



INTERIOR BOARD OF INDIAN APPEALS

Will Graven v. Western Regional Director, Bureau of Indian Affairs

59 IBIA 202 (10/24/2014)

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United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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WILL GRAVEN,)	Order Affirming Decision in Part and
Appellant,)	Dismissing Appeal in Part
)	
v.)	
)	Docket No. IBIA 12-048
WESTERN REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	October 24, 2014

Will Graven (Appellant) appealed to the Board of Indian Appeals (Board) from a November 17, 2011, decision (Decision) of the Western Regional Director (Regional Director), Bureau of Indian Affairs (BIA), regarding a dispute between Appellant and the Gila River Indian Community (Tribe). In 2005, Appellant acquired a sublease for certain property located within a 1350-acre area of trust lands on the Tribe’s Reservation known as the Memorial Airfield property. The Airfield property is under a master lease between the landowners, as lessor, and Memorial Airfield Corporation (MAC), as lessee. MAC is¹ a tribally chartered, landowner-owned entity created to develop the Airfield property. In 2007, the Tribe declared Appellant’s sublease terminated and evicted him from the premises. Appellant sought BIA’s intervention against the Tribe to restore him to possession of the subleased premises, and to prevent the Tribe from interfering with MAC’s administration of the Airfield lands.

In the Decision, the Regional Director concluded that BIA had no right or obligation to become involved in the dispute over Appellant’s sublease and eviction. Decision at 2 (Administrative Record (AR) Tab 8). The Regional Director also concluded that Appellant’s sublease had expired by its own terms in February 2011, that BIA had no authority to “toll” the expiration of the sublease for the period of Appellant’s eviction or to otherwise reinstate it, and thus there was no remedy available for Appellant through BIA. *Id.*

The Decision also responded to a separate request for BIA assistance from Lynford Wilson as the Acting Chairman of MAC, made on behalf of MAC “and Allotted

¹ MAC’s present status may be a matter of dispute. The Board expresses no opinion on MAC’s present status, nor is it relevant to our disposition of this appeal.

landowners,” of which Wilson is one. Letter from Wilson to Regional Director, Jan. 24, 2011, at 1 (Administrative Record (AR) Tab 23). In response to that request, the Regional Director first concluded that a purported attempt by some landowners in 2007 to reconstitute MAC’s Board of Directors was ineffective. Decision at 1. With respect to protecting the interests of the individual landowners, the Regional Director noted several steps that BIA had taken to attempt to settle the dispute, and stated that the Tribe had accepted a conceptual framework for settlement and that the Tribe would establish a landowner team to further negotiate the details. *Id.* at 2. Wilson did not appeal the Decision to the Board.

In his appeal, Appellant seeks to vindicate his own interests as a sublessee, as well as those of MAC and the individual Indian landowners. Appellant contends that BIA knew that the Tribe was acting illegally in ousting Appellant, should have sought injunctive relief against the Tribe, and should have fulfilled its trust responsibility to the individual Indian landowners. Opening Brief (Br.) at 14. Appellant argues that contrary to the Regional Director’s conclusions, BIA was required to act and should have tolled or reinstated his sublease. *Id.* at 15-16, 19. Appellant also argues that BIA should pay him reparations under 25 U.S.C. § 229 (Injuries to property by Indians). *Id.* at 19. The Regional Director seeks dismissal of all of Appellant’s claims for lack of standing and mootness.

With respect to Appellant’s claim that BIA erred in failing to toll the expiration of Appellant’s sublease (or to reinstate it), we affirm the Regional Director’s conclusion that no such remedy is available through BIA, nor is it available through the Board. And because the sublease expired before Appellant filed this appeal, we agree with the Regional Director that Appellant lacks standing to challenge the portion of the Decision in which the Regional Director concluded that BIA had no right or obligation to intervene to protect Appellant’s leasehold rights against Tribal interference. Appellant did not raise his § 229 claim in his demand-for-action that prompted the Decision, and thus we dismiss that portion of his appeal as not properly before the Board.

To the extent Appellant seeks to assert the interests of MAC or the Indian landowners, we agree with the Regional Director that Appellant lacks standing. Wilson, as MAC’s Acting Chairman, separately sought relief from BIA, but he did not appeal from the Decision. Appellant contends that he is MAC’s Chief Executive Officer and a member of its Executive Committee, but he has produced no evidence that he was authorized by either MAC’s Board or its Executive Committee to bring the appeal on MAC’s behalf. Nor does he have standing to assert the third-party rights of the individual Indian landowner-lessors of the Airfield property, whose interests in possibly settling the matter would appear to conflict with Appellant’s interest in opposing any settlement that might exclude a role for

him (or MAC) in developing the Airfield property. Accordingly, we dismiss the appeal in remaining part.²

Background

In 1971, BIA's Pima Agency Superintendent (Superintendent) approved a 65-year master lease (Master Lease) of the Airfield property on the Gila River Indian Reservation, between the Indian landowners and MAC. Master Lease at 11-12 (AR Tab 35); Decision at 1. MAC was created for the purpose of managing the leased property. Master Lease at 1; Charter of MAC, Aug. 20, 1969, at 1-2 (AR Tab 35). Most of the Airfield property consists of individually owned allotted trust lands, although some of the land is owned by the Tribe.

According to Appellant, the Tribe has a long history of attempting to interfere with MAC. *See* Opening Br. at 12. In 1980, the Tribe apparently passed an ordinance to dissolve MAC, only to pass other ordinances to reinstate MAC under certain conditions. *See* Letter from Superintendent to Tribe's Governor, Oct. 19, 2007, at 5 (Superintendent's Letter) (AR Tab 32).³

In February of 1981, the Superintendent approved a sublease (Sublease) between MAC and Biegert Aviation, Inc. for a portion of the Memorial Airfield property. Sublease at 14 (AR Tab 35). The initial term of the Sublease was 10 years, commencing on February 5, 1981. *Id.* at 2, 14. The Sublease specified that it could be renewed for two additional 10-year terms, *id.* at 2-3, which it was, thus extending the term to February 2011.

On May 20, 1981, the Tribal Council created the Gila River Airport Authority (Airport Authority) to control airport facilities on the Tribe's Reservation. Resolution GR-73-81 (AR Tab 35); *Graven v. Western Regional Director*, Docket No. IBIA 11-047 (Dec. 29, 2010) (Notice of Appeal, Ex. 15, Resolution GR-74-81) (AR Tab 28). The Tribe's original intent apparently was that the Airport Authority would enter into a sublease

² Appellant requested oral argument for this appeal. The Board has authority to grant oral argument, but has rarely done so. *See Alturas Indian Rancheria v. Pacific Regional Director*, 54 IBIA 15, 17 n.4 (2011) (Board's exercise of its authority to hold oral argument "has been exceedingly rare, to the point of being almost nonexistent"). The Board finds this appeal suitable for resolution without oral argument.

³ MAC's charter provides: "The life of this corporation shall be perpetual unless restricted or terminated by the Gila River Indian Community Council. . . ." MAC Charter, art. IV (AR Tab 35).

with MAC, although no such sublease was ever finalized. *See* Superintendent’s Letter at 4. Years later, on June 21, 1995, the Tribal Council adopted several resolutions purporting to assign MAC’s interest in the Master Lease to the Airport Authority. *See, e.g.*, Resolution GR-76-95, Resolution GR-77-95 (AR Tab 35). Neither MAC nor its shareholders—the landowners—consented to the assignment, and BIA never approved the assignment.

In early 2005, Appellant first learned of the Airfield property, and through a series of transactions, he acquired the assets of Biegert Aviation, Inc., including the Sublease.⁴ Appellant began working with some of the landowners and was involved in efforts to “reconstitute” MAC. Opening Br. at 13. According to Appellant, at a landowner meeting he hosted in August 2007, a new Board was elected for MAC, and Appellant was elected to MAC’s Executive Committee and selected as its CEO. *Id.*

Shortly thereafter, on September 7, 2007, the Tribe’s Governor and the Airport Authority informed Appellant that they had determined that Appellant was not a party to a valid sublease with MAC or with the Airport Authority, described as MAC’s “successor.” Letter from Airport Authority to Appellant, Sept. 7, 2007 (Notice of Appeal, Nov. 28, 2011, Ex. 9). The Tribe and the Airport Authority demanded that Appellant vacate the subleased property within 45 days and remove his personal property. *Id.* Appellant requested BIA’s assistance regarding the eviction notice. He also pursued injunctive relief in tribal court, to no avail. Letter from Appellant to Superintendent, Oct. 17, 2007 (Notice of Appeal, Ex. 10); Letter from Tribe’s General Counsel to Superintendent, Jan. 17, 2008, at 1 (AR Tab 31).

On October 19, 2007, before the 45-day period had expired, the Superintendent wrote to the Tribe’s Governor, advising him that BIA had never approved the Tribe’s purported assignment of the Master Lease from MAC to the Airport Authority. Superintendent’s Letter at 5. The Superintendent suggested that the landowner actions in 2007 to reconstitute MAC’s Board apparently did not comply with MAC’s charter, but that BIA, the Tribe, and the Airport Authority had recognized the “reconstituted” Board at least informally as representing the interests of the landowners. *Id.* at 6. Addressing the conflict over Appellant’s sublease, the Superintendent stated that “it would appear” that the eviction notice to Appellant did not provide a proper basis to terminate the Sublease, or a basis for the Tribe to exercise “self-help remedies.” *Id.* at 8. While stating that BIA does “not normally become involved in disputes between master lessees and their sublessees,” the

⁴ Biegert sold and transferred its assets to new owners and changed its corporate name to Farwest Air, Inc., and ABS Aviation Development, LLC, owned by Appellant, acquired Farwest Air, Inc. and its assets, including the Sublease. *See* Request for Approval, June 22, 2006 (AR Tab 34); Superintendent’s Letter at 7.

Superintendent asserted that it “may be necessary” for BIA to take a position on the validity of the Sublease, given the Airport Authority’s lack of management authority over the Airport property. *Id.* The Superintendent concluded by stating that she was “prepared to issue a formal decision consistent with the conclusions set forth above, after obtaining concurrence from our Field Solicitor’s Office, as needed.” *Id.* at 10.⁵

On December 13, 2010, after several years of delay while BIA and the Solicitor’s Office reviewed the matter, Appellant filed a request for action or decision, pursuant to 25 C.F.R. § 2.8 (appeal from inaction of official), with the Regional Director. Letter from Appellant to Regional Director, Dec. 13, 2010 (AR Tab 30).⁶ Appellant requested, among other things, that the Regional Director review Appellant’s eviction and “do something to settle the mess at the Airfield.” *Id.* at 1. When the Regional Director failed to respond within the time period prescribed by § 2.8, both Appellant and Wilson appealed to the Board from the Regional Director’s inaction.⁷

On November 17, 2011, the Regional Director issued the Decision. AR Tab 8.⁸ The Regional Director found that the Tribe’s purported assignment of the Master Lease to the Airport Authority was ineffective for lack of landowner consent and BIA approval. Decision at 1. But with respect to Appellant’s request for BIA action to protect his rights under the Sublease, the Regional Director also found that the Sublease had expired by its

⁵ The Tribe responded to the Superintendent’s letter, taking issue with the Superintendent’s tentative conclusions and providing its views on Appellant’s activities on the Biegert Aviation sublease property and Appellant’s business practices in general. Letter from Giff to Superintendent, Jan. 17, 2008 (AR Tab 31).

⁶ Section 2.8 is an action-prompting mechanism that allows a party, after following certain procedural requirements, to request action from a BIA official. 25 C.F.R. § 2.8(a). If the BIA official fails to respond in accordance with § 2.8, the official’s inaction becomes appealable to the next level in the administrative appeal process. *Id.* § 2.8(b).

⁷ Wilson, on behalf of MAC and the landowners, filed an initial appeal based on Appellant’s § 2.8 demand, but then withdrew it on procedural grounds. *See Memorial Airfield Corporation v. Western Regional Director*, 53 IBIA 27 (2011). Wilson then filed a separate § 2.8 demand for action on behalf of MAC and the landowners, *see* Letter from Wilson to Regional Director, Jan. 24, 2011 (AR Tab 23), and then again appealed from the Regional Director’s inaction when the Regional Director failed to respond.

⁸ After the Regional Director issued the Decision, we dismissed Appellant’s and MAC’s appeals from BIA inaction as moot. *Graven v. Western Regional Director*, 54 IBIA 171 (2011).

own terms in February 2011. *Id.* at 2. The Regional Director concluded the portion of the Decision addressing Appellant's request by stating:

Given the ostensible authority that [the Airport Authority] was acting under at the time, and the fact that BIA has no right or obligation to become involved in disputes between the parties to a sublease (or to participate in tribal court proceedings), no action was then taken on [Appellant's] behalf and no remedy (including revival or reinstatement of the now-expired sublease) is now available through BIA.

Id. The Regional Director also noted that future documentation from BIA regarding the Master Lease "will not attempt to ratify any specific past actions taken by [the Airport Authority] with regard to the [S]ublease or any other Airfield property." *Id.*

Addressing Wilson's request for BIA action to protect the interests of MAC and the individual Indian landowners, the Regional Director stated that BIA was working on a settlement with the Tribe, which had accepted a conceptual framework set forth by BIA. *Id.* According to the Regional Director, a landowner team was to be involved in the negotiations, and the proposed settlement would include a formal assignment of the Master Lease as well as an amendment to the Master Lease that would establish a new rental structure and impose certain pre-development obligations on the assignee. *Id.*

Appellant appealed the Decision to the Board.⁹ In his notice of appeal and opening brief, Appellant asserts two types of claims: 1) complaints regarding the termination of the Sublease, his eviction from the Memorial Airfield property, BIA's failure to "obtain[] an injunction" to stop the Tribe, Opening Br. at 14, BIA's failure to toll the expiration of the Sublease, and BIA's failure to address his claim for compensation; and 2) complaints regarding the Tribe's treatment of the individual landowners of Memorial Airfield and MAC, and BIA's failure to intervene and protect their interests. Appellant argues that BIA should have taken action to stop the Tribe's alleged "illegal acts." Opening Br. at 14, 18-19; Notice of Appeal at 7. Appellant also contends that he asked BIA to commence the process of paying him for injuries to his leasehold interest, pursuant to 25 U.S.C. § 229, and he seeks an order from the Board for BIA to complete the process and pay him for the Tribe's "depredations." Opening Br. at 19.

The Regional Director filed a combined motion to dismiss and answer brief. Regional Director's Motion to Dismiss, Sept. 21, 2012 (Mot. to Dismiss). The Regional Director argues that Appellant lacks standing to assert claims regarding his eviction from

⁹ As noted earlier, Wilson did not appeal from the Decision.

the Airfield property because the Sublease has expired, and that those claims are also moot. *Id.* at 8-12. The Regional Director also contends that Appellant lacks standing to assert any claims on behalf of the individual landowners or MAC because Appellant cannot rest his claims on the rights and interests of others. *Id.* at 11. The Regional Director further asserts that Appellant has not provided any evidence that the landowners or MAC authorized him to represent their interests, nor has he established that he is qualified, pursuant to 43 C.F.R. § 1.3, to represent these parties before the Board. *Id.* In addition, if the Board does not dismiss the appeal, the Regional Director argues that Appellant has not met his burden of showing that the Decision was in error. *Id.* at 12-14.

Appellant's reply brief reasserts his merits arguments, but also increasingly accuses personnel within the BIA and the Solicitor's Office of acting in bad faith and intentionally stalling, after having "assured" him that BIA would protect him and restore him to the subleased property. *See* Appellant's Reply Br., at 2. In response to the Regional Director's argument that Appellant does not have standing to bring claims on behalf of the landowners or MAC, Appellant contends that he was elected to MAC's Executive Board. *Id.* at 4-5.

Analysis

I. Standard of Review

As relevant here, the Board reviews questions of law *de novo*. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011) (citation omitted). An appellant bears the burden of demonstrating standing and of showing error in a regional director's decision. *Kickapoo Tribe of Indians v. Southern Plains Regional Director*, 57 IBIA 146, 147 (2013); *Seminole Tribe*, 53 IBIA at 210.

II. The Regional Director Correctly Concluded that No Relief is Available from BIA for the Expired Sublease¹⁰

We reject Appellant's argument that that BIA could and should have tolled the expiration of the Sublease while Appellant's requests for assistance from BIA and his § 2.8 demand for action were pending, or otherwise reinstated the sublease. BIA did not have authority to toll the Sublease, and neither BIA nor the Board has authority to reinstate it.

¹⁰ Although not relevant to our disposition of this appeal, we do not find the record to support Appellant's allegation that either BIA or the Solicitor's Office acted in bad faith, although it is regrettable that BIA does appear to have led Appellant to believe that a BIA decision on the matter would be issued sooner than it was.

The Regional Director reached this conclusion in the Decision, which he argues should be affirmed, and at the same time, he also relies on this finding to argue that Appellant fails to show injury and redressability as elements of standing and that the appeal is moot. Decision at 2; Mot. to Dismiss at 9-10, 12-13. Whether viewed as a “merits,” “standing,” or “mootness,” determination, we affirm the Decision in regard to Appellant’s claims concerning the Sublease and his eviction.

Appellant does not dispute that the Sublease has expired. Opening Br. at 19; Appellant’s Reply at 2; *see also* Sublease ¶ 4. Appellant argues, however, that BIA should have tolled the expiration of the Sublease. Notice of Appeal at 7; Opening Br. at 18-19. Contrary to Appellant’s argument, neither BIA nor the Board has the authority to toll (or reinstate) the Sublease, which would result in the modification or extension of the Sublease’s term. *See Racquet Club Properties, Inc. v. Acting Sacramento Area Director*, 25 IBIA 251, 256-57 (1994) (BIA and the Board lack the authority to unilaterally modify a lease, and they cannot order the parties to negotiate or enter into a new lease); *see also Frye v. Acting Southern Plains Regional Director*, 54 IBIA 183, 187 (2011) (BIA’s regulations do not provide it with unilateral authority to modify a lease).

Appellant identifies no statute, regulation, or other rule that vests BIA with freestanding authority to toll a lease term, or reinstate an expired lease. His reference to *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324 (10th Cir. 1982), offers no support for his position. In that case, the U.S. Court of Appeals for the Tenth Circuit concluded that the trial court did not err in tolling the terms of leases while litigation was pending. *Id.* at 1340-42. But it does not follow that BIA had such authority, or that it could reinstate an expired sublease. And the Board’s decisions are to the contrary. Accordingly, Appellant fails to show that the Regional Director erred in concluding that no relief is available for Appellant’s claims concerning the Sublease and his eviction. The Regional Director correctly concluded that no relief is available from BIA for Appellant’s claims concerning the Tribe’s purported termination of his Sublease and the Tribe’s eviction of Appellant from the Memorial Airfield property, because the Sublease expired by its own terms on February 5, 2011.¹¹

¹¹ Our affirmance of the Regional Director’s conclusion on this issue renders it unnecessary for us to review Appellant’s challenge to the Regional Director’s statements that BIA had no duty or obligation to intervene on Appellant’s behalf, i.e., before the Sublease expired. Nor do we need to address the Regional Director’s unexplained characterization of the Airport Authority as acting under “ostensible authority” in relation to the purported termination of the Sublease.

III. Appellant's Claim for Reparations is Not Properly Before the Board

In his opening brief, Appellant contends that the Regional Director failed to address his claim for monetary compensation, under 25 U.S.C. § 229 (Injuries to property by Indians), based on the Tribe's interference with his leasehold interest under the Sublease. Opening Br. at 19. Appellant did not identify his § 229 claim in his § 2.8 demand for action from the Regional Director, nor did his demand for action specifically identify an underlying document in which that claim was made, and we are not convinced that the Regional Director could reasonably have understood the § 2.8 demand to encompass a demand for action on Appellant's § 229 claim. Therefore, we conclude that this issue is not properly before the Board.¹²

IV. Appellant Lacks Standing to Assert Claims on Behalf of the Landowners or MAC

In order to have a right of appeal to the Board, an appellant must have a legally protected interest that was adversely affected by the decision that is being appealed. *See* 25 C.F.R. § 2.2 (definitions of "Appellant" and "Interested party"); 43 C.F.R. § 4.331 (Who may appeal); *Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 296 (2014) (hereinafter *POLO*). An appellant bears the burden to establish standing for each of his individual claims. *Thompson v. Great Plains Regional Director*, 58 IBIA 240, 241 (2014).

Importantly, an appellant may generally only assert his *own* legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of others. *Id.* Appellant's legally protected interest that he alleged was adversely affected by the Decision was based on the Sublease, which has now expired. Appellant, as an individual, cannot assert the interests of either the landowners or MAC, or seek relief on their behalf. *See id.*; *see also Reeves v. Great Plains Regional Director*, 54 IBIA 207, 213 (2012) (appellant could not assert legally protected interest of a family member).

Nor has Appellant provided any evidence that any landowners, let alone the 800 landowners, *see* Opening Br. at 5, whose interests he purports to advance through this appeal, authorized him to represent them in this appeal or seek relief on their behalf. And

¹² It appears that Appellant may have submitted a § 229 claim both to BIA and to the Assistant Secretary – Indian Affairs, and it is unclear whether or where the matter is currently pending. *See Graven v. Assistant Secretary – Indian Affairs*, 53 IBIA 87 (2011) (dismissing appeal from alleged failure of Assistant Secretary to act on Appellant's § 229 claim submitted to the President of the United States); *see also Graven v. Obama*, 571 Fed. Appx. 612 (9th Cir. 2014) (affirming district court's dismissal of Appellant's application for a writ of mandamus on § 229).

while an organization, such as MAC, may bring an appeal on behalf of its members, if certain requirements are met, *see POLO*, 58 IBIA at 282 n.6, Appellant does not provide any evidence showing that he has authority to represent MAC or to seek relief on its behalf either. As noted above, Wilson, who filed MAC's § 2.8 demand for action with the Regional Director, did not file an appeal from the Decision. Although Appellant may be a member of MAC's Executive Committee or even its CEO, he has produced no evidence that an individual member of the Executive Committee or the CEO is vested with unilateral authority to file litigation on behalf of MAC. *See Tabeguache/Uncompahgre Indian Tribal Members v. Western Regional Director*, 59 IBIA 41, 46-47 (2014) (dismissing appeal, in part, because appellants could not show that organizations authorized them to bring claims); *Yeahquo v. Southern Plains Regional Director*, 36 IBIA 11, 12 (2001) (rejecting appellants' claim that they represented Indian tribe, because they could not show that the tribe authorized them to appeal). Consequently, we dismiss Appellant's remaining claims.

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 affirms the Decision in part and dismisses the appeal in remaining part.¹³

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

¹³ Any additional unresolved pending motions, including MAC's September 18, 2013, "emergency motion," are either denied or rendered moot by this decision.