



## INTERIOR BOARD OF INDIAN APPEALS

Bonnie Matt v. Rocky Mountain Regional Director, Bureau of Indian Affairs

53 IBIA 259 (07/13/2011)

Related Board Case:

54 IBIA 263



## 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

BONNIE MATT,	)	Order Affirming Decision in Part,
Appellant,	)	Vacating Decision in Part, and
	)	Remanding
v.	)	
	)	
ROCKY MOUNTAIN REGIONAL	)	Docket No. IBIA 09-082
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	July 13, 2011

The Board of Indian Appeals (Board) vacates the March 16, 2009, decision (March 16 Decision) of the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he affirmed a decision of the Superintendent, Blackfeet Agency, BIA (Superintendent), finding that there is no approved and recorded Grant of Easement for Right-of-Way for legal access to Homesite Lease #14-20-0251-4501 across Allotment No. 1747-G on the Blackfeet Reservation.<sup>1</sup> We affirm the Regional Director's conclusion that a form signed by Appellant's mother-in-law, Pearl Mutch Matt (Pearl), does not grant Appellant an easement across Allotment No. 1747-G. But based upon the record provided us and BIA's limited responses to the Board's orders, we conclude that BIA's finding that Appellant lacks a duly approved and recorded easement across Allotment No. 1747-G is not supported by the record because the record contains documents that suggest that an easement may exist and the Regional Director did not explain or address these documents. Therefore, we vacate the Regional Director's conclusion that "our records indicate there is not an approved and recorded Grant of Easement for Right-of-Way for legal access" to Appellant's homesite, and remand this matter to the Regional Director for further consideration consistent with our decision.

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<sup>1</sup> Homesite Lease #14-20-0251-4501 is located on tribal tract T1745, which is adjacent to Allotment No. 1747-G.

## Facts

### 1. Background

In 1975, the Blackfeet Tribe (Tribe) leased a small portion of land, consisting of 1.371 acres and located on Allotment No. 1745 (originally allotted to Three Bear), to the Blackfeet Indian Housing Authority (Housing Authority) for a term of 25 years with an automatic 25-year renewal provision. Lease No. 14-20-0251-4501 (Administrative Record (AR), Tab 5).<sup>2</sup> The lease “granted” egress and ingress to the homesite, but did not identify any specific route to the homesite. *Id.* Also in or about 1975, the Housing Authority, as permitted under its lease with the Tribe, sublet the homesite to Appellant and her husband for the same term as the primary lease, i.e. for an initial term of 25 years with an automatic renewal for an additional 25 years. Nothing in the sublet agreement addresses the means of accessing the homesite. In 1996, the Housing Authority assigned all of its rights and interest in Lease No. 14-20-0251-4501 to Appellant and her husband.<sup>3</sup>

Appellant asserts that for the past 35 years the primary, if not sole, means of access to and from Appellant’s homesite is a road (access road) that lies across neighboring Allotment No. 1747-G to Highway 89, which is the nearest public road. Allotment No. 1747-G is owned by Chester (Chet) Gladstone, Jr., who purchased it in 2002. Appellant maintains that her mother-in-law, Pearl (now deceased), once owned what is now Allotment No. 1747-G and granted Appellant and her husband, Jerry Matt (also now deceased), the easement that she has been using to access her homesite all these years.

The present dispute apparently arose in September 2008 when Appellant erected a mailbox at the end of the access road at Highway 89. Gladstone took exception to the presence of the mailbox, and wrote a letter to the Superintendent of BIA’s Blackfeet Agency requesting that BIA inform Appellant that Gladstone would no longer permit her to use the access road. Thereafter, relations between the neighbors deteriorated. After a meeting with Appellant, the Superintendent wrote Appellant on November 21, 2008, and informed her

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<sup>2</sup> The allotment where Appellant’s homesite is located is now designated on BIA’s land records as Allotment No. 1745-B. *See* Title Status Report, Allotment No. 1745-B (Oct. 1, 2008) (AR, Tab 5). The entire allotment consists of 160 acres. *Id.*

<sup>3</sup> According to the Regional Director’s March 16 Decision, the reassignment of Lease No. 14-20-0251-4501 from the Housing Authority to Appellant had not yet been approved by or recorded with BIA.

that BIA did not have “an approved and recorded Grant of Easement for Right-of-Way for legal access to [Appellant’s] Homesite Lease #14-20-0251-4501 from U.S. Highway 89.” Appellant sought reconsideration from the Superintendent, in which she stated that she was unaware that the easement was not recorded, and explained that she has an easement by prescription. The Superintendent responded by letter dated November 26, 2008, and reaffirmed his November 21 decision. He also stated that BIA does not recognize easements by prescription.

Appellant appealed the Superintendent’s decision to the Regional Director. She asserted that an undated document entitled “Consent of Owner to Grant of Right of Way, Perpetual Ingress and Egress Easement” (Consent Form) signed by Pearl as the sole owner of Allotment No. 3175, was part of Appellant’s lease “package” with the Housing Authority and “was approved and recorded on January 27, 1976, [by BIA].” Statement of Reasons, Dec. 9, 2008, at 1 (AR, Tab 8). She also appealed the Superintendent’s determination that BIA did not recognize prescriptive easements. In support, she provided a legal opinion authored in 1982 by then-Associate Solicitor Lawrence G. Jensen in which he responded to an inquiry concerning access to Indian lands that are completely surrounded by non-Indian lands. Appellant also provided a copy of the decision entered in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980). Finally, she enclosed copies of pleadings filed in her lawsuit against Gladstone, which was filed in Blackfeet Tribal Court. *Matt v. Gladstone*, No. 2008 CA 266 (Blackfeet Trib. Ct.). Among the documents is a permanent injunction issued by the Tribal Court on December 4, 2008, against Gladstone that prohibits him from barricading the access road and barring Appellant from using it, and grants Appellant the right to utilize the road.

On March 16, 2009, the Regional Director affirmed the Superintendent’s decision. He reiterated that BIA’s records did not contain an approved and recorded easement for access to Appellant’s homesite. He stated that the terms of the Consent Form signed by Pearl did not grant an easement across Allotment No. 1747-G. He also explained that even though Appellant’s lease granted her ingress and egress, this “grant” did not give her any right to cross Allotment No. 1747-G. Finally, he rejected her arguments concerning a prescriptive easement, citing *United States v. Abtanum Irrigation Dist.*, 236 F.2d 321, 334 (9th Cir. 1956), *United States v. Clarke*, 529 F.2d 984, 986 (9th Cir. 1976), *Imperial Granite Company v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991).

This appeal followed.

## 2. The Parties' Positions Before the Board

Appellant asserts that Pearl originally owned Allotment No. 1747 in its entirety before selling off various parcels, including No. 1747-G, which she sold to her daughter, Pauline Matt Peterson. Appellant maintains that Allotment No. 1747-G lies between the allotment on which her homesite is located and Highway 89, and that her homesite on Allotment T1745-B is landlocked. Appellant adamantly maintains that when Pearl owned the land now comprising Allotment No. 1747-G, she granted Appellant and her husband (Pearl's son) a perpetual right-of-way across Allotment No. 1747-G. She claims that BIA maintains that the easement signed by Pearl "is for Allotment # 1747-G which is not where [Appellant's] Homesite is located." Statement of Reasons to the Board, Apr. 15, 2009, at 1. Appellant continues to assert that she has a prescriptive easement in the absence of a BIA-approved and recorded easement.

In his answer brief, the Regional Director addresses only the purported right-of-way from Pearl. First, he explains that the right-of-way on which Appellant relies is a consent form that was signed by Pearl, not a grant of easement that has been approved by BIA. In addition, the Regional Director explains that the Consent Form signed by Pearl gave consent for a right-of-way across part of Section 11 and across the NW $\frac{1}{4}$  SW $\frac{1}{4}$  of Section 12, both in T. 32 N., R. 12 W. of the Principal Meridian in Montana. In contrast, the Regional Director points out that the road being used by Appellant crosses the S $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 12, which is where Allotment No. 1747-G is located. The Regional Director does not reiterate his determination that BIA has no record of an approved easement across Allotment No. 1747-G, and he does not address Appellant's argument concerning a prescriptive easement.

No reply brief was filed. When the matter came before the Board for decision, the Board requested the parties and Gladstone to inform the Board whether the appeal may have become moot through, e.g., an agreement for Appellant to use the road across Allotment No. 1747-G or Appellant's use of a new road to and from her homesite. The Board also requested information concerning any events in Tribal Court subsequent to the Tribal Court's December 4 injunction. Appellant responded and asserted that while she has been able to use the road across Allotment No. 1747-G unimpeded, the matter is not moot because she needs assurance for herself and for her family that they have a legal entitlement to use the road for ingress and egress to her homesite. She reported that there have been no events in Tribal Court following the December 4 injunction. BIA responded that it was not aware of any subsequent developments that would moot the appeal. Gladstone responded, and averred that he is awaiting the Board's decision before taking further actions with respect to his allotment. He did not elaborate.

### 3. Record

Among the documents that appear in the administrative record are the following:

1. An incomplete survey map, dated September 1974, that appears to be a map of Appellant's homesite.<sup>4</sup> See AR, Tab 5. Out of the upper right hand corner of the homesite, a line stretches to Highway 89. This line is marked "40' Road Easement," which appears to refer to the width of the easement, and is described as being 2,274.91 feet long. The line marked "40' Road Easement" appears to cross what is now Allotment No. 1747-G.<sup>5</sup> This partial map appears in the record behind the lease documents for Appellant's homesite, and may be part of the lease package.<sup>6</sup>

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<sup>4</sup> The legal description on the second page of the map matches the legal description found in Appellant's homesite lease.

<sup>5</sup> To the right of the line marked "40' Road Easement" appears a circle divided into quarters. Inside the upper lefthand quadrant of the circle is written "Joseph Three Bears 1747;" inside the lower lefthand quadrant is written "Three Bears 1745." The writing in the remaining two quadrants is not readable on the Board's copy.

<sup>6</sup> Because of the way the record is assembled, we are unable to determine whether this map is attached to and recorded as a part of Appellant's Lease No. 14-20-0251-4501. Moreover, only part of the map was included in the administrative record. The documents under Tab 5 of the record purport to be the administrative record provided to the Regional Director by the Superintendent. The Superintendent's record includes a table of contents that identifies 14 documents. But none of these documents are separately tabbed or stapled, and thus we are unable to determine, for example, what paperwork is filed with the lease. In addition, several documents appear under Tab 5 that are not identified in his table of contents, e.g., title status reports and maps.

BIA must take greater care in assembling the record. Complete copies of maps (and documents) should be provided. Documents should be tabbed or separated according to the table of contents so that it can be determined, for example, what documents were recorded together as a package, what documents comprise the actual record provided to the Regional Office by the Agency office, and what documents accompanied correspondence and statements of reason.

2. The Title Status Report (TSR)<sup>7</sup> for Allotment No. 1747-G, which identifies two potentially relevant encumbrances. The first is identified as Document No. 24157. It is a “miscellaneous” encumbrance that is “perpetual” and “surface only.” The second is Document No. 24237, and it, too, is identified as a “miscellaneous” encumbrance that is “perpetual” and “surface only.” The “encumbrance holders” are identified by two separate identification numbers that, according to ProTrac,<sup>8</sup> are associated with Pearl (Document No. 24157) and with Ronald Franklin Peterson (Ronald) (Document No. 24237). Appellant asserts that Ronald is married to Pearl’s daughter, Pauline. Opening Brief at 2.

### Discussion

Appellant strenuously maintains that her mother-in-law, Pearl, granted a road easement across what is now Allotment No. 1747-G to Appellant and her husband in or about 1975 when they obtained their homesite lease on what is now Allotment No. T1745-B; BIA represents that it has no record of a road easement across Allotment No. 1747-G. Alternatively, Appellant maintains that she acquired an easement by prescription because her land is otherwise land-locked. We affirm the Regional Director’s conclusion that the Consent Form included in the present record provides Appellant with no rights to cross Allotment No. 1747-G. But we find that the Regional Director’s decision that BIA’s records do not “indicate” the existence of an approved and recorded easement is not supported by the record that is presently before us because (1) we cannot determine how the Regional Director determined that there is no approved easement benefitting Appellant that crosses Allotment No. 1747-G, and (2) the record, such as it is, supports the contrary, i.e., that a road easement may exist across Allotment No. 1747-G. Therefore, we vacate the Regional Director’s decision on this issue, and we remand this matter for further consideration.

#### 1. Standard of Review

We review the Regional Director’s factual determinations in light of the administrative record and will uphold the determination if it is supported by the record, comports with the law, and is not arbitrary or capricious. *Estes v. Acting Great Plains*

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<sup>7</sup> The TSR is a computer-generated document that reflects information maintained in BIA’s records concerning a tract of Indian trust land. *See* 25 C.F.R. § 150.2(o) (definition of “title status report”).

<sup>8</sup> ProTrac is the name of the computer system utilized by BIA and by the Office of Hearings and Appeals (OHA) to track probate proceedings administered by OHA.

*Regional Director*, 50 IBIA 110, 115 (2009). We review de novo the sufficiency of the evidence in support of the Regional Director’s decision. *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011). If the administrative record fails to support the decision, we will not substitute our judgment for the Regional Director’s but will vacate his decision and remand the matter for further proceedings. *Hawkey v. Acting Northwest Regional Director*, 52 IBIA 86, 89-90 (2010).

## 2. The Consent Form Signed by Pearl

Appellant continues to maintain that the Consent Form executed by Pearl entitles Appellant to use the access road. We agree with the Regional Director that *this* particular document does not grant Appellant any easement rights across Allotment No. 1747-G. As the Regional Director explains, this document purports to consent to a perpetual road easement consisting of an existing trail or road *but* neither the legal description of the property where the road reportedly exists nor the sketch of the road that appears on the Consent Form involves any portion of Allotment No. 1747, let alone Allotment No. 1747-G. Instead, the purported easement exists entirely on Allotment No. 1745. For this reason alone the Consent Form cannot be said to grant a right of easement across Allotment No. 1747-G.<sup>9</sup> Therefore, we affirm the Regional Director’s conclusion that the Consent Form is irrelevant to the issue of an easement across Allotment No. 1747-G.

## 3. The Existence of a Road Easement Across Allotment No. 1747-G

Appellant is adamant that a “Right of Way was generated by a BIA employee on a BIA form and *recorded* and stamped by BIA.” Opening Brief at 2. After Appellant moved to Allotment No. T1745-B, she explains that Pearl began selling her land, including the parcel that became Allotment No. 1747-G. Appellant asserts that Pearl first sold Allotment No. 1747-G to her daughter, Pauline, and Pauline’s husband, Ronald. She says the allotment was resold twice more, culminating in the sale to Gladstone in or about 2002.

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<sup>9</sup> In addition, as the Regional Director points out, the document is not a grant of easement but is a *consent* to a grant of easement, as its title states. Pursuant to 25 C.F.R. § 161.3(b) (1975), now found at *id.* § 169.3(b), “no right of way shall be granted over and across individually-owned lands . . . without the prior written consent of the owner . . . of such lands and the approval of the Secretary [of the Interior].” The actual grant of easement is issued by BIA only after the appropriate consent is obtained pursuant to § 169.3 and additional regulatory requirements are met. *See id.* § 161.15 (1975), now found at *id.* § 169.15.

Appellant's assertions find some support in the record. First, the TSR for Allotment No. 1747-G lists perpetual surface encumbrances apparently held by Pearl and by Ronald that may reserve easements for purposes of crossing Allotment No. 1747-G. And the survey map for Appellant's homesite identifies a road easement that appears to lie across what is now Allotment No. 1747-G. Of course, without further research and documentation by BIA, we cannot say that an approved and recorded road easement in fact exists for Appellant's use across Allotment No. 1747-G. We emphasize that our decision is limited to whether the record supports the Regional Director's determination that the "records indicate there is not an approved and recorded Grant of Easement . . . for legal access to [Appellant's homesite]." March 16 Decision at 1. And because of the above entries in the record and the absence of any explanation from the Regional Director concerning these entries, we are compelled to find that the record does not support the Regional Director's decision, for which reason we vacate his decision and remand this matter. On remand, BIA should research its records to determine why the survey map reflects an easement across what appears to be Allotment No. 1747-G and examine the documents that, according to the TSR for Allotment No. 1747-G, appear to repose perpetual surface encumbrances in favor of Pearl and Ronald to determine whether, in fact, BIA has approved and recorded a road easement that benefits Appellant's homesite.

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 in part, vacates in part, and remands the Regional Director's March 16, 2009, decision for further consideration consistent with our decision.<sup>10</sup>

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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<sup>10</sup> Given our disposition of this appeal, we need not reach Appellant's alternative argument concerning a prescriptive easement across Allotment No. 1747-G.