



INTERIOR BOARD OF INDIAN APPEALS

Kathleen Wing and Ted Bell v. Rocky Mountain Regional Director,
Bureau of Indian Affairs

60 IBIA 297 (05/12/2015)



United States Department of the Interior

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

KATHLEEN WING and TED BELL,)	Order Vacating Decision and
Appellants,)	Remanding
)	
v.)	
)	Docket No. IBIA 13-010
ROCKY MOUNTAIN REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	May 12, 2015

Kathleen Wing and Ted Bell (Appellants) appealed to the Board of Indian Appeals (Board) from an August 24, 2012, decision (Decision) of the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirming a decision by BIA’s Fort Belknap Agency Superintendent (Superintendent), charging Appellants with trespass on Fort Belknap Allotment Nos. 752-B and 752-C, and assessing \$32,320 in trespass damages against Appellants. We vacate the Decision because the record indicates that the damages assessed against Appellants are based entirely on a trespass that was committed when the Fort Belknap Indian Community (Tribe) constructed a temporary access road across the allotments. It is undisputed that Appellants did not construct the road. Although Appellants sought assistance from the Tribe to obtain emergency access to their property when their usual access road washed out, the Regional Director failed to articulate how that request, standing alone, renders Appellants liable for the Tribe’s actions.

Background

Appellants live on Fort Belknap Allotment 751-D, and ordinarily accessed their property by using the White Horse Canyon Road, which passes across Allotments 752-B and 752-C,¹ and for which the Tribe apparently has a right-of-way.² Severe flooding in the spring of 2011 washed out portions of White Horse Canyon Road. According to

¹ Both parcels are located in Section 20, Township 26 North, Range 25 East. The specific legal descriptions for the parcels are included in the Decision.

² The existence and scope of the Tribe’s easement rights for the White Horse Canyon Road, and Appellants’ use of that road, are not at issue in this appeal.

Appellants, after Appellant Wing nearly drowned trying to ford White Horse Canyon Creek along a washed out portion of the road, they requested emergency assistance from the Tribe to obtain access to their property.

In response, the Tribe requested an estimate from Appellants on the cost of an emergency access road. Appellants apparently provided an estimate, although the record contains no evidence to indicate the basis of that estimate. Appellants also apparently made several attempts to contact Terryl T. Matt, the owner of Allotment 752-B and a co-owner of Allotment 752-C, to obtain permission for temporary access across her property, but did not reach Matt. At some point, the Tribe proceeded to construct an emergency access road, generally parallel to, but at some distance from, the White Horse Canyon Road. *See* Trespass and Damage Report at 6-7 (Administrative Record (AR) Tab 14, No. 42) (2011 Aerial Photo).³ There is no evidence in the record that the Tribe sought permission from the landowners and BIA before constructing the road, and no evidence that Appellants represented to the Tribe that they had obtained such permission. The record is not clear to what extent, if any, Appellants actually used the temporary access road, but it is undisputed that they immediately discontinued use of the temporary road after receiving a trespass notice from BIA.

On June 24, 2011, Matt wrote a letter to the Superintendent complaining about the new road across her property, and alleging that Appellants had “created” the road and that approximately 1 mile of land had been damaged by the road. Letter from Matt to Superintendent, June 24, 2011 (AR Tab 14, No. 1). Matt reported that “[a] backhoe, which it appears is owned by the Fort Belknap Tribe was used to cut out hills, fill coulees, and put in five culverts, and as of yesterday this backhoe is still on the hill side.” *Id.* After receiving Matt’s letter, BIA requested an appraisal to estimate damages for the trespass, and was in additional contact with Matt. According to notes taken by a BIA employee from a conversation with Matt, Matt “had a lot of questions” and “talked about who gave them permission, etc., to use tribal owned equipment, council members?” Notes to File, June 24-30, 2011, at 1 (unnumbered) (AR Tab 14, No. 13).

On June 30, 2011, the Superintendent sent a letter to Appellants notifying them “that an access road to [Appellant’s] property is in trespass on Indian agricultural land,” and that BIA employees had “observed an access road in trespass” on Allotments 752-B and

³ It is unclear whether a portion of the emergency access road across Allotment 752-B initially followed an older existing road, before veering south and crossing into Allotment 752-C, or whether the road is entirely a newly cut and graded road. *Compare* AR Tab 14, No. 15, Ex. A (Aerial photo with “New Road” superimposed), *with* Trespass and Damage Report at 6-7 (AR Tab 14, No. 42) (2009 Aerial Photo; 2011 Aerial Photo).

752-C. Letter from Superintendent to Appellants, June 30, 2011 (AR Tab 14, No. 12). The Superintendent provided no details regarding the construction of the road, but advised Appellants that they were trespassing on Allotment 752-B and 752-C, and did not have a valid access road right-of-way or permission “to have built this access road.” *Id.* The Superintendent stated that the access road “can no longer be used,” and concluded by stating that BIA would inspect the property and thereafter assess damages against Appellants. *Id.*

Appellants responded to the Superintendent, stating that in May of 2011, the road to their house had completely washed away, and that a temporary access road was approved by tribal emergency personnel for access to their home. Appellants stated that they had attempted to contact Matt for permission to cross her land, but to no avail, and suggested that tribal emergency personnel “must have contacted her prior to approving access.” Letter from Bell to Superintendent, July 19, 2011, at 1 (unnumbered) (AR Tab 14, No. 17). Appellants stated that they stopped using the access road after receiving notice of the trespass from the Superintendent. *Id.* Appellants complained that they were being singled out, and noted that multiple parties, including BIA, Bureau of Land Management, and tribal employees, had also used the road. *Id.* Appellant Bell offered to apologize to Matt, but stated that “she also must understand that we did not install access, we asked EMERGENCY PERSONNEL to help us access our home.” *Id.*

The Superintendent replied, stating that the access road was constructed without authorization or approval from BIA. Letter from Superintendent to Appellants, Aug. 4, 2011, at 1 (unnumbered) (AR Tab 14, No. 20). The Superintendent stated that no right-of-way may be granted without prior written consent from the landowners and approval from BIA, and that the tribal emergency personnel, mentioned in Appellants’ letter, lacked authority to approve a right-of-way over 752-B and 752-C. *Id.* The Superintendent did not address Appellant’s contention that they had not constructed the road. The Superintendent acknowledged that Appellants had complied with the notice of trespass by stopping their use of the road. *Id.*

On March 14, 2012, the Superintendent assessed damages “caused by [Appellants’] unauthorized use” in the amount of \$32,320 against Appellants. Letter from Superintendent to Appellants, Mar. 4, 2011, at 1 (unnumbered) (AR Tab 14, No. 43). The damages total included \$14,270 for road repair and restoration, \$16,800 for 3 years of lost rent during restoration, and \$1,250 for 2 years of crop loss during restoration. *Id.* The damages were based upon a Trespass and Damages Report, dated February 24, 2012, prepared by the Office of the Special Trustee for American Indians. Trespass Damage Report, Feb. 24, 2012, (AR Tab 14, No. 42).

Appellants objected to the Superintendent's assessment of damages and requested that he reconsider the decision. Letter from Appellants to Superintendent, Mar. 26, 2012 (AR Tab 14, No. 45). In doing so, Appellants again stated that they did not construct the road. *Id.* at 1 (unnumbered). The Superintendent responded on March 27, 2012. Without addressing Appellant's assertion that they had not constructed the road, the Superintendent reiterated that tribal emergency personnel had no authority to approve a right-of-way. Letter from Superintendent to Appellants, Mar. 27, 2012, at 1 (AR Tab 14, No. 47).

Appellants appealed the Superintendent's assessment of damages to the Regional Director. Appellants argued that the Emergency Director for the Tribe had approved emergency access to Appellants' home; that Appellants did not construct or authorize construction of the road; that the damages were improperly allocated entirely to Appellants, because others had used the road as well; and that the amount of damages was unsupported. Appellants also contended that it is tribal tradition and custom to assist each other during emergencies. First Notice of Appeal to Regional Director, Apr. 12, 2012 (AR Tab 18) (appealing from Superintendent's March 14 decision); First Statement of Reasons, May 11, 2012 (AR Tab 12); Second Notice of Appeal to Regional Director, Apr. 24, 2012 (AR Tab 13) (appealing from Superintendent's March 27 decision); Second Statement of Reasons, May 23, 2012 (AR Tab 11).

On August 24, 2012, the Regional Director issued his decision, upholding the Superintendent's assessment of trespass damages against Appellants in the amount of \$32,320. Decision at 3 (unnumbered). The Regional Director found that the Tribe had reserved a right of ingress and egress across 752-B and 752-C, to access tribal lands, but that Appellants did not have a right-of-way across either tract. *Id.* at 2 (unnumbered).⁴ In response to Appellant's assertions that their access had been approved by tribal emergency personnel, the Regional Director explained that BIA's authority to manage and preserve trust land was not delegated to tribal personnel. The Regional Director stated that "tribal emergency personnel failed to coordinate with the beneficial landowner(s) and the Superintendent," and that if they had done so, they would have known that BIA approval was required prior to construction of a temporary access road. *Id.* at 3 (unnumbered). The Regional Director asserted that, other than access for Appellants, "there was no compelling

⁴ The record contains a copy of a deed from the Tribe granting to Annabelle Wing Healy an undivided 1/2 interest in Allotment 752-C, "reserve[ing] a perpetual free use right-of-way across the herein described land for access to the Tribal Timber Reserve," and a deed from the Tribe granting to Sophia Healy an undivided 1/2 interest in Allotment 752-B, "[s]ubject to ingress and egress to the [Tribe] for the purpose of access to other tribal lands." AR Tab 14, No. 39.

reason to build a road of the magnitude that was illegally constructed.” *Id.* He concluded by stating that Appellants had “caused the temporary road to be built when they asked for temporary access.” *Id.*⁵

On appeal to the Board, Appellants again deny that they constructed the road or should be liable for trespass damages resulting from the road’s construction. Appellants’ Brief, Dec. 5, 2012, at 2-7 (Opening Br.). Appellants argue that the decision to construct the road was only within the control and authority of the tribal government and its employees. *Id.* at 4. Appellants also contend that the damage assessments are unsupported, and that their actions could not have resulted in damages in the amount of \$32,320. *Id.* at 8-10.⁶

The Regional Director did not file an answer brief, and neither the Tribe nor Matt participated in the appeal.

Standard of Review

The Board reviews *de novo* questions of law and the sufficiency of evidence to support a BIA decision. *Heirs and Successors in Interest to Mose Daniels v. Eastern Oklahoma Regional Director*, 55 IBIA 139, 143 (2012). The Board will not substitute its judgment in place of BIA’s in matters of discretionary decision making, but it will review a regional director’s decision to determine whether it comports with the law, is supported by the administrative record, and is not arbitrary or capricious. *Thompson v. Acting Southern Plains Regional Director*, 54 IBIA 125, 130 (2011); *see also Heirs and Successors in Interest to Mose Daniels*, 55 IBIA at 143.

Discussion

We limit our review to the Regional Director’s conclusion that by requesting assistance from the Tribe to gain emergency access to their property, Appellants “caused” the Tribe, as a matter of law, to construct the access road without obtaining proper permission, thus making Appellants legally responsible for trespass and damages resulting from the road construction. We disagree. The Regional Director’s cursory conclusion imputing causation to Appellants falls short of an adequate explanation for that conclusion.

⁵ The Regional Director also asserted that Matt had stated that she would have allowed Appellants to cross her property to access their land, but was not willing to have a road constructed for that purpose. *Id.*

⁶ Appellants also contend that the Tribe’s construction of the road was justified under the emergency circumstances that existed. *Id.* at 2.

See Lummi Nation v. Northwest Regional Director, 44 IBIA 47, 67-70 (2007) (BIA was required to articulate why tribe could be held liable for trespass and the facts in the record must support BIA's finding of liability). Nor is the record sufficient to support that conclusion. Because the only damages imposed on Appellants are related to the construction of the road and not to Appellants' use of the road, we vacate the Decision.⁷

It is undisputed that Appellants did not construct the temporary access road. Although Matt apparently initially speculated that Appellants had undertaken the construction themselves, using tribal equipment, Appellants flatly denied that they had performed the construction themselves. *Compare* Notes to File, June 24-30, 2011, at 1 (unnumbered) (AR Tab 14, No. 13) (Matt asking BIA "who gave them permission . . . to use tribal owned equipment"), *with* Email from Kennedy to Banks, Dec. 20, 2011 (AR Tab 14, No. 39 ("Matt is saying tribal construction had something to do with building the road. I don't know because we did not actually see anyone doing it.")). Despite Appellants' denials, BIA apparently never investigated the facts to determine who constructed the road. The evidence in the administrative record, however, indicates that the Tribe, through its employees, was in control of and directed the actual road construction.⁸

A party that authorizes or directs a trespass may be held jointly liable with the actual trespassers. *Lummi Nation*, 44 IBIA at 63 (citing *Bloedel Timberlands Development, Inc. v. Timber Industries, Inc.*, 626 P.2d 30, 34 (Wash. App. 1981)). Liability may extend to one who induces or abets the commission of a trespass, but "[t]here is no liability if a defendant did not have control over the trespasser's activities, or did not order them." 75 Am. Jur. 2d Trespass § 55 (2014); *see also Old Granite Development, Ltd. v. City of Toledo*, 2008 U.S. Dist. LEXIS 29449 at *5-7 (N.D. Ohio Apr. 10, 2008) (trespass claim against abutting landowner unsupported because passive landowner took no active part in project and did not make any false representations or inducements leading to possible trespass by the city).

⁷ Because the evidence is insufficient to support a finding that Appellants are liable for damages caused by construction of the road, we do not address whether BIA's determination of the amount of damages would otherwise be supported by the record.

⁸ *See, e.g.*, Letter from Matt to Superintendent, June 24, 2011 (alleging that a backhoe owned by the Tribe was used to cut out hills, fill coulees, and put in culverts on property) (AR Tab 14, No. 1); Email from Brien to Fox, Aug. 8, 2011 (noting that tribal equipment may have been utilized to construct access road) (AR Tab 14, No. 22); Field Report, Aug. 9, 2011 (same) (AR Tab 14, No. 23); Letter from Hudson to Superintendent, Nov. 29, 2011 (stating that the Tribe's construction department "caused extensive damage" to Matt's property) (AR Tab 14, No. 32).

In the present case, the Regional Director summarily concluded that Appellants' request to their tribal government for emergency assistance to access their property gave rise to their personal liability for the actions undertaken by that government in constructing the temporary access road.⁹ As noted, it is undisputed that Appellants did not directly commit the trespass by constructing the road. The Tribe, or its employees, apparently made the decision to proceed, and apparently constructed or directed the construction of the road. Nothing in the record indicates that Appellants had the authority or power to control the Tribe's decision. Nor is there evidence that Appellants made any false representations to the Tribe to induce it to proceed, i.e., representations that they had obtained the necessary approvals from the landowners and BIA. Because the record does not show that Appellants had any greater power than to make a request to the Tribe, we are not convinced that it is sufficient to support a finding that Appellants "caused," as a matter of law, construction of the temporary access road, for purposes of finding them liable for trespass damages resulting from construction of the road. Thus, we vacate the Decision. *See Strom v. Northwest Regional Director*, 44 IBIA 153, 170 (2007) (vacating a decision in part, finding no support in the record for holding two appellants liable for trespass); *see also O'Connor v. Rocky Mountain Regional Director*, 54 IBIA 308, 315 (2012) (reversing a trespass decision because the record failed to support BIA's determination).

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 August 24, 2012, decision, and remands for further proceedings consistent with this decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Robert E. Hall
Administrative Judge

⁹ Appellants argue that the Tribe's rights of access across Allotments 752-B and 752-C, reserved in the deeds, was sufficient to give the Tribe the right to construct the temporary access road. Opening Br. at 5-7. The Regional Director did not address the scope of the Tribe's rights-of-way, as relevant to its construction of the temporary access road. We assume, solely for purposes of this appeal, that a trespass was committed when the Tribe constructed the road.