



INTERIOR BOARD OF INDIAN APPEALS

Richard Kehler, Jr. v. Rocky Mountain Regional Director, Bureau of Indian Affairs

56 IBIA 279 (04/15/2013)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

RICHARD KEHLER, JR.,)	Order Dismissing Appeal
Appellant,)	
)	
v.)	
)	Docket No. IBIA 11-100
ROCKY MOUNTAIN REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	April 15, 2013

Richard Kehler, Jr. (Appellant) appealed to the Board of Indian Appeals (Board) from a March 9, 2011, decision (Decision) of the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Decision left in place a decision by BIA’s Crow Agency Superintendent (Superintendent) to approve a 5-year agricultural lease of Allotment No. 3223 to Larry Little Owl, Sr. (Little Owl). In approving the lease to Little Owl, the Superintendent tacitly denied a lease to Appellant. Appellant contends that the Decision is arbitrary because Appellant followed all of the appropriate leasing procedures as directed by BIA, yet Little Owl negotiated the lease after Appellant filed his completed lease application and after a deadline given to Appellant as the end of the negotiation period.

We dismiss this appeal for lack of standing. Owners of a majority of the fractionated interests in the allotment withdrew their consent to a lease with Appellant and consented instead to a lease with Little Owl, who offered a higher annual rental than Appellant. Once these landowners withdrew consent to Appellant’s proposed lease, any legally protected interest of Appellant in having BIA consider his lease, as well as BIA’s authority to approve his lease, disappeared. In addition, Appellant has not met his burden to demonstrate that BIA’s Decision to approve the lease to Little Owl adversely affected any legally protected interest of Appellant. Therefore, Appellant lacks standing to challenge either BIA’s tacit denial of his lease or BIA’s approval of Little Owl’s lease.

Background

Prior to the 5-year agricultural lease term at issue, i.e., November 1, 2010, to October 31, 2015, Appellant, working through Agri-Leasing, Inc. of Hardin, Montana, held a 10-year agricultural lease from November 1, 1995, to October 31, 2005, and a 5-

year agricultural lease from November 1, 2005, to October 31, 2010, on Crow Allotment No. 3223 (Allotment). Lease Nos. 202 31164 and 202 37555 (Administrative Record (AR) Tab 4). The Allotment is more particularly described in the Regional Director's Decision as W¹/₂, W¹/₂ W¹/₂ E¹/₂ of Section 25 and W¹/₂ of Section 36, both in Township 5 South, Range 32 East, containing 720 acres and owned by 14 individuals. Appellant is not an owner of the Allotment.

BIA gave Appellant a deadline of February 10, 2010, by which to submit a complete lease application, including a rental rate negotiated with owners of a majority of the fractionated interests in the Allotment. *See* Notice of Appeal to Regional Director, Dec. 20, 2010, at 1 (AR Tab 9).¹ Little Owl was the first prospective lessee to submit an application to Crow Agency for a lease of the Allotment, on December 8, 2009. Little Owl's Application (AR Tab 13).² At the time, Little Owl had not negotiated a rental rate with the landowners. Appellant filed a complete lease application with Crow Agency on January 15, 2010, including consents from landowners holding 81% of the fractionated interests in the Allotment. Appellant's Application (AR Tab 4).

Several months after the February 10, 2010, deadline given to Appellant to submit his completed application, Little Owl obtained consents from landowners holding 84% of the fractionated interests in the Allotment. Consents to Little Owl's Lease (AR Tab 11); Decision at 1. These included the same six landowners who had previously given their consent to Appellant and two more landowners. *Compare* Consents to Appellant's Lease (AR Tab 4) *with* Consents to Little Owl's Lease. Whereas Appellant had negotiated a lease for the annual rate of \$3.50 per acre, the lease that Little Owl negotiated was for \$5.00 per acre. *Id.*

The Superintendent approved Little Owl's lease pursuant to 25 C.F.R. § 162.207(c) (“[a]n agricultural lease of a fractionated tract may be granted by the owners of a majority interest in the tract”) on October 27, 2010. Decision at 1; Approved Lease (AR Tab 11).³

¹ Because BIA does not appear to dispute this allegation made by Appellant, we accept it as factual for the purpose of considering Appellant's standing to appeal.

² A portion of Little Owl's application is incorrectly included with Appellant's lease documents at AR Tab 4.

³ Enacted in 2000, Section 219 of the Indian Land Consolidation Act (ILCA), 114 Stat. 1991, 2004-05, codified at 25 U.S.C. § 2218, applies higher percentage consent requirements to tracts having fewer than 20 owners. Where, as here, there are fewer than 20 but more than 10 owners, the applicable percentage is 60%. 25 U.S.C. § 2218(b)(1)(C). Because Little Owl obtained consents from landowners holding 84% of

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At some point in time Appellant and Agri-Leasing learned of the Superintendent's decision and on November 30, 2010, they both "appealed" the Superintendent's decision back to the Superintendent. Notice of Appeal to Superintendent (AR Tab 9).⁴ Appellant contended that he had submitted a timely and complete lease application, and that he "should not be punished for his lease not being processed in a timely manner at the BIA." *Id.* On December 17, 2010, a Supervisory Realty Specialist at Crow Agency sent Appellant and Agri-Leasing a letter that stated: "The decision was bas[ed] on [the fact] that Mr. Little Owl's Lease application was filed on 12/8/2009 and requested by Landowner." AR Tab 10. Thus, it appears that the Superintendent based his decision on the fact that Little Owl was the first to submit an application (albeit incomplete at the time), and that the landowners subsequently had consented to the terms of Little Owl's lease.⁵

On December 20, 2010, Appellant and Agri-Leasing appealed the Superintendent's decision to the Regional Director. Notice of Appeal to Regional Director (AR Tab 9). Appellant contended that even though he complied with all of the appropriate leasing procedures as directed by BIA, the Superintendent approved Little Owl's "untimely" lease. *See id.* at 1. Appellant also contended that he had not been told, prior to the Superintendent's decision, that another lease application had been submitted. *Id.* at 2. Appellant suggested that he was willing to renegotiate with the landowners. *Id.*

The Regional Director upheld the Superintendent's decision. In doing so he noted that BIA owes a trust responsibility to the Indian owners of the Allotment to determine the

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the fractionated interests in the Allotment, those consents are adequate under either § 2218(b)(1)(C) or 25 C.F.R. § 162.207(c). The new percentage requirements were published at 77 Fed. Reg. 72440, 72471 (Dec. 5, 2012), to be codified at 25 C.F.R. § 162.012.

⁴ As of November 30, 2010, the Superintendent had not provided Appellant or Agri-Leasing with written notice of the decision to approve Little Owl's lease, including notice of opportunity to appeal that decision, pursuant to 25 C.F.R. § 2.7. Although we conclude that Appellant lacks standing to appeal, it does not follow that BIA need not provide notice of its actions to known potentially interested parties such as Appellant. Due process considerations support giving notice to known potentially interested parties, and the Board has made clear that in doing so, BIA cannot confer standing where it does not otherwise exist. *Hall v. Great Plains Regional Director*, 43 IBIA 39, 45-46 (2006).

⁵ BIA's December 17, 2010, letter also did not contain any notice of appeal rights. However, because Appellant and Agri-Leasing in fact appealed the Superintendent's decision to the Regional Director, the lack of notice of appeal rights is moot.

fair annual rental⁶ of the land prior to approving a lease, and that BIA does not act as a trustee for a current or prospective lessee. Decision at 1-2. He then determined that, although Appellant was the first applicant to conclude negotiations and secure landowner consents, the Superintendent properly carried out the Federal trust responsibility to the landowners by implementing their subsequent decision to accept the higher rental rate offered by Little Owl. *Id.*

Appellant (but not Agri-Leasing) appealed to the Board. *See* Notice of Appeal. Appellant filed an opening brief. Appellant alleges that BIA awarded the lease to someone who did not comply with the requirements demanded of Appellant, BIA did not adequately assist Appellant in his negotiations with the landowners, and BIA did not ensure that the landowners received the maximum possible rental rate. Opening Brief (Br.) at 2-3. As relief, Appellant requests reversal of the Decision to approve the lease to Little Owl and an award of the lease to Appellant or, in the alternative, either reopening of negotiations or advertisement of the lease for open bidding. *Id.* at 4.

The Regional Director filed an answer brief, arguing, among other things, that by consenting to Little Owl's lease, the landowners impliedly withdrew their consent to Appellant's proposed lease, and the Superintendent thus lacked authority to approve Appellant's application. Answer Br. at 8. Appellant did not file a reply brief. Although neither party expressly addressed the issue of Appellant's standing to bring this appeal, the Regional Director's brief, in substance, raises issues that are suitable for evaluation within the framework of standing. For the reasons discussed below, we dismiss Appellant's appeal for lack of standing to challenge either the Regional Director's tacit denial of Appellant's proposed lease or the Decision to approve Little Owl's lease.

Discussion

I. Standard of Review and Standing Requirements

Standing is a jurisdictional requirement and the Board has a well-established practice of satisfying itself that an appellant has standing to appeal. *E.g., Hall*, 43 IBIA at 43 n.4. Whether an appellant has standing is a legal question that we review *de novo*. *Biegler v. Great Plains Regional Director*, 54 IBIA 160, 163 (2011). An appellant has the burden of establishing his standing for each claim on appeal. *See* 25 C.F.R. § 2.2 (definitions of

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.

“Appellant” and “Interested Party”); 43 C.F.R. § 4.331 (Who may appeal); *see also Anderson v. Great Plains Regional Director*, 52 IBIA 327, 331 (2010).

To establish standing, an appellant must show that he is “adversely affected” (i.e., injured) by the BIA decision that is being appealed. *Anderson*, 52 IBIA at 331. Specifically, it is the appellant’s burden both to demonstrate that the injury was to a legally protected interest of the appellant, and that the injury was caused by or fairly traceable to the BIA decision and not the consequence of an independent action of a third party. *Id.* A “legally protected interest” 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.” *Shelbourn v. Acting Great Plains Regional Director*, 54 IBIA 75, 79 (2011) (citations omitted).

II. Rights of Indian Landowners and Prospective Lessees

Individual Indian owners of trust or restricted lands may, with the approval of BIA, lease their lands for agricultural purposes. 25 U.S.C. §§ 415, 3715; 25 C.F.R. Part 162, Subpart B (Agricultural Leases). Where a tract is fractionated, 25 U.S.C. § 2218(b) sets forth the applicable percentages of owner consents that must be obtained for a lease. For tracts with fewer than 20 but more than 10 owners, a lessee must obtain consents from the owners of at least 60% of the leasehold. *Id.* § 2218(b)(1)(C).

Most important to the question of Appellant’s standing, an Indian landowner may revoke previously granted consent to a lease at any time before the lease has been approved by BIA. *Brooks v. Muskogee Area Director*, 25 IBIA 31, 35 (1993); *Rathkamp v. Billings Area Director*, 21 IBIA 144, 149 (1992); *see also Biegler*, 54 IBIA at 164 (deed); *Bitonti v. Alaska Regional Director*, 43 IBIA 205, 214 (2006) (deed); *Lira v. Acting Pacific Regional Director*, 38 IBIA 36, 38-39 (2002) (right-of-way); *Moccasin v. Acting Billings Area Director*, 19 BIA 184, 188 (1991) (right-of-way).

Absent landowner consent, BIA has no power to approve a lease under authority of 25 U.S.C. § 2218(b)(1)(C) or 25 C.F.R. § 162.207(c). *See Emm v. Western Regional Director*, 50 IBIA 311, 317 (2009) (applying 25 C.F.R. § 162.207(b)); *Rathkamp*, 21 IBIA at 149 (applying former 25 C.F.R. § 162.2). An agricultural lease is not effective unless and until it has been approved by BIA. 25 C.F.R. § 162.215. And “an unapproved lease of trust or restricted property is void and grants no rights to any party.” *Brooks*, 25 IBIA at 34. Thus, upon a landowner’s withdrawal of consent to an unapproved lease, the prospective lessee loses any legally protected interest that he might have otherwise had in obtaining a decision on his application or in the lease itself. *See Biegler*, 54 IBIA at 164; *Shelbourn*, 54 IBIA at 79.

III. Appellant's Lease

Appellant contends that the Regional Director's Decision "against" his proposed lease is arbitrary and should be reversed because BIA held Appellant's lease application to a different deadline or standard than Little Owl's application. Opening Br. at 3. But even if that allegation is true as we assume, the individual Indian owners of the Allotment revoked their consent to Appellant's proposed lease before BIA approved any lease of the Allotment. As discussed above, without the consent of the owners of a sufficient interest in the tract to Appellant's lease, BIA lacks authority to consider much less approve Appellant's proposed lease.⁷

It is undisputed that the landowners who had consented to a lease with Appellant at the rate of \$3.50 per acre subsequently consented to leasing their property to Little Owl at the higher rate of \$5.00 per acre. Appellant has not alleged, and nothing in the administrative record suggests, that the landowners lacked mental competence, that they changed their minds under fraud or coercion, or that their consents were forged. *See Twinn v. Aberdeen Area Director*, 23 IBIA 196, 196 (1993) (BIA would be required to investigate an allegation of forgery as part of its trust responsibility to the Indian landowners but, in general, BIA should be able to rely on signatures without having to verify each one). Although the landowners do not appear to have expressly revoked their consent to Appellant's proposed lease, BIA reasonably treated their subsequent signed consent to Little Owl's lease for the same tract as an implied withdrawal of their prior consent to Appellant's lease. *See Lira*, 38 IBIA at 38 (landowners' subsequent actions implied their withdrawal of any prior consent).

Once the landowners withdrew their consent to Appellant's proposed lease, any legally protected interest that Appellant might have had in his lease, either as a matter of processing his lease application for a decision or in the lease itself, vanished. *See Biegler*, 54 IBIA at 165 (any interest that the appellant may have had in an executed but unapproved deed "lapsed" when the landowner executed a deed to another party). Consequently, Appellant cannot show that he had a legally protected interest in his lease at the time that BIA approved Little Owl's lease and tacitly denied Appellant's application. And even assuming that Appellant acquired a legally protected interest in obtaining a decision on his lease application when the landowners initially consented to his lease, Appellant has not shown that he suffered an injury that was caused by the Regional Director's Decision rather than by the landowners' independent action to withdraw their

⁷ Under 25 U.S.C. § 2218(c) and 25 C.F.R. § 162.209, BIA may grant an agricultural lease on behalf of an Indian landowner in certain enumerated circumstances, however, Appellant did not allege that any of those circumstances are applicable in this case.

consent to his lease. Therefore, Appellant lacks standing to appeal the Regional Director's non-approval of Appellant's lease.

IV. Little Owl's Lease

Appellant also contends that BIA committed procedural errors in the leasing process by not notifying him that Little Owl had submitted a competing lease, not notifying him that the landowners had negotiated a higher rental rate with Little Owl, and not providing him with an opportunity to renegotiate with the landowners for a rate equal to or higher than Little Owl's rate. Opening Br. at 2-3. In the context of these arguments, Appellant challenges the Regional Director's Decision to approve Little Owl's lease and suggests that BIA did not fulfill its trust responsibilities to the Indian landowners. *Id.* at 3. Appellant lacks standing to challenge on these grounds BIA's Decision to approve Little Owl's lease.

First, we dispense with Appellant's alleged regulatory entitlements as indicia of a legally protected interest of Appellant. The leasing regulations do not require BIA to inform a prospective lessee about other negotiations concerning the same tract.⁸ Nor do the regulations assign a preference to the current lessee of a tract. *See* 25 C.F.R. § 162.229(d) ("An agricultural lease may not provide the tenant with an option to renew.")⁹ And BIA has no duty to assist a prospective lessee in negotiations. BIA's assistance in negotiations is for the benefit of the Indian landowners and the limited help that BIA gives to prospective tenants is incidental to that purpose. *See id.* § 162.206 (BIA "will assist prospective tenants in contacting the Indian landowners or their representatives for the purpose of negotiating a lease, and [BIA] will assist the landowners in those negotiations upon request"). Thus, the regulations afforded Appellant no legally protected interest with respect to BIA's Decision to approve Little Owl's lease.

⁸ Indeed, it would be incongruous for BIA to have to give such notice to prospective lessees, to whom BIA owes no trust responsibility, when BIA generally is not required to provide notice to non-consenting Indian landowners prior to approving a lease of their land. *See* 25 C.F.R. § 162.207(c). Of course, if Appellant wanted to be informed of any negotiations that the landowners might undertake with other prospective lessees, e.g., in order to submit a higher offer, he was free to make such a request to the landowners.

⁹ The Regional Director incorrectly stated that a "current lessee *has the right* to negotiate a lease with the landowners during the last twelve (12) months of the lease pursuant to 25 C.F.R. § 162.215." Decision at 2 (emphasis added). Section 162.215 provides that a lease is effective on the date on which it is approved, unless the lease provides that it is effective on some other past or future date, but such a lease may not be approved by BIA more than one year prior to the date on which the lease term is to commence. This rule does not speak to any "right" to negotiate a renewal or extension of an existing lease.

Moreover, Appellant’s unapproved lease “created nothing more than an expectancy,” which is not a legally protected interest and did not entitle Appellant to a renegotiation with the landowners. *See Biegler*, 54 IBIA at 165. And once the Superintendent approved Little Owl’s lease, Appellant no longer had an expectancy much less a legally protected interest arising from earlier negotiations. In sum, the Regional Director’s approval of Little Owl’s lease did not adversely affect a legally protected interest of Appellant.

Finally, to the extent that Appellant suggests that in carrying out its trust responsibilities to the landowners BIA should have ensured that negotiations were continued until the maximum rental was negotiated, that is not a basis for Appellant to assert his own standing in this appeal. Rather than rest his claim for relief upon the rights and interests of the landowners, Appellant must—but did not—allege an injury to his own legally protected interest. *See Biegler*, 54 IBIA at 166.

Because Appellant does not have a legally protected interest that was injured by BIA’s approval of Little Owl’s lease, either through his status as a prospective lessee or through any alleged violations of BIA’s trust responsibility to the landowners, Appellant’s challenge to the approval of Little Owl’s lease also must be dismissed for lack of standing.

Conclusion

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.

I concur:

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Thomas A. Blaser
Administrative Judge

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Steven K. Linscheid
Chief Administrative Judge