i) We have given the Indian landowners written notice of our intent to consent to a lease on their behalf;

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<sup>8</sup> Section 162.013(c) implements multiple statutory authorities under which BIA may grant leases on behalf of Indian landowners. *See, e.g.*, 25 U.S.C. §§ 380, 2218(c).

<sup>9</sup> Section 162.012 sets forth the percentage ownership required by 25 U.S.C. § 2218 for BIA to approve a lease, e.g., where there are five owners or less, Appellant must have the consent of the owners of 90% of the undivided interest in Allotment No. 341859.

- (ii) The Indian landowners are unable to agree upon a lease during a 3 month negotiation period following the notice; and
- (iii) The land is not being used by an Indian landowner under § 162.005(b)(1).<sup>[10]</sup>

Thus, BIA is authorized by § 162.013(c) to grant leases on behalf of Indian owners of a fractionated tract of Indian trust land in the above circumstances and without their express consent.<sup>11</sup> And it appears that these circumstances fit Appellant's situation. Appellant asserts in the first sentence of her appeal: "I have requested a residential lease." Notice of Appeal at 1. She further asserts in her appeal that Hector agreed to her lease, but she has not received any response to her multiple entreaties to Victor, Victoria, and Christopher, which demonstrates that the heirs have not been able to agree upon a lease. And, most recently in response to the Board's order for status reports, she reiterates her desire to lease a homesite on the allotment, her continued interest in moving forward with her appeal, and that she "ha[s] done all [she] can" to obtain the consent of her co-owners but "[a]ll correspondence was returned to [her] undelivered." Letter from Appellant to Board, Feb. 19, 2013. Thus, it appears that the whereabouts of Appellant's co-owners may be unknown.<sup>12</sup>

It is certainly preferable for prospective lessees to obtain the requisite percentage of consent directly from the owners of a tract of land that they desire to lease. Doing so promotes the involvement of the owners in decisions affecting their lands. But, where, as here, the heirs of a fractionated tract have been unable to agree on a lease (or cannot be located) and where the land is not otherwise being used,<sup>13</sup> BIA is authorized to grant leases on behalf of the non-consenting heirs. As explained in 25 C.F.R. § 162.013(c), the

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<sup>10</sup> Section 162.005(b)(1) states that a lease is not required where the person seeking possession of the land owns 100% of the allotment.

<sup>11</sup> "Fractionated tract" is defined as "a tract of Indian land owned in common by Indian landowners and/or fee owners holding undivided interests therein." 25 C.F.R. § 162.003, 77 Fed. Reg. at 72468.

<sup>12</sup> The Board has sent copies of its orders to Victor, Victoria, and Christopher, and none have been returned undeliverable to the Board by the Postal Service except mail addressed to Christopher. The Board has been unable to obtain a current address for Christopher.

<sup>13</sup> According to her handwritten letter, Lucita (a non-owner) resided on the allotment in 2007. However, the TSR does not reflect any leases for the allotment. It stands reason on its head that a non-owner was, and may still be, residing on the allotment while Appellant, who owns a 50% interest in the allotment, is denied the right to live on a single acre of this 160-acre allotment.

consent(s) granted by BIA on behalf of landowners pursuant to that subsection are also used to determine whether the requisite percentage of consent has been obtained for approval of a lease.

Thus, we affirm the Regional Director's decision not to approve the lease on the grounds that the lease did not have the written consent of the owners of 90% of the undivided interest in the allotment. However, we refer this matter back to him to consider Appellant's appeal as a new request for a lease under 25 C.F.R. § 162.013(c) and to issue a new decision after determining whether to consent to the lease on behalf of the non-consenting owners.<sup>14</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 December 1, 2010, decision but refers this matter back to him for a new decision after considering whether to grant the lease pursuant to his authority under 25 C.F.R. § 162.013(c).<sup>15</sup>

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

\_\_\_\_\_  
//original signed  
Thomas A. Blaser  
Administrative Judge

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<sup>14</sup> Any new decision must include notice of Appellant's appeal rights as required by 25 C.F.R. § 2.7(c).

<sup>15</sup> Alternatively, Appellant may apply to BIA to partition Allotment No. 341859 pursuant to 25 C.F.R. § 152.33, so that she might be the sole owner of 80 acres on which she may reside without the approval of BIA, *see* 25 C.F.R. § 162.005(b)(1), 77 Fed. Reg. at 72470, and without the need to pay fair market rent to non-consenting owners pursuant to 25 C.F.R. § 162.321, 77 Fed. Reg. at 72477.