



## INTERIOR BOARD OF INDIAN APPEALS

Kim and Rick Shawver v. Acting Northwest Regional Director, Bureau of Indian Affairs

42 IBIA 53 (11/23/2005)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

KIM and RICK SHAWVER,	:	Order Affirming Decision
Appellants,	:	
	:	
v.	:	
	:	Docket No. IBIA 04-25-A
ACTING NORTHWEST REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	November 23, 2005

This is an appeal from an October 28, 2003, decision of the Acting Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning the right to use an irrigation well and to place a pump on allotment No. 1567-A in the Fort Hall Reservation. For the reasons discussed below, the Board affirms the Regional Director's decision.

### Background

Cecil Broncho is the sole owner of Allotment No. 1567-A in the Fort Hall Reservation. He inherited this allotment from his father, Wilford Broncho, on May 10, 2001. The allotment consists of approximately 20 acres, 18.76 acres of which has been deemed farmable. For a number of years, Allotment No. 1567-A has been included with several adjacent allotments in farming leases between the Indian landowners and Appellants Kim and Rick Shawver, under authority of 25 C.F.R. Part 162. Leases involving Mr. Broncho's allotment have included Lease Nos. 91-26 (from January 1, 1991 to

December 31, 1995), 1/ 97-45 (from January 1, 1997 to December 31, 2000), and 01-039 (a two year lease commencing in 2001). 2/

The record indicates that Appellants got a permit to drill an irrigation well on Allotment No. 1567-A on May 29, 1991, with the consent of Wilford Broncho. Appellants were allowed to use this well in connection with Lease No. 91-26. By 1997, however, the well was no longer in use, and the pump, motor and accessories for operating the well had been removed from the site. BIA had to pursue the Appellants to get them to abandon the well properly. There is no indication that the well was used in connection with Lease Nos. 97-45 and 01-039.

Lease No. 01-039 evidently expired at the end of 2002. On August 30, 2002, Mr. Broncho executed a new Lessor's Consent Form for a Farm, authorizing the Superintendent to lease Allotment No. 1567-A for a period of two years, from January 1, 2003 to December 31, 2004. The consent form reflects an approved lease offer of \$135.00 per acre. The consent form says nothing about the well or well site being leased.

Before a new lease was signed and approved by BIA, Mr. Broncho wrote a letter dated March 25, 2003, 3/ to the Fort Hall Agency Superintendent (Superintendent). In his letter, Mr. Broncho made clear that during lease negotiations, there had been "no agreement" for Appellants to use Mr. Broncho's well. He then specifically stated that he gave no authorization for the use of his well or the installation of a pump in connection with the new lease, and that the source of irrigation was to be Gibson Canal. He further indicated that he would treat the use of his well as a trespass or lease violation, and that BIA

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1/ Appellants and Lease No. 91-26 have been the subject of earlier Board decisions. See Denny v. Northwest Regional Director, 36 IBIA 220 (2001); Ortiz v. Northwest Regional Director, 38 IBIA 71 (2002); and Wadsworth v. Northwest Regional Director, 41 IBIA 172 (2005).

2/ There is no copy of Lease No. 01-039 in the record. The Board infers the existence of this lease from the reference to it on Mr. Broncho's Aug. 30, 2002 Lessor's Consent Form for a Farm Lease, and from the fact that Mr. Broncho indicates in his Answering Brief that "Appellant has paid the same \$135.00 per acre since 1997 under the *two* prior leases \* \* \*." (Emphasis added.)

3/ Mr. Broncho dated the letter Mar. 26, 2003, next to his signature.

should take immediate action under 25 C.F.R. § 162.255 to protect his interests. <sup>4/</sup> BIA received this letter on March 27, 2003.

On April 1, 2003, the Superintendent approved Farm Lease No. 03-116, the lease involved in this appeal, in favor of “K & R Farms, % Rick Shawver.” <sup>5/</sup> The lease covered approximately 592 acres, of which not more than 564.23 acres was to be cultivated. The lease included Mr. Broncho’s Allotment No. 1567-A.

Lease No. 03-116 refers to irrigation, but it does not specify the source of that irrigation except by mentioning the Fort Hall Irrigation Project, and by requiring that the tenant comply with the applicable regulations, 25 C.F.R. Part 171. Documents attached to and incorporated in the lease, including a Plan of Conservation Operations and a Conservation Plan Map, clarify matters in only two respects. First, paragraph 12(C) of the Plan of Conservation Operations specifies that

[t]he tenant owns 2 irrigation pumps, 2 irrigation motors, electrical panels, 4 center pivots from point of attachment to concrete pivot pad, portable handlines, portable mainline and ancillary equipment with the right of removal from the lease premises. The landowners own the buried irrigation mainline, buried electrical lines, power service poles, fences, concrete pivot pads and well casing.

Second, the Conservation Plan Map and its accompanying legend show the position of Mr. Broncho’s well at the north end of his allotment, and the location of the two pumps owned by the Appellants, each a considerable distance from the well and immediately adjacent to Gibson Canal.

The Superintendent responded to Mr. Broncho’s letter on April 10, 2003, with a formal decision “to authorize” Appellants to use the well on allotment No. 1567-A for

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<sup>4/</sup> The provisions of 25 C.F.R. § 162.255 authorize BIA to take certain emergency actions in response to the threat of “immediate and significant harm to the leased premises during the term of an agricultural lease.”

<sup>5/</sup> Lease No. 03-116 is signed by Rick Shawver “V.P. \* \* \* dba K & R Farms,” suggesting a corporate lessee. In contrast, Appellants evidently signed prior leases as individuals.

Because neither the lease nor the record otherwise identifies K & R Farms as a corporation, and because the Shawvers assert their rights in this appeal individually, with no mention of a separate corporate interest, the Board will assume for purposes of this appeal that K & R Farms is merely a trade name for Appellants’ interest as individuals.

irrigation, and to install a pump there. The Superintendent recited several facts he thought pertinent to his decision: that Appellant Kim Shawver had obtained a permit to build the well in 1991; that Mr. Broncho's father (who owned allotment number 1567-A in 1991) had consented to construction of the well; that the well was intended as a back-up source of irrigation water to Gibson Canal in the event of drought; that the tenant had bid \$135.00 per acre to farm the unit with the understanding that the well would be available for its use; and that there was a current drought necessitating use of the well.

Mr. Broncho appealed the Superintendent's decision to the Regional Director. Both Appellants and Mr. Broncho briefed their respective positions to the Regional Director.

The Regional Director issued his decision concerning Mr. Broncho's appeal on October 28, 2003. He reversed the decision of the Superintendent by determining that Lease No. 03-116 did not authorize the tenant to use the well on allotment No. 1567-A, and that any such use of the well would be a trespass. He was unable to tell the extent of any trespass damages, however, and remanded the case to the Superintendent to make that determination.

Appellants appealed the Regional Director's October 28, 2003 decision. Appellants, the Regional Director, and Mr. Broncho (as an interested Party) have all submitted briefs to the Board.

### Discussion

Appellants have the burden of proving that the Regional Director's decision was erroneous or not supported by substantial evidence. See, e.g., Van Gorden v. Acting Midwest Regional Director, 41 IBIA 195, 198 (2005); Aloha Lumber Corp. v. Alaska Area Director, 41 IBIA 147, 156 (2005). The Board reviews questions of law and the sufficiency of evidence de novo. See, e.g., Aloha, 41 IBIA at 157; Navajo Nation v. Navajo Regional Director, 40 IBIA 108, 115 (2004).

Appellants advance three arguments for reversing the Regional Director's October 28, 2003 decision, and for allowing them to use Mr. Broncho's well to pump groundwater for irrigation. First, Appellants argue that section 7 of the 1887 General Allotment Act, 25 U.S.C. § 381, as interpreted in Grey v. United States, 21 Cl. Ct. 285, 299 (1990), requires that Appellants be allowed to use Mr. Broncho's well for irrigation purposes. Second, they argue that they entered into the lease with the expectation of being able to use the well for irrigation purposes, an expectation apparently derived from assurances of the Superintendent during lease negotiations, and that the price they agreed to pay for the lease reflected that understanding. Third, Appellants contend that the lease

value of all allotments within the farming unit is as high as it is because of its irrigation, and that absent the use of Mr. Broncho's well "Appellants will not be able to have sufficient water to irrigate their crops," Appellants' Opening Brief at 6, resulting in economic injury to the other allottees/lessors.

To address Appellants' first argument, we will start by quoting 25 U.S.C. § 381:

In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior is authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

Section 381 does not apply here. First, it authorizes the Secretary to prescribe rules and regulations for the distribution of irrigation water for Indians residing on reservations, but Appellants have identified no such rules or regulations that have been promulgated pursuant to 25 U.S.C. § 381, let alone any rules that require the result they seek. <sup>6/</sup> Second, the subject matter of 25 U.S.C. § 381 does not apply because the Regional Director's decision only addresses Appellants' use of Mr. Broncho's well, and does not address the distribution of irrigation water among users on the reservation. The language that Appellants quote from the Grey decision, concerning the Secretary's regulatory authority under 25 U.S.C. § 381, is simply irrelevant to the issue of whether Appellants are entitled to use Mr. Broncho's property — his well — without his consent, to access groundwater for irrigation.

We correspondingly reject Appellants' argument that 25 U.S.C. § 381 or the interpretation of that statute in Grey requires Mr. Broncho to make his well available to Appellants for irrigation.

Appellants next argue that the lease consideration, and therefore the lease itself, included use of the well. They contend that

Appellants entered into the Fort Hall Lease No. 03-116 with the understanding that they would be able to use the well located on Allotment

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<sup>6/</sup> Part 171 of 25 C.F.R. applies to the Fort Hall Irrigation Project, but those regulations rely on authorities other than 25 U.S.C. § 381. Appellants do not argue that Part 171 authorizes them to use Mr. Broncho's well without his consent.

No. 1567-A for the purpose of irrigating the farmable acreage in the Lease. The Appellant offered a significant amount of rental, \$135 per farmable acre, with the understanding, supported by [the Superintendent], that they could use this well. If the use of the well is denied by the Board, the consideration for the subject Lease will be significantly damaged, giving the Appellants a legitimate basis to terminate the lease for breach by the Allottees.

Appellants' Opening Brief at 5.

The Regional Director found that the lease itself says nothing about using Mr. Broncho's well for irrigation purposes:

[I]t is reasonable to conclude that the parties to the lease knew that an irrigation well was located on the allotment, that the lessee intended to use the land for irrigated crops, and that the lessee planned to make use of water from the Fort Hall Irrigation Project. However, nothing in the documents explicitly grants a right to use the well, or explicitly prohibits the use of the well.

October 28, 2003 Decision at 5. The Regional Director concluded that "Lease No. 03-116 does not authorize the lessee K & R Farms to make use of the well on Allotment 1567-A. Any use of the well will be considered a trespass." *Id.* at 7.

We agree. Regardless of what the Appellants thought the lease encompassed, and regardless of what assurances the Superintendent may have given them with respect to the use of the well on Mr. Broncho's allotment, it is the intent of the parties as expressed in the lease that matters. See Wessman v. Pacific Regional Director, 41 IBIA 238, 247 (2005) ("The best evidence of the parties' intent in a lease is the language of the lease itself. In the absence of an ambiguity in the terms of a lease, no judicial construction is required or permitted." (Citations omitted.))

Here, although the lease does not say one way or the other whether Appellants could re-open a private, sealed well located on Mr. Broncho's property, install a pump, and draw underground water to supplement irrigation water already available from Gibson Canal, that seems pretty clearly to be the sort of affirmative right the lease would have to articulate

in order to bind the sole allotment owner that would be so burdened. <sup>7/</sup> The lease does not do so. To the contrary, the Conservation Plan Map attached to the lease indicates that the two irrigation pumps owned by Appellants are to be located on Gibson Canal, a respectable distance from Mr. Broncho's well. Appellants' assertion that the parties intended to authorize the installation of a pump on Mr. Broncho's well therefore conflicts with diagrams integral to the lease itself.

If the Board were to look beyond the clear terms of the lease, and attempt to explore the intention of the parties from extrinsic evidence, Appellants' argument would encounter worse problems still. The Superintendent's authority to negotiate the lease on behalf of Mr. Broncho derives from the August 30, 2002 Lessor's Consent Form for a Farm Lease, and other manifestations of Mr. Broncho's wishes. The consent form says nothing about the use of Mr. Broncho's well, and Mr. Broncho's March 26, 2002 letter to the Superintendent states unequivocally that the Superintendent is *not* authorized to include Mr. Broncho's well or the addition of a pump among the lease terms. The lease was signed after BIA received both of these documents. Thus, the Superintendent *could not* have agreed to include the well or pump in the lease without overstepping his authority — possibly to the extent of invalidating Lease No. 03-116, at least with respect to Allotment No. 1567-A. See Denny, 36 IBIA at 226 (“The Superintendent’s trust responsibility for the other allotments did not authorize him to condone a trespass on Allotment 3020”); see also Rathkamp v. Billings Area Director, 21 IBIA 144, 149 (1992) (“An Indian landowner can withdraw consent to a lease until the lease is actually approved by BIA.”)

Appellants have also failed to respond to the assertion of Mr. Broncho that the amount Appellants agreed to pay for Farm Lease No. 03-116, \$135 per acre, was no more than what they had agreed to pay for Farm Leases No. 97-45 and 01-139, two leases where Appellants did not use the well on Mr. Broncho's Allotment No. 1567-A.

The Board therefore rejects Appellants' second argument, to the effect that they are entitled to use Mr. Broncho's well on the basis of an undocumented “understanding” they held when they agreed to the lease.

Finally, Appellants argue that Mr. Broncho is economically harming all of the other allottees in his farming unit by withholding the use of his well. Appellants contend that without the use of Mr. Broncho's well, they “will not be able to have sufficient water to

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<sup>7/</sup> The Plan of Conservation Operations attached to the lease specifies that the landowner, *i.e.*, Mr. Broncho, owns (among other things) the power service pole and well casing that the Appellants seek to use. We do not see how the lease can place these items in the service of the Appellants without making the intent to do so reasonably clear.

irrigate their crops.” Appellants’ Opening Brief at 6. Appellants expressly assert that “irrigated farm land is much more valuable than dry farm land.” Appellants’ Reply to Broncho Answer Brief at 3. Appellants would have the Board put these concepts together and conclude that the use of Mr. Broncho’s well is essential in order to consider the property covered by Farm Lease No. 03-116 as irrigated farm land, for the benefit of the Indian landowners.

Appellants lack standing to raise this argument. If other allottees might be adversely affected by Mr. Broncho’s unwillingness to make his well available for irrigation, such a complaint ought to come from them, not Appellants. In fact, it appears that no other allottee has objected to Mr. Broncho’s position, and none appealed from the Regional Director’s decision. We therefore reject Appellants’ third argument as well.

In sum, Appellants have failed to carry their burden to prove that the Regional Director’s decision was erroneous or not supported by substantial evidence. We correspondingly affirm the Regional Director’s decision.

#### 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 October 28, 2003 decision.

I concur:

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// original signed  
David B. Johnson  
Acting Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge