



## INTERIOR BOARD OF INDIAN APPEALS

Nelson Birdbear v. Acting Great Plains Regional Director, Bureau of Indian Affairs

62 IBIA 56 (12/22/2015)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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|                              |   |                                      |
|------------------------------|---|--------------------------------------|
| NELSON BIRDBEAR,             | ) | Order Affirming Decision in Part and |
| Appellant,                   | ) | Dismissing Appeal in Remaining Part  |
|                              | ) |                                      |
| v.                           | ) |                                      |
|                              | ) | Docket No. IBIA 14-075               |
| ACTING GREAT PLAINS REGIONAL | ) |                                      |
| DIRECTOR, BUREAU OF INDIAN   | ) |                                      |
| AFFAIRS,                     | ) |                                      |
| Appellee.                    | ) | December 22, 2015                    |

Nelson Birdbear (Appellant) appealed to the Board of Indian Appeals (Board) from a February 13, 2014, decision (Decision) of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which affirmed the Acting Fort Berthold Agency Superintendent’s (Superintendent) decision to approve an assignment of an oil and gas lease for a mineral estate owned by Appellant. The assignment reverses a prior partial assignment, returning full ownership of the leasehold to the original lessee. There is no evidence in the record that Appellant consented to either assignment, but in this appeal Appellant argues, without further explanation, that without his consent to the latter assignment, BIA’s approval violated “the terms of the lease, regulations[, and the] Fort Berthold Oil and Gas Leasing statute.” Notice of Appeal, Mar. 10, 2014.

We affirm the Decision in part and dismiss the appeal in remaining part. First, we agree with the Regional Director that neither the lease nor the regulations required Appellant’s consent to the assignment. Second, Appellant’s statutory argument, as applied to the facts of this case, is self-defeating and negates any claim of injury resulting from the approval of the assignment, thus warranting dismissal of the appeal in remaining part. If the latter assignment is invalid, as Appellant contends, then under Appellant’s theory the former assignment is also invalid, and the end result would be the same: the original lessee would have (retained) full ownership of the leasehold. Therefore, we dismiss the appeal for lack of standing.

## Background

Appellant is the sole owner of Fort Berthold Allotment No. M1773-B (Allotment). Decision, Feb. 13, 2014, at 2 (Administrative Record (AR) 10). On March 17, 2009, Appellant and Kodiak Oil & Gas (USA) Inc. (Kodiak) entered into an oil and gas lease of

the Allotment, which the Superintendent approved on April 23, 2009.<sup>1</sup> Lease at 1, 4. The lease includes a clause, entitled “Assignment of lease,” in which Kodiak agrees “[n]ot to assign this lease or any interest therein . . . except with the approval of the Secretary of the Interior.” *Id.* § 3(h).

Initially, Kodiak assigned 40% of its interest in the lease to Petrogulf Corporation (Petrogulf) for “Ten and 00/100 dollars (\$10.00) and other consideration.” Lease Assignment, Nov. 9, 2012 (First Assignment) (AR 4). The Superintendent notified Appellant of his intent to approve the assignment, *see* Letter from Superintendent to Appellant, Feb. 13, 2013 (AR 2), and approved the assignment on February 20, 2013, *see* First Assignment at 3. There is no evidence in the record that Appellant consented to the assignment from Kodiak to Petrogulf.

A few months later, Petrogulf assigned its 40% interest in the Allotment back to Kodiak for “Ten and 00/100 dollars (\$10.00) and other consideration,” thus returning Kodiak’s stake in the leasehold to the status quo ante. Lease Assignment, July 31, 2013 (Second Assignment) (AR 6). Here again, the Superintendent issued Appellant a notice of his intent to approve the assignment, *see* Letter from Superintendent to Appellant, Sept. 20, 2013 (AR 5), and approved the assignment on September 23, 2013, *see* Second Assignment at 3.

Appellant appealed the latter assignment to the Regional Director. Notice of Appeal, Oct. 4, 2013 (AR 7). First, Appellant argued that his consent to the assignment was required under Public Law No. 105-188, 112 Stat. 620 (1998),<sup>2</sup> BIA regulations at 25 C.F.R. § 212.53, and lease § 3(h), and that he did not consent to the assignment. *Id.* Next, he argued that Public Law No. 105-188 required a determination by the Secretary

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<sup>1</sup> The lease was for a 5-year initial term “and as much longer thereafter as oil and/or gas is produced in paying quantities from said land.” Lease No. 7420A42230 (Lease) § 1 (AR 1). Appellant does not dispute that, due to production, the lease may be held past its primary term. *See* Decision at 2 n.6.

<sup>2</sup> The statute is entitled “An Act [t]o permit the mineral leasing of Indian land located within the Fort Berthold Indian Reservation in any case in which there is consent from a majority interest in the parcel of land under consideration for lease.” The statute amended the Mineral Leasing Act of 1909, codified at 25 U.S.C. § 396, which had been interpreted as requiring the Secretary of the Interior (Secretary) to secure the consent of *all* owners holding an undivided interest in a parcel of land that would be the subject of a mineral lease. *See* S. Rep. No. 105-205, at 1, 4, 7 (1998).

that approval of the assignment would be in Appellant’s “best interest,” and that there was no record of such a determination.<sup>3</sup> *Id.*

The Regional Director affirmed the Superintendent’s decision to approve the assignment, concluding that Appellant failed to show that his consent to the assignment was required under any of the foregoing cited authorities. Decision at 3-4. To the contrary, the Regional Director found that Public Law No. 105-188 “modified the existing law by changing the consent requirements for obtaining a mineral lease” and that the statute neither mentions nor applies to assignments. *Id.* at 4. The Regional Director found that 25 C.F.R. § 212.53 (concerning assignments of allotted lands for mineral development) is clear that consent to an assignment is only necessary if it is required by the lease.<sup>4</sup> *Id.* at 3. The Regional Director also found that, in the case of an assignment, § 3(h) of the lease requires only Secretarial approval. *Id.* at 4. Finally, because the Regional Director found that Public Law No. 105-188 is inapplicable to assignments, he found that the statute did not require a best interest determination. *Id.*

Appellant appealed to the Board and filed only the notice of appeal. The Regional Director filed an answer brief.

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<sup>3</sup> Relevant to Appellant’s arguments, § 1(a)(2)(A) of Public Law No. 105-188 provides:  
The Secretary may approve any mineral lease or agreement that affects individually owned Indian land, if—

(i) the owners of a majority of the undivided interest in the Indian land that is the subject of the mineral lease or agreement . . . consent to the lease or agreement; and

(ii) the Secretary determines that approving the lease or agreement is in the best interest of the Indian owners of the Indian land.

<sup>4</sup> Section 212.53 incorporates by reference 25 C.F.R. § 211.53(a) (concerning assignments of tribal lands for mineral development), which provides:

Approved leases or any interest therein may be assigned or transferred only with the approval of the Secretary. The Indian mineral owner must also consent if approval of the Indian mineral owner is required in the lease. If consent is not required, then the Secretary shall notify the Indian mineral owner of the proposed assignment. To obtain the approval of the Secretary the assignee must be qualified to hold the lease . . . and shall furnish a satisfactory bond conditioned for the faithful performance of the . . . lease.

## Discussion

### I. Standard of Review and Standing Requirements

Whether to grant approval of a lease assignment is a discretionary decision that the Board will not disturb unless it fails to comport with the law, is not supported by the evidence, or is otherwise arbitrary and capricious. *Citation Oil & Gas Corp. v. Acting Navajo Regional Director*, 57 IBIA 234, 239 (2013) (citing *Birdbear v. Acting Great Plains Regional Director*, 56 IBIA 87, 89 (2012)). We review *de novo* the sufficiency of the evidence and questions of law. *Id.* The appellant bears the burden to show how the regional director has erred in rendering the decision. *Id.*

An appellant also has the burden to demonstrate that he has standing to bring an appeal. See 25 C.F.R. § 2.2 (definitions of “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). The appellant must establish, *inter alia*, that he was “adversely affected,” (i.e., injured) by the BIA decision being appealed, and to be “adversely affected” within the meaning of the regulation, one must have a legally protected interest that was, or allegedly was, adversely affected by the challenged decision. See 25 C.F.R. § 2.2; 43 C.F.R. § 4.331; *Anderson*, 52 IBIA at 331.

### II. Analysis

The Regional Director argues that Appellant has made only “bare allegations” and therefore has not met his burden on appeal to show error in the Decision. Answer Brief, June 23, 2014, at 2. The Regional Director also argues, in the alternative, that the Decision should be affirmed on the merits pursuant to our decision in *Birdbear*, *supra*, in which we affirmed BIA’s approval of an assignment, without the consent of the mineral owner, involving an identical lease assignment clause. *Id.* at 2-3; see *Birdbear*, 56 IBIA at 89-90. We agree that our decision in *Birdbear* disposes of Appellant’s arguments that the lease and the regulations required his consent. In that case, BIA determined that “neither the lease nor the governing regulations require the mineral owners’ consent to an assignment of the lease, or otherwise prohibit assignments,” and we found “no error in [BIA’s] explanation or interpretation of the lease and the regulations.” *Birdbear*, 56 IBIA at 88, 90. Accordingly, we need not discuss those arguments further.

The statutory argument raised by Appellant was not addressed in *Birdbear*, but we dismiss Appellant’s appeal with regard to that claim, for lack of standing, because even if we were to assume that his theory is correct, i.e., that his consent and a best interest determination were required for approval of an assignment of the lease, Kodiak would still have full ownership of the leasehold and thus Appellant has not demonstrated any injury resulting from the Decision.

Section 1(a)(2)(A) of Public Law No. 105-188 states that the Secretary may approve “any mineral lease or agreement that affects individually owned Indian land,” if the owners of a majority interest consent and the Secretary determines that approval is in the best interest of the Indian owners. 112 Stat. at 620. Appellant apparently interprets the language to require owner consent and a best interest determination for assignments of mineral leases. But were we to accept that argument, neither the assignment back to Kodiak nor the initial assignment to Petrogulf would be valid, because there is no evidence that Appellant consented to either assignment.

On the other hand, if we were to agree with the Regional Director that, in addition to the regulations and the lease, the statute did not require Appellant’s consent or a best interest determination prior to approving an assignment (or that Appellant waived any argument that the assignment was not in his best interest<sup>5</sup>), then *both* the former assignment and the latter assignment would be valid. In either situation—if both assignments are invalid or both assignments are valid—the result is the same that Kodiak is now a full owner of the leasehold. Accordingly, we conclude that Appellant has not shown that he was adversely affected by the Decision, and thus lacks 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 affirms the Regional Director’s February 13, 2014, decision in part and dismisses the appeal in remaining part.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge

<sup>5</sup> In his notice of appeal, Appellant asserts that he suffered “damages” and “loss of revenue.” Notice of Appeal. The Regional Director objects to this argument on the basis that it was raised for the first time on appeal, and for that reason we decline to consider it. *See* 43 C.F.R. § 4.318 (Scope of review); *Newtok Traditional Council v. Acting Alaska Regional Director*, 61 IBIA 167, 170 (2015) (“The Board has consistently held that it is not required to, and generally will not, consider arguments raised or evidence presented for the first time on appeal, which could have been presented in the proceedings below.”). We also note that Appellant failed to provide any evidence to support the claims.