



INTERIOR BOARD OF INDIAN APPEALS

Thomas I. McKay and Dianne Magee v. Rocky Mountain Regional Director,
Bureau of Indian Affairs

63 IBIA 234 (07/20/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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THOMAS I. McKAY AND)	Order Affirming Decision in Part
DIANNE M. MAGEE,)	and Vacating Decision in Part
Appellants,)	
)	
v.)	
)	Docket No. IBIA 15-051
ROCKY MOUNTAIN REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	July 20, 2016

With the consent of an Indian tribe, the Bureau of Indian Affairs (BIA) may grant an easement for a right-of-way across tribal trust lands.¹ But BIA may not encumber non-trust property interests, such as a lessee’s leasehold interest in tribal trust land, unless the lease grants such authority to BIA. Appellants Thomas McKay and Dianne Magee have a business lease that encumbers trust land of the Blackfeet Tribe (Tribe). BIA granted an easement to the Montana Department of Transportation (MDOT) for a highway project that crosses tribal trust land, and in so doing occupies approximately 2 acres of land encompassed by Appellants’ lease. BIA’s Blackfeet Agency Superintendent (Superintendent) then issued a Notice to Proceed, purportedly authorizing MDOT to begin construction activities on that land. Appellants sought rescission of BIA’s approval of the easement; the Superintendent rejected their request. The Rocky Mountain Regional Director (Regional Director) affirmed the Superintendent, finding that the highway project will not adversely impact Appellants’ business lease, and suggesting that a reduction-in-rent provision in the lease, which is triggered by a condemnation action, adequately addressed Appellants’ objections. *See* Letter from Regional Director to Appellants, Nov. 13, 2014 (Decision) (Administrative Record (AR) 8).

We affirm BIA’s decision declining to rescind its grant of the easement, but only with a critical clarification that BIA failed to provide to Appellants: The grant of easement to MDOT only applies to the underlying tribal trust title; it does not encumber Appellants’ leasehold interest. As BIA now acknowledges, the grant of easement was expressly made “subject to any valid existing right of adverse claim,” which includes Appellants’ leasehold

¹ *See* 25 C.F.R. §§ 169.3(a), 169.15.

and right of possession. Grant of Easement for Right-of-Way, Dec. 19, 2013 (Easement), at 2 (AR 17); *see* BIA’s Supplemental Brief (Br.), June 20, 2016, at 2 (grant of easement “by its express terms, exempts [Appellants’] leasehold premises from the right-of-way”).

We vacate the Regional Director’s finding that the highway project will not adversely impact Appellants’ business lease: the record shows that the project occupies approximately 2 acres of land encompassed by the lease. And there is no evidence in the record that either the Tribe or MDOT condemned the leasehold pursuant to laws of Eminent Domain, and therefore the Superintendent’s Notice to Proceed was without foundation.

Background

In 1998, Lucille McKay entered into a business lease with the Blackfeet Tribe, leasing a 7.15-acre portion of Blackfeet Tribal Allotment T7010 (Allotment), in Montana. Lease B-334, May 4, 1998 (Lease) (AR23). The lease was approved by BIA. The lease is for a 25-year term, with an option for the lessee to renew the lease for an additional 25 years. Appellants are successors-in-interest to the original lessee.² The leased premises consist of two parcels, divided by U.S. Highway 2. On the east side of the highway is a 1.2-acre parcel, on which Appellants’ business, the Junction Drive-Inn and Café (Café), is located. On the west side of the highway is the remaining acreage of the leased property, which apparently was vacant. *See* Email from Schilf to Eichhorn, July 30, 2015, Attachments (project survey maps and parcel maps (Ex. Q to Grant of Easement)) (Supplemental Record); *see also* Order for Regional Director to Supplement Record, June 12, 2015.

In 2013, MDOT and the Blackfeet Tribe agreed on a highway reconstruction and realignment project, which would move the highway west—away from the Café—to a new roundabout, with the purpose of increasing traffic safety and aligning the highway with an entry to the Tribe’s casino. The realigned highway apparently will occupy approximately 2 acres of the property that is subject to Appellants’ business lease. *See* Supplemental Record.

Appellants strongly objected to the highway realignment project, arguing that it would constitute a “taking” of their property, and that there is no language in their business lease that would authorize the Tribe to grant an easement affecting their leasehold without

² It is not entirely clear whether Appellants hold the business lease jointly or if it is held only by Appellant McKay, but for purposes of this decision we refer to the lease as held jointly.

their consent. *See, e.g.*, Letter from Appellants to MDOT, Feb. 19, 2013 (AR 41).³ There is evidence in the record that MDOT, the Tribe, and BIA met and corresponded with Appellants in an attempt to resolve the dispute, but no resolution was achieved.

The Tribal Council passed a resolution reciting that the Tribe is vested with the power “to prevent the . . . encumbrance of tribal lands . . . without the consent of the Tribe,” but also stating that “such lands may be condemned for public purposes such as roads . . . , upon payment of adequate compensation by an agency of the State of Montana or the Federal Government, or by the Tribe itself.” Blackfeet Resolution 196-2013, May 16, 2013 (AR 17).⁴ The resolution recites that MDOT was requesting an easement across the Allotment, and for the payment of \$16,125, “grants [MDOT] an easement . . . with compensation at the rate established herein,” instructing the Superintendent to execute the necessary documents to complete the grant of easement. *Id.* It is undisputed that Appellants did not consent to the grant of easement, nor were they compensated for the encroachment on land encompassed by their business lease.

On December 19, 2013, the Superintendent signed a grant of easement to MDOT for a right-of-way for the highway project. *See* Easement at 3; *see also id.* at 1 (easement granted pursuant to 25 C.F.R. Part 169). The grant of easement includes the Allotment, as well as other tribal trust lands, but excludes “privately owned lands” and applies to “TRUST INTEREST ONLY.” Easement at 1. The easement “is subject to any valid existing right of adverse claim.” *Id.* at 2.

Appellants apparently understood the grant of easement as interfering with their leasehold, and sought reconsideration and rescission by the Superintendent of the grant of easement, eventually appealing to the Regional Director from the Superintendent’s inaction on their request for rescission. *See* Notice of Appeal, Mar. 13, 2014 (AR 31); Letter from Appellants to Superintendent, May 23, 2014 (AR 29); Notice of Appeal, June 13, 2014 (AR 28). The Regional Director directed the Superintendent to take action on Appellants’

³ The highway realignment project also encroaches on a homesite lease held by Appellants, but to a lesser extent. Appellants agree that the homesite lease, in contrast to their business lease, expressly authorizes the lessor to grant an easement across the property, subject to a right of compensation. The Regional Director agrees that Appellants are entitled to compensation for the portion of their homesite lease subject to the grant of easement for the highway project. The issue of which entity is liable to Appellants for this taking is not within the scope of this appeal, nor does the Board have jurisdiction to award damages. *Price v. Portland Area Director*, 18 IBIA 272, 275 (1990).

⁴ The Resolution cites no authority for the proposition that tribal lands may be condemned by a state.

request, *see* Memorandum from Regional Director to Superintendent, July 30, 2014 (AR 19), and the Superintendent issued a decision denying Appellants' request that the grant of easement be rescinded, *see* Letter from Superintendent to Appellants, Aug. 29, 2014 (AR 17).

In her decision, the Superintendent noted that MDOT had negotiated with the Tribe, as "owner of this tract," for the Tribe's consent to the right-of-way, and that "compensation was made to the trust landowners." *Id.* at 2 (unnumbered). The Superintendent quoted an excerpt from Tribal Resolution 196-2013, and stated that "BIA has established that the Blackfeet Tribe has the authority to condemn tribal property for Right-of-Way purposes." *Id.* at 3 (unnumbered). The Superintendent also stated that Appellants "have the opportunity to further negotiate with the Tribe and MDOT to address your claim of damages." *Id.* at 2 (unnumbered).

Appellants appealed to the Regional Director. *See* Notice of Appeal, Sept. 11, 2014 (AR 17). Seven days after receiving the notice of appeal to the Regional Director, the Superintendent issued a Notice to Proceed to MDOT "to continue work necessary to fully initiate Phase I" of the highway project on the Allotment. Letter from Superintendent to MDOT, Sept. 19, 2014 (AR 17). The Superintendent asked MDOT to notify utility companies and associated contractors that her Notice to Proceed "grants them the authority to proceed with staking and construction work." *Id.* The Superintendent also advised MDOT that she had "made a referral to Blackfeet Law Enforcement Services," and they "are prepared to provide on-site assistance." *Id.* The Superintendent sent a separate letter to Appellants advising them that she had issued a Notice to Proceed "[b]ased upon the approved negotiated right-of-way easement." Letter from Superintendent to Appellants, Sept. 19, 2014 (AR 17). It is apparent from the record that the Superintendent's action to enlist law enforcement services was for the purpose of preventing Appellants from interfering with highway construction activities.

Appellants immediately objected to the Superintendent's Notice to Proceed, noting that under 25 C.F.R. § 2.6, the Superintendent's decision was automatically stayed pending resolution of Appellants' appeal. Letter from Appellants to Regional Director, Sept. 22, 2014 (AR 17); *see* 25 C.F.R. § 2.6 (BIA decision automatically without effect during appeal period, unless made effective by the official to whom an appeal may be filed). No action was taken by the Regional Director to either enforce the automatic stay of the Superintendent's decision, or to place the Superintendent's decision into effect pursuant to § 2.6.

On the merits, the Regional Director affirmed the Superintendent's decision not to rescind the grant of easement across the Allotment. Decision at 2 (unnumbered) (AR 8). The Regional Director stated that the Tribal Council is responsible for managing tribal

lands on the Blackfeet Reservation and had approved the grant of easement to MDOT. According to the Regional Director, Article 23 of Appellants' business lease "addresses the matter of taking land from the lease" by providing for a reduction in rent in the proportion that the rental value of the premises is reduced. Article 23, titled "Eminent Domain," applies "[i]f, at any time during the term of this lease, the leased premises or any part thereof is taken or condemned under the laws of Eminent Domain," and provides for a reduction in rent under such circumstances. Lease, Art. 23 (AR 23). The Regional Director concluded that Article 23 was included in the lease "in the event that the Tribal Council chose to take land from the leased premises to meet other needs." Decision at 2 (unnumbered). The Regional Director further stated that his review of maps provided by the Superintendent showed that the roundabout would be approximately 400-500 feet west of the Café, and "will not adversely affect" Appellants' business lease, "which is the location of the café you operate." *Id.*

Appellants appealed to the Board, complaining—in addition to their merits challenge—that BIA was violating the automatic stay provision in § 2.6. The Board issued an order confirming that the grant of easement was without effect. Notice of Docketing, Feb. 6, 2015, at 3-5. In scheduling briefing on the appeal, the Board specifically solicited from Appellants clarification regarding the extent that the easement physically encroaches on premises that are subject to their business lease. *Id.* at 2.

MDOT subsequently filed a motion to place the grant of easement into immediate effect, arguing that delay in the project could place Federal funding at risk. MDOT Motion to Make Grant of Easement Effective, Feb. 19, 2015. MDOT argued that any potential damage to Appellants' leasehold could be addressed through money damages. MDOT also contended that the new highway alignment moves the highway "away from [Appellants'] business." *Id.*, Statement of Facts ¶ 3. BIA filed a response in support of MDOT's motion. Response in Support of MDOT's Motion, Mar. 4, 2015. Appellants objected to the motion. The Board granted MDOT's motion, noting that Appellants had not responded to MDOT's assertion that the project moves the highway *away* from their business, and also noting that it remained unclear to the Board precisely how moving forward with the project would encroach on the property leased by Appellants. Order Making Decision Effective Immediately, Mar. 13, 2015.

After completion of briefing on the merits of the appeal, the Board's review of the administrative record indicated that the record was missing the exhibits to the grant of easement, including an exhibit containing survey project maps and parcel maps. The Board ordered the Regional Director to supplement the record. *See* Order for Regional Director to Supplement Record, June 12, 2015. The supplemental record submitted by the Regional Director includes a map clearly showing the boundaries of two parcels identified

as Appellants' business lease, one of which is west of the current highway, and through which the highway realignment runs. *See* Supplemental Record.

The Board also solicited supplemental briefing and responses from the Regional Director on several questions, including (1) whether the easement expressly exempts Appellants' interest in the land held under the business lease; (2) whether BIA contends that a portion of Appellant's leasehold was taken or condemned under the laws of Eminent Domain, and if so, by what entity. Order for Supplemental Briefing, June 9, 2016. The Regional Director responded by acknowledging that the easement expressly exempts Appellants' leasehold interest. The Regional Director did not provide a responsive answer to the Board's second question.⁵

While acknowledging that the easement expressly exempts Appellant's leasehold, the Regional Director also responded that the "State of Montana's authority to build a road across the land encompassing Appellant[s'] leasehold interest was granted to them by the BIA with the . . . Grant of Easement . . . and by the Tribe with Blackfeet Tribal Resolution No. 196-2013 (Resolution)." BIA Supplemental Br. at 4. According to the Regional Director, "[t]he law does not require the consent of a lessee to grant a right-of-way across lands owned by the Tribe." *Id.* at 5. The Regional Director further contends that

[t]he Grant of Easement for Right-of-Way was granted by the BIA to [MDOT] in perpetuity. . . . The Tribe approved the grant . . . and received compensation from the State . . . for the loss of its property. . . . But, if there was a reduction in acreage of [Appellants'] leasehold . . . it may constitute a taking, which could entitle [Appellants] to compensation

Id. at 7.

The Board received no responses to the Regional Director's supplemental brief.

Discussion

We affirm BIA's Grant of Easement because it is undisputed that the easement exempts Appellant's leasehold interest and right of possession from the encumbrance

⁵ Instead of addressing the Board's question, the Regional Director asserted that Appellants had not shown that any portion of their "leasehold's 7.15 acres was reduced by the granting of the easement or the construction of the highway," and that Appellants only allege harm "caused to [the] business lease" by BIA's granting the easement. BIA Supplemental Br. at 3.

created by the easement. Although neither the Superintendent nor the Regional Director explained this critical fact to Appellants, the grant of easement expressly states that it is “subject to any valid existing right of adverse claim,” Easement at 2, and BIA now acknowledges that the easement exempts Appellants’ leasehold interest. BIA Supplemental Br. at 2.

But the Superintendent’s actions—issuing a Notice to Proceed to MDOT, and enlisting law enforcement to deter interference by Appellants—and the Regional Director’s responses to the Board’s questions on appeal, indicate that BIA understood, and apparently continues to understand, BIA’s grant of easement, or possibly the Tribe’s Resolution, as authorizing MDOT to gain possession of land encumbered by Appellants’ business lease, for construction of the highway project. As noted, the easement expressly exempts Appellants’ leasehold interest from the right-of-way encumbrance, and the Tribe’s Resolution does not purport to take or condemn Appellants’ leasehold, or any part thereof, under the laws of Eminent Domain.

The Regional Director suggests that Tribal Resolution No. 196-2013 somehow has the effect of authorizing MDOT access to the land leased by Appellants by “describ[ing] Tribal Allotment T7010 as the parcel that the Tribe grants an easement across.” BIA Supplemental Br. at 4. But the Tribal Resolution refers only to “tribal lands,” and “such lands,” with no mention of the leasehold. Even assuming the Tribe intended implicitly to refer to a non-trust leasehold interest in such tribal land, the resolution states that “such lands may be condemned for public purposes such as roads . . . , upon payment of adequate compensation.” The Tribal Resolution does not purport to exercise a tribal right of condemnation of Appellants’ leasehold or make payment of adequate compensation.

The Regional Director argues that “[t]he law does not require the consent of a lessee to grant a right-of-way across lands owned by the Tribe,” BIA Supplemental Br. at 5, but the issue is not whether MDOT obtained a right-of-way with respect to the Tribe’s trust title. Instead, the issue is on what basis BIA purported to authorize MDOT to proceed with the project across land encumbered by Appellants’ lease. The Regional Director cites no general authority granting BIA a right to encumber a non-trust leasehold interest in Indian trust land with a right-of-way, and no such authority is granted in Appellants’ business lease.

The Regional Director ultimately states that “if there was a reduction of the acreage” covered by Appellant’s lease “due to the granting of the easement or the construction of the highway, it may constitute a taking, which could entitle [Appellants] to compensation.” *Id.* at 7. The Regional Director’s own record shows the highway project as passing through approximately 2 acres of the land leased by Appellants. *See* Supplemental Record. Although it is apparent that at one time staff in the Regional Director’s office were

uncertain how the highway project impacted lands covered by Appellants' lease, *see* Email from Schilf to LaCounte, Sept. 26, 2014 (AR 17), and Appellants themselves failed to advise the Board of the physical encroachment during briefing on whether to make the Decision effective, the maps eventually supplied by the Regional Director contradict his finding that the highway project will not adversely impact Appellants' business lease.⁶ *See* Supplemental Record.

The Regional Director also suggests that the appeal should be dismissed because Appellants' "only requested remedy" is to be awarded damages, and the Board has no authority to award damages. We agree that the Board has no authority to award damages, but we disagree that Appellants are seeking such an award from the Board. Neither Appellants' opening brief nor their reply brief seeks such damages as relief; instead, they seek reversal of the Regional Director's decision as impermissibly infringing on their property rights.

Because the easement does *not* grant a right-of-way that purports to encumber Appellant's business leasehold interest, we affirm the Regional Director's decision upholding the Superintendent's action in granting the easement. Appellants' consent to the easement was not required as long as the easement did not purport to encumber their existing leasehold interest in the land. But we vacate the Regional Director's decision to the extent he found that the highway project will not adversely impact Appellant's business lease, because that finding is contradicted by the record: the maps show the realigned highway as running directly through land subject to the lease. And to the extent that the Superintendent and Regional Director understood the easement, or the Tribe's underlying consent to the easement, as constituting sufficient authorization for BIA to instruct MDOT to proceed with the highway project across the leased premises, they erred. When the Superintendent granted the easement, MDOT obtained a right-of-way with respect to the Tribe's trust title, but because the Tribe's interest was encumbered by Appellants' possessory leasehold interest, BIA's grant of easement provided no basis for the Superintendent to authorize MDOT to proceed.

⁶ It is likely that Appellants' primary concern may have been that the highway project would move traffic *away* from the Café, thereby allegedly "interfering" with their restaurant business, but for purposes of our review of the grant of easement, and BIA actions taken in connection with the grant of easement, we consider the physical encroachment of the highway project on the land encumbered by Appellants' business lease, without regard to the location of the Café.

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 November 13, 2014, decision in part, and vacates the decision in part.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge