



INTERIOR BOARD OF INDIAN APPEALS

Loren David v. Acting Great Plains Regional Director, Bureau of Indian Affairs

47 IBIA 129 (07/10/2008)



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

LOREN DAVID,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 06-120-A
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	July 10, 2008

Loren David (Appellant) seeks review of an August 28, 2006, decision (Decision) of the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), upholding a decision by the Superintendent of the BIA Sisseton Agency (Superintendent; Agency), which declined to issue a new lease to Appellant for Allotment No. 755, Alexis LaFromboise (Allotment). Appellant previously held a 5-year lease to the Allotment, and sought a new 3-year lease.¹ The Regional Director and the Superintendent both concluded that because a proposal to issue a new lease to Appellant did not have the consent of owners holding a collective majority interest in the Allotment, BIA could not approve such a lease for Appellant.

Appellant contends that he negotiated a new lease with one of the landowners, Duane LaBelle; that the Superintendent agreed, both in writing and orally, to issue a new lease for three years at a rental rate of \$3,744 per year; and that when Appellant agreed to pay that amount, BIA was obligated to issue the lease to him. Appellant argues that BIA never informed him that consent of a majority interest of the landowners was needed, and therefore BIA could not condition approving or issuing a new lease on such landowner consent.

We affirm the Regional Director's decision because (1) LaBelle, as a minority interest owner in the Allotment, did not have authority to grant a lease to Appellant, and it

¹ The Allotment is described as the E $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 28, Township 128 North, Range 53 West, Fifth Principal Meridian, Marshall County, South Dakota, containing 80 acres, more or less.

is undisputed that the owners of a majority interest in the Allotment did not consent to grant a new lease to Appellant; (2) the fact that BIA did not advise Appellant that the consent of the owners of a majority interest in the Allotment was required did not, and could not, preclude BIA from applying that requirement and declining to issue a lease to Appellant in the absence of such majority consent; and (3) in any event, the Superintendent's "agreement," on which Appellant relies and which is memorialized in a letter from the Superintendent to Appellant, dated April 10, 2006 (Superintendent's Letter), was not a commitment by the Superintendent to grant, approve, or issue a lease to Appellant for the Allotment, but only addressed the rental price that BIA considered to be acceptable.

Background

Between October of 2001 and September of 2006, Appellant held a 5-year agricultural lease for the Allotment. In December of 2005, during the final year of the lease, Appellant obtained the consent of one of the co-owners of the Allotment, Duane LaBelle, who held a 2.3% ownership interest, to negotiate a new 3-year lease with Appellant at a rental rate of \$3,700 per year.² There are 26 owners of the Allotment,³ each of whom owns an undivided fractional interest.⁴ The individual ownership interests range between 0.96% (6 landowners) and 18.6% (3 landowners). *See* AR Tab 4.

BIA's leasing regulations provide that "[a]n agricultural lease of a fractionated tract^[5] [of Indian land] may be granted by the owners of a majority interest in the tract, subject to

² BIA's title status report indicates ownership to the tenth decimal (e.g., Duane LaBelle is listed as owning a 0.0232539683 interest in the Allotment, *see* Administrative Record (AR) Tab 12.). The percentages indicated in this decision are rounded, which explains why the total does not equal 100 percent.

³ For convenience, the Board refers in the present tense to the ownership status of the Allotment at the time of the Superintendent's decision. Any changes of ownership since that decision are not relevant to this appeal.

⁴ One of the owners holds a 5% undivided interest in fee, leaving a total of 25 "trust" owners of the Allotment. Affidavit of Carol Jordan (Affidavit of Jordan), Dec. 1, 2006.

⁵ The term "fractionated tract" is defined as "a tract of Indian land owned in common by Indian landowners and/or fee owners holding undivided interests therein." 25 C.F.R. § 162.101.

[BIA's] approval." 25 C.F.R. § 162.207(c); *see* 25 U.S.C. § 3715(c)(2)(A).⁶ As the regulatory language indicates, "granting" a lease (an exercise of ownership) and "approving" a lease (an exercise of BIA's trusteeship) are two distinct components to a final and enforceable lease of Indian land. Under certain circumstances, BIA may grant consent to a lease on behalf of individual Indian landowners — e.g., certain minors, individuals for whom BIA holds a power of attorney, or individuals whose whereabouts are unknown. *See* 25 C.F.R. § 162.209. Thus, when individual Indian lands are leased, BIA may wear two hats: one under which it is acting on behalf of one or more specific individual landowners in granting a lease as lessors, and another under which BIA is acting as trustee for all of the Indian landowners in deciding whether the lease is in their best interest and should be approved. *Compare* 25 C.F.R. § 162.209 (When can BIA grant an agricultural lease on behalf of an Indian landowner?) *with id.* § 162.214 (How and when will BIA decide whether to approve an agricultural lease?).

Appellant's agreement with LaBelle to negotiate a new lease at a rate of \$3,700 per year was reviewed by BIA, and in the Superintendent's Letter dated April 10, 2006, the Superintendent notified Appellant that BIA had determined that the annual rent for the Allotment should be slightly higher — \$3,744 per year for a 3-year lease. The Superintendent's Letter stated: "Please let us know as soon as possible if you are in agreement with the above terms." On April 14, 2006, Dawn David — Appellant's wife and business partner — advised BIA that the \$3,744 per year rent was acceptable. *See* Affidavit of Dawn David at 1, Dec. 15, 2006. Subsequently, on or about April 26, 2006, the Superintendent sent lease acceptance forms to the landowners, on which they could indicate their consent or lack of consent to a new 3-year lease with Appellant.⁷ The cover letter

⁶ Subsection 3715(c)(2)(A) provides:

The owners of a majority interest in any trust or restricted land are authorized to enter into an agricultural lease of the surface interest of a trust or restricted allotment, and such lease shall be binding upon the owners of the minority interests in such land if the terms of the lease provide such minority interests with not less than fair market value for such land.

⁷ BIA apparently sent lease acceptance forms to 22 of the owners holding trust interests, *see* Affidavit of Jordan, although the record does not include a copy of the correspondence to Patricia Campbell (1.35% interest), *compare* AR Tab 4 *with* AR Tab 5. BIA did not have addresses for two owners who collectively held a 19.9% interest. *See* Affidavit of Jordan. One additional owner, with a 2.3% ownership interest, was a minor on whose behalf BIA would grant or deny consent to the lease. *Id.*

accompanying the form indicated that if a landowner failed to respond, then that landowner's consent to the lease would be presumed.

In response, four landowners, who collectively owned a 43.8% interest in the Allotment, returned the forms indicating that they did not consent to a lease with Appellant. Five landowners, who collectively owned a 13% interest in the Allotment, returned the forms indicating their consent to a lease with Appellant at \$3,744 per year. Thirteen landowners, collectively owning a 15.7% interest, did not return the form, and therefore their consent was presumed. *See* Affidavit of Jordan at 2. Thus, among the twenty-two adult trust owners of the Allotment who were contacted, those representing a collective 43.8% ownership interest refused their consent to the lease, and those representing a 28.7% ownership interest gave or were presumed to give their consent.

In a letter dated July 28, 2006,⁸ the Superintendent wrote to Appellant, informing him that because BIA could not obtain the consent of a majority of the owners of the Allotment, BIA could not approve the lease. Appellant responded to the Superintendent, contending that

sometime ago a 3 year lease was negotiated on this land by you personal[ly] agreeing on such terms on the \$3,744 per year. We accepted the contract and your staff determined the price we had to pay, also I was told that by Mr. LaBelle agreeing to rent us the land it would be sufficient contingent on you agreeing to the terms, in fact you made us pay more [than that] which was agreed upon.

Letter from Appellant to Sisseton Agency, Aug. 5, 2006. The Superintendent treated Appellant's letter as an appeal, and forwarded it to the Regional Director, taking the position that "[t]here was no agreement in place." Memorandum from Superintendent to Regional Director, Aug. 11, 2006.

On August 28, 2006, the Regional Director issued her decision and upheld the Superintendent's refusal to issue a new lease to Appellant. The Regional Director stated:

We can not approve negotiated leases on trust or restricted property without the consent of a simple majority of the ownership interest, pursuant to the

⁸ As typewritten, the letter is dated "June," but in the administrative record, a copy of the letter has what appears to be a correction — handwritten — changing the date from "June" to "July."

American Indian Agricultural Resource[] Management Act of 1993, P.L. 103-177 (107 Stat. 2011).^{9]} The consent obtained from Duane LaBelle does not equal a simple majority. Your current lease will expire on September 30, 2006 and is not affected by this decision.

Decision at 1.

Appellant then appealed to the Board. Appellant filed an opening brief, the Regional Director filed an answer brief, and Appellant filed a reply brief. After briefing on the merits had concluded, BIA submitted additional evidence that landowners representing a majority interest in the allotment (i.e., not simply a greater relative share among those returning consent forms) had by then given their actual consent to lease the Allotment to another individual, James Nickeson. The Board then ordered additional briefing from the parties on whether this appeal had become moot. Appellant and the Regional Director filed briefs in response.

Appellant contends that the appeal is not moot because BIA is (and continues to be) bound by its original “agreement” that if Appellant would accept the rental price for a new lease (which he did), BIA would issue a new lease to him. Appellant contends that he negotiated a lease with Duane LaBelle, that BIA approved the lease subject only to Appellant agreeing to the adjusted rental amount, and that he remains legally entitled to have a lease issued to him, notwithstanding the landowners’ subsequent consent to a lease with Nickeson. The Regional Director argues that this appeal is moot because the consent of a majority landowner interest to lease to Nickeson now independently precludes BIA from approving or issuing a lease to Appellant, regardless of whether BIA’s original decision declining to issue a lease to Appellant was proper.

Discussion

I. Mootness

We agree with Appellant that the appeal is not moot. Mootness occurs when nothing turns on the outcome. *See Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 274 (2005). If Indian landowners consent to a lease, and then revoke that consent before BIA has approved the lease, that revocation of consent may render BIA’s approval authority moot because there is no longer any agreement between the landowners and the would-be lessee for BIA to approve. *See Brown v. Navajo Regional Director*, 41 IBIA

⁹ *See* 25 U.S.C. § 3715(c).

314, 318 (2005) (the Indian landowners remained free to revoke their consent any time prior to BIA's approval of a permit, thus rendering BIA's approval authority moot), and cases cited therein. In the present case, however, Appellant contends that he and LaBelle negotiated a lease and that BIA made an irrevocable commitment to approve and issue the new lease to him once he agreed to pay the rental rate of \$3,744 per year. Appellant contends that because the Superintendent's Letter did not inform him that BIA's approval and issuance of the lease would still be contingent upon receiving the consent of the owners of a majority interest in the Allotment, no such requirement could subsequently be imposed and the Superintendent's Letter constituted final acceptance and approval of a new lease if Appellant agreed to the \$3,744 annual rent. Thus, according to Appellant, consent of other landowners was not and is not relevant to his right to be awarded the lease, and any subsequent consent by the owners to lease to Nickeson is likewise without effect and irrelevant. This case therefore differs from *Brown* because in this case, Appellant contends that the necessary owner consent (LaBelle's consent) and BIA approval (the Superintendent's Letter) were present at the same time, and therefore once the Superintendent's Letter was issued, neither LaBelle's consent nor BIA's approval could be revoked.

For purposes of determining whether a case is moot, we accept Appellant's legal argument as true. We conclude that if the Board were to accept Appellant's legal argument, we could grant him relief by declaring that Appellant's acceptance of BIA's rental rate gave rise to an enforceable right to be issued the lease, and that the right is superior to any subsequently executed lease. Therefore, we conclude that the appeal is not moot.

II. The Merits: Is Appellant Entitled to a Lease for the Allotment?

Although we conclude that the appeal is not moot, we nonetheless reject Appellant's claim on the merits that he is entitled to be issued a lease for the Allotment. First, even assuming that LaBelle gave his individual consent to a lease with Appellant,¹⁰ that consent was not legally sufficient to grant a lease to Appellant. The regulations authorize the

¹⁰ There is no evidence in the record that LaBelle purported to or acted on behalf on any other landowners. With respect to LaBelle's individual consent, the only written evidence of his consent in the record is the consent form that he signed, in which he consented to "negotiate" a 3-year lease with Appellant at a rental rate of \$3,700 per year. No other terms or conditions for such a lease are described in the consent form (or elsewhere in the record), such as terms of payment, a bond requirement or waiver of a bond, and conservation practice requirements. Each of these subjects was addressed in the 5-year lease that Appellant previously held for the Allotment.

owners of a majority interest in fractionated land to grant an agricultural lease, subject to BIA approval. 25 C.F.R. § 162.207(c). No such right exists for owners of a minority interest, and it is undisputed that LaBelle only owned a 2.3% interest in the Allotment.¹¹ Appellant appears to rely on LaBelle's consent as sufficient because, Appellant contends, the Superintendent told him that was the case.¹² The regulations — and the statute, 25 U.S.C. § 3715(c)(2)(A) — are clearly to the contrary, and the Superintendent has no authority to waive either. *See State Bank of Eagle Butte v. Director, Office of Economic Development*, 41 IBIA 43, 51 (2005).¹³ Appellant also argues that in a separate case, BIA settled a dispute with him and agreed to issue a lease to him, allegedly without requiring landowner consent.

¹¹ The ownership records included in the administrative record for this case are not entirely clear. A summary of ownership interests in the Allotment, dated April 14, 2006, lists 26 owners, but does not list Duane LaBelle among those owners, even though he was the individual who initiated the new lease negotiations with Appellant. *See* AR Tab 4. A title status report for the Allotment, dated September 1, 2006, lists LaBelle as owning a 2.3% interest, but also lists a few individuals who are not on the April 14, 2006, list. *See* AR Tab 12. Because it is undisputed that LaBelle did not own a majority interest, these unexplained differences in the ownership records are not material to resolution of this appeal.

¹² In his reply brief, Appellant complains that he was not given any opportunity to review the consent forms returned by nine of the landowners to BIA. Appellant suggests that he was not allowed an opportunity to verify or rebut BIA's assertions concerning those consent forms, specifically the assertions that the owners of a majority interest in the Allotment did not consent to the lease and 43.8% of the ownership interests specifically disapproved the lease. *See* Reply Brief at 4-5. Appellant is mistaken. All nine of the consent forms that were returned to BIA are in the administrative record. When the Board scheduled briefing in this case, it notified Appellant that the record was available for his review and described procedures for obtaining copies. It was Appellant's responsibility to review the record or request copies, if he so chose.

As part of the Board's consideration of requests from the Regional Director to approve two one-year leases with Nickeson during the pendency of this appeal, the Board did grant a protective order with respect to the consent forms obtained by BIA with respect to those one-year leases. Those protective orders did not, however, affect Appellant's right to review the administrative record for the Regional Director's August 28, 2006, decision, nor are the consent forms for those interim leases relevant to our resolution of this appeal from the August 28, 2006, decision.

¹³ Of course, the Superintendent's Letter made no representation that BIA intended to waive the regulations — it was completely silent on the matter of landowner consent.

Appellant offers no proof that BIA did not obtain landowner consent in settling that previous dispute, but in any event a settlement in an unrelated dispute would have no precedential effect. Moreover, there is no language in the settlement agreement provided by Appellant that suggests that consent of a majority of ownership interests is *not* required as a matter of law when Indian owners decide to grant a lease.

There is no evidence in the record — nor does Appellant contend — that BIA represented to Appellant that it was acting on behalf of the owners of a majority interest of the Allotment to grant a lease to Appellant, which as we have noted is distinct from BIA’s review and approval of a lease as trustee. To the contrary, Appellant contends that he “negotiated the lease with Duane LaBelle in December 2005” and that BIA “accepted” the lease. Reply Brief at 5. In his reply brief, however, Appellant also argues that from April to August 2006, BIA had discretionary authority to grant the lease because the landowners were not able to agree during a three-month negotiating period. Appellant relies on 25 C.F.R. § 162.209(b), but that regulation only allows BIA to grant a lease after BIA provides Indian landowners “with written notice of [BIA’s] intent to grant a lease on their behalf.” The lease acceptance form that BIA sent to landowners only solicited their consent to, or disapproval of, a lease with Appellant; it did not state that BIA intended to grant a lease on their behalf.

We conclude that LaBelle’s consent was not sufficient to grant a lease to Appellant, and Appellant has not demonstrated that the owners of a majority interest in the Allotment consented to lease the Allotment to him. Therefore, we agree with the Regional Director that there was no legally sufficient lease agreement between Appellant and the landowners that BIA could approve.

Second, although Appellant makes much of the Superintendent’s failure to advise him that consent by the owners of a majority interest in the Allotment was necessary for granting the lease, any such failure was irrelevant. The Superintendent could not waive or disregard the regulations and statute. Moreover, the regulations impose no duty on the Superintendent to advise individuals who are negotiating with one or more Indian landowners that a majority interest of the owners is required for the owners to grant the lease and for BIA to approve it. Appellant, as a person doing business on Indian land, is charged with knowledge of the leasing regulations. *Jackson v. Portland Area Director*, 35 IBIA 197, 201 (2000); see *Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 212 (2006). Appellant’s argument presumes that the Superintendent had an affirmative duty to advise him that additional landowner consent would be required for a lease, but that is not the case. Thus, we reject Appellant’s argument that the Superintendent’s failure to advise him of the landowner consent requirement for Indian leases precluded BIA from conditioning approval or issuance of a lease on such consent.

Third, we disagree with Appellant that the Superintendent's Letter constituted an exercise of the Superintendent's "authority to approve a 3-year lease." Reply Brief at 4. The Superintendent's Letter simply advised Appellant that BIA had determined that the rental price for a 3-year lease "should be \$3,744," and asked Appellant if he agreed to that rate. BIA's statement that the rent "should be \$3,744" does not constitute a written and irrevocable commitment from BIA to approve or issue the lease if Appellant agreed to that rental rate. Instead, the letter indicates that BIA, acting in its capacity as trustee, had determined that \$3,744 was fair annual rent for a 3-year lease. BIA's lease form specifically includes a line for BIA's signature to formally approve the lease, and we will not presume, as Appellant would have us do, that BIA's communication regarding the acceptability of a rental rate constitutes BIA's formal and final approval of a proposed lease. *Cf. Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 212 (2006) (the only clear "agreement" purportedly approved by the Superintendent was on a single subject, and did not reflect any other terms of a sale). Appellant contends that the Superintendent also orally agreed to approve the lease, but provides no legal authority for the proposition that such an oral representation would be enforceable, and in any event Appellant's characterization of that oral consent provides even less detail than the Superintendent's Letter, on which Appellant primarily relies in arguing that BIA approved the lease.

Conclusion

We conclude that (1) LaBelle's consent, as a minority interest owner in the Allotment, was insufficient to grant a lease to Appellant; (2) the fact that BIA did not advise Appellant that the consent of the owners of a majority interest in the Allotment was required did not preclude BIA from applying that requirement and declining to issue a lease to Appellant in the absence of majority ownership consent; and (3) the Superintendent's April 10, 2006, letter was not a commitment by the Superintendent to grant, approve, or issue a lease to him for the Allotment.

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 August 28, 2006, decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Maria Lurie
Acting Administrative Judge