



## INTERIOR BOARD OF INDIAN APPEALS

James L. Frenchman v. Acting Great Plains Regional Director, Bureau of Indian Affairs

60 IBIA 90 (03/10/2015)



# United States Department of the Interior

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

JAMES L. FRENCHMAN,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	Docket No. IBIA 12-116
	)	
ACTING GREAT PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	March 10, 2015

James L. Frenchman (Appellant), appealed to the Board of Indian Appeals (Board) from an April 20, 2012, decision (Decision) of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director dismissed Appellant’s appeal from a decision by BIA’s Winnebago Agency Acting Superintendent (Superintendent) announcing his decision to approve an application for a right-of-way (ROW) through an allotment, in which Appellant holds an undivided ownership interest, on the Winnebago Indian Reservation of Nebraska. The Superintendent’s decision to approve the ROW application was premised on the consent of the Winnebago Tribe of Nebraska (Tribe). However, while Appellant’s appeal to the Regional Director was pending, the Tribe withdrew its consent, and the Superintendent notified the landowners that he would *not* approve the ROW application.

The Regional Director dismissed Appellant’s appeal on the grounds of standing and ripeness. We affirm the Regional Director’s dismissal of the appeal but on the ground of mootness. The Regional Director construed the Superintendent’s initial decision to approve the ROW application as preliminary and, after the Tribe withdrew its consent, allowed the Superintendent to revoke his preliminary approval and deny the application. Thus, Appellant’s challenge to the Superintendent’s initial decision became moot, warranting dismissal of this appeal.

### Background

This case concerns Winnebago tract 383-97, the Edward Priest Allotment (Allotment 97). Allotment 97 is owned in trust or restricted fee status by the Tribe, ten individual Indian landowners, and the estates of two deceased landowners. *See Owners’*

List (Administrative Record (AR) Tab 19); Title Status Report, Apr. 18, 2011 (AR Tab 29).

On January 11, 2005, the Superintendent notified Steve Oswald, who resided on private property adjacent to Allotment 97, that there was no legal ROW for the private road he had constructed across Allotment 97 to access his residence. Letter from Superintendent to Oswald (AR Tab 1). Following negotiations with BIA, Oswald submitted an application for a ROW across Allotment 97 with a 10-year duration. Right-of-Way Application, June 13, 2011 (AR Tab 13). BIA subsequently informed Allotment 97 owners that Oswald agreed to pay \$500.00 annually for a 10-year ROW across Allotment 97, and requested that they inform BIA whether they consented to the proposed ROW and terms. *See* Letter from Superintendent to Tribe, June 17, 2011 (AR Tab 14); Letter from Superintendent to Individual Landowners, June 17, 2011 (AR Tab 15).

The Tribe, which owns an undivided 48.87% interest in the allotment, “authorized” the ROW for a 10-year term at the proposed total compensation level, but required a lump sum payment to all landowners and expressly did not approve annual payments. Tribal Resolution No. 11-141, July 8, 2011, at 1 (AR Tab 16). Seven individual landowners withheld consent to the ROW. Landowner Consent Documents (AR Tab 18). The non-consenting landowners collectively accounted for 43.82% of the undivided interests. Owners’ List. Three landowners who did not return their consent forms held a collective 2.78% of the undivided ownership interest. *Id.* The remaining 4.53% of interests were held by estates of deceased landowners. *Id.*

On September 6, 2011, the Superintendent sent letters to all Allotment 97 owners stating that Oswald’s “right of way application *will be* approved.” Letter from Superintendent to Owners (AR Tab 21) (emphasis added). The Superintendent explained that “the decision to approve was based on majority consent of the other landowners, which included the Winnebago Tribe of Nebraska.”<sup>1</sup> *Id.* at 1 (unnumbered). The Superintendent also advised the landowners of their right to appeal “the decision to approve the Steve Oswald [ROW].” *Id.*

Appellant timely appealed the Superintendent’s decision challenging the sufficiency of landowner consent and the percentage ownership held by the Tribe. *See* Notice of Appeal to Regional Director, Oct. 4, 2011 (AR Tab 23).

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<sup>1</sup> It is unclear on what basis the Superintendent believed sufficient consent, which under the regulations is the majority of undivided interests, *see* 25 C.F.R. 169.3(c)(2), had been obtained. As the Regional Director recognized, Decision, Apr. 20, 2012, at 3 n.10 (AR Tab 39), the Tribe does not own a majority of interests in Allotment 97.

After learning that other co-owners of Allotment 97 were opposed to the ROW, the Tribe rescinded its consent. *See* Tribal Resolution No. 12-07, Oct. 7, 2011 (AR Tab 24) (rescinding Resolution No. 11-141). On October 24, 2011, the Superintendent informed landowners that, due to the withdrawal of the Tribe's consent, Oswald's request for a ROW had been denied for lack of sufficient consent. Letter from Superintendent to Landowners (AR Tab 26).

On April 20, 2012, the Regional Director dismissed Appellant's appeal for lack of standing and ripeness. Ultimately, the Regional Director construed the Superintendent's decision to approve the ROW as preliminary in nature, and as superseded by the Tribe's withdrawal of its consent and the Superintendent's subsequent letter announcing his disapproval of the ROW. *See* Decision at 10.

Appellant timely filed a notice of appeal with the Board. Notice of Appeal, May 25, 2012. Appellant does not identify any error or other basis for challenging the Regional Director's decision; rather, Appellant re-asserts his merits argument against the Superintendent's initial decision. *Id.* at 1. Appellant did not file an opening brief and the Regional Director did not file an answer brief.

### **Discussion and Conclusion**

We affirm the Regional Director's dismissal of Appellant's appeal but on the ground of mootness. Appellant does not dispute that the Tribe timely withdrew its consent. *See Kehler v. Rocky Mountain Regional Director*, 56 IBIA 279, 283 (2013) (“[A]n Indian landowner may revoke previously granted consent to a lease at any time before the lease has been approved by BIA.”); *Lira v. Acting Pacific Regional Director*, 38 IBIA 36, 38-39 (2002) (stating that Indian landowner may withdraw consent prior to lease approval); *Moccasin v. Acting Billings Area Director*, 19 IBIA 184, 188 (1991) (concluding that landowner's withdrawal of consent was valid as it occurred before Superintendent approved the right-of-way). Nor does he dispute the Regional Director's characterization of the Superintendent's decision as a preliminary one that had been superseded by the Superintendent's subsequent disapproval of the ROW application. Any actual case or controversy based on the Superintendent's authority to grant the ROW based on the Tribe's consent, became moot when the Tribe withdrew its consent and the Regional Director accepted the Superintendent's revocation of that approval. Hence, we conclude that the appeal became moot and we affirm the Regional Director's dismissal on that basis.<sup>2</sup>

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<sup>2</sup> Technically, the Superintendent lost jurisdiction over the matter when Appellant appealed to the Regional Director. The Regional Director, however, was within his authority to

(continued...)

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 April 20, 2012, decision.

I concur:

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// original signed  
Robert E. Hall  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge

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(...continued)  
allow the Superintendent to withdraw approval of the ROW application, which effectively is what the Regional Director did in this case.