



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
 INTERIOR BOARD OF INDIAN APPEALS
 801 NORTH QUINCY STREET
 SUITE 300
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PATRICK ADAKAI,
 Appellant,

v.

ACTING NAVAJO REGIONAL
 DIRECTOR, BUREAU OF INDIAN
 AFFAIRS,
 Appellee.

) Order Vacating Decision and
) Remanding

) Docket No. IBLA 11-001

) January 8, 2013

Patrick Adakai (Appellant) appealed to the Board of Indian Appeals (Board) from the August 2, 2010, approval by the Acting Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA), of a 20-year renewal of a right-of-way for an oil pipeline crossing Navajo Allotment No. 2073 (Allotment), in which Appellant owns an interest. The Regional Director granted the renewal of the right-of-way to Western Refining Southwest, Inc. (Western), after finding that owners who collectively owned a majority (60.26%) of the undivided interests in the Allotment had consented to the renewal. Appellant challenges the process for obtaining owner consent as defective and contends that the compensation paid for the right-of-way is less than fair market value.

We vacate the decision and remand the matter because one of the owners whose consent was relied upon by BIA in finding majority consent owned only a life estate in the Allotment; the remaindermen did not consent. Without counting the life estate holder's interest (42.5%), the majority consent requirement was not satisfied. We conclude that it was arbitrary and capricious for BIA to grant an unqualified 20-year renewal of the right-of-way by relying on the consent of the life estate owner without also obtaining the consent of the remaindermen, or requiring Western to procure additional consents to achieve a majority of the interests.

Background

I. Statutory Framework

BIA, exercising the authority of the Secretary of the Interior, has the authority to grant oil pipeline rights-of-way across allotted trust lands. 25 U.S.C. § 321; *see also* 25 C.F.R. Part 169. BIA may renew a right-of-way across an allotment without all of the

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individual landowners' consents when "[t]he land is owned by more than one person, and the owner or owners of a majority of the interests therein consent to the grant." 25 C.F.R. § 169.3(c)(2), *incorporated in* 25 C.F.R. § 169.19. Unless properly waived by the landowners and approved by BIA, the landowners must receive no less than fair market value for any grant or renewal of a right-of-way across trust land. 25 C.F.R. § 169.12. BIA must provide the landowners with an appraisal of the right-of-way to assist them in negotiations with the applicant for the right-of-way or its renewal. *Id.*

II. Factual Background

On June 22, 2009, Western submitted an application for a 20-year renewal of a right-of-way for an existing oil pipeline that crosses 43 Navajo allotments, including the Allotment. Administrative Record (AR) at 129.¹ Western's existing right-of-way was due to expire on March 31, 2010. *Id.* Between April and October 2008, Western's representatives had collected consents from several owners of undivided interests in the Allotment, apparently using a BIA title status report that listed the owners of the Allotment and their fractional interests. *See* AR at 342-45 (Title Status Report (TSR) dated Jan. 16, 2008). Western provided BIA with consent forms signed by eight landowners, which reflected the owners' consent to Western's offer of \$40 per rod of pipeline. *See id.* at 317-18, 320, 322-24, 328, 341.² BIA calculated the owners' consent to constitute, collectively, 60.26% of the undivided interests in the Allotment. *Id.* at 305. Of these eight consenting owners, five held 0.38% undivided interests, one held a 1.67% undivided interest, one held a 14.17% undivided interest, and one held a 42.5% undivided interest. The TSR lists the 42.5%-interest owner as a "special interest holder," which means that he holds a life estate in the Allotment. AR at 344; Answer Br. at 2.

The Office of the Special Trustee for American Indians (OST) commissioned an appraisal from a private appraiser of the fair market value of the right-of-way renewal, pursuant to 25 C.F.R. § 169.12. *See* AR at 288. The appraiser found the fair market value of the 20-year right-of-way on the Allotment to be \$2650. *Id.* at 304. OST reviewed the

¹ The Regional Director's administrative record is organized with tabs and with each page Bates-stamped with an "ADAK" prefix and a page number. Our citations to the record use the Bates number without the prefix.

² A rod is a unit of distance equal to 16½ feet. The length of the right-of-way crossing the Allotment is 166.41 rods, or 0.52 mile. AR at 123A. The grant renewing the right-of-way, the appraisal, and the consent forms, describe the right-of-way as 60 feet in width, *see id.* at 123A, 296, and 307, but the environmental assessment documents in the record describe it as 40 feet in width, *see id.* at 183-87, 193, and 226. On remand, if BIA again decides to renew the right-of-way, it must address this apparent discrepancy.

appraisal and approved it on November 2, 2009. *Id.* at 160-178. BIA issued notices to 19 of the 33 listed owners of the Allotment, advising them of the appraised fair market value, of Western's offer, and of the owner's share of the proceeds based on his or her ownership interest. *Id.* at 141-159. The notices also advised the recipients of their right to object to Western's offer, which was approximately 2.5 times the appraised fair market value. *See id.* (appraised fair market value was \$2650; Western's offer was \$6656.40 (\$40/rod x 166.41 rods = \$6656.40)). Appellant was among the owners to whom a notice letter was sent.³ The record does not contain any evidence that notice letters were sent to the life tenant or to the eight remaindermen for the interest held by the life tenant.

After reviewing Western's renewal application, the Acting Regional Realty Officer for the Navajo Regional Office recommended its approval. AR at 127-28. She stated that "[b]ased on the calculated consent percentage," there was sufficient consent to grant the renewal. *Id.* at 128. The Regional Director granted the renewal on August 2, 2010, and sent notice to 32 of the (by then) 46 landowners, including 21 of the 33 landowners listed on the 2008 TSR. Grant of Renewal, Aug. 2, 2010 (AR at 123-24 & 123A); Notices of Decision, Sept. 3, 2010 (AR at 28-119); *see also* TSR dated Sept. 22, 2010 (copy added to record). None of the remaindermen for the 42.5% interest were sent notice of the approval.

Appellant timely appealed the Regional Director's decision to the Board and filed a statement of reasons in support of his appeal. Appellant filed an opening brief, as did another owner of the Allotment, Justin Adakai.⁴ The Regional Director filed an answer brief, and Appellant filed a reply.

On appeal, Appellant questions the procedures by which consents for the right-of-way renewal were obtained from the landowners, including whether the landowners were provided adequate information and assistance in understanding the process and their rights. Appellant also contends that, in his opinion, Western's offer was "very low," arguing that 25 C.F.R. § 169.12 requires that consideration for a right-of-way "shall be not less than but

³ Appellant contends that he personally contacted BIA to be placed on a list of owners who wished to negotiate with Western over the compensation. Opening Br. at 4. BIA's telephone call log does not reflect any calls from Appellant. *See* AR at 140.

⁴ Before scheduling briefing, the Board also received 14 statements, each signed by an owner of the Allotment, expressing general support for Appellant's appeal. Justin Adakai's "opening brief" in support of Appellant's appeal was titled "Interested Parties Opening Brief," but it was only signed by Justin.

not limited to the fair market value of the rights granted, plus severance damages, if any.” Statement of Reasons at 2, 3.⁵

In response, the Regional Director contends that the documentation of landowner consents in the present case was sufficient for BIA to grant the right-of-way renewal. The Regional Director argues that while only eight owners provided written consent, their collective ownership interest exceeded 60% of the ownership of the Allotment. Addressing the consent granted by the life estate holder, the Regional Director states that the life estate holder “conveyed his undivided interest in the allotment to his eight (8) children but retained his authority and the income from the land holdings for the remainder of his life.” Answer Br. at 6 n.4. The Regional Director did not submit to the Board a copy of the instrument of conveyance from the life estate holder to his children. In addition to defending the sufficiency of the owner consent relied upon in granting the right-of-way renewal, the Regional Director defends the compensation as meeting or exceeding the requirement of fair market value. The Regional Director also contends that certain recommendations made by Appellant for improving the consent process are outside the scope of this appeal and not within the authority of the Board to grant.

Discussion

I. Standard of Review

The Board will review a regional director’s decision to determine whether it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *Nemont Telephone Cooperative, Inc. v. Acting Rocky Mountain Regional Director*, 55 IBIA 75, 79 (2012). We review legal determinations and the sufficiency of the evidence *de novo*. *Id.* An appellant bears the burden of showing error in a regional director’s decision. *Id.* If we find that a regional director has erred in exercising his discretion, we will not substitute our judgment for the regional director’s, but will remand the matter for further consideration. *Id.* at 79-80.

⁵ Appellant argues that “other landowners” have secured higher compensation for rights-of-way, although he does not directly challenge OST’s appraisal or provide evidence to rebut that appraisal. It is not entirely clear whether Appellant contends that the value of the right-of-way, as appraised by OST, is below fair market value, or that the landowners should attempt to negotiate compensation that is above fair market value. See Appellant’s Opening Br., Attach. dated Dec. 26, 2010, at 3 (suggesting that landowners might negotiate compensation that is “100-200 times” OST’s appraised fair market value).

While the Board's scope of review is usually limited to the issues raised before the official whose decision is under review, we may act to correct manifest injustice or error where appropriate. 43 C.F.R. § 4.318; *see also, e.g., Cloud v. Alaska Regional Director*, 50 IBIA 262, 269 (2009).

II. BIA Erred in Finding that a Majority of the Interest Owners Consented to the Right-of-Way Renewal

We resolve this appeal based on a single issue: the sufficiency of the owners' consent relied upon by BIA in granting the right-of-way renewal. Although Appellant did not squarely present the issue in his briefs, the Regional Director's answer brief addressed it by defending the sufficiency of the documentation relied upon by BIA. Even if that were not the case, the Board would have authority to address the issue to correct manifest error. *See* 43 C.F.R. § 4.318.

The Regional Director relied upon the consent of an owner of a 42.5% interest in the Allotment in finding that landowners holding a majority of the undivided interests had consented to renewal of the right-of-way for the compensation offered by Western. But that owner held only a life estate interest, and thus the authority he retained over the interest was limited to his lifetime. In the absence of consent from the remaindermen of the interest, it was arbitrary and capricious for the Regional Director to grant an unqualified 20-year right-of-way renewal.

The regulations governing rights-of-way across Indian trust lands do not address the effect of consent by the owner of a life estate, *see* 25 C.F.R. Part 169, and thus we apply general principles of property law. "A person holding an estate less than fee simple may create an easement only within the terms of his or her estate." 25 Am. Jur. 2d Easements and Licenses § 11 (2012). As relevant here, the owner of property whose interest is limited by the duration of his or her life may only grant, or give consent to, a right-of-way for the duration of his or her life. *See* Answer Br. at 6 n.4 (life estate holder "retained his authority and the income . . . for the remainder of his life." Emphasis added.).⁶ The holder of a life

⁶ It is possible that the Regional Director intended the clause "for the remainder of his life" to refer only to the life estate holder's retention of "income," and that the Regional Director contends that the life estate holder "retained his authority" to encumber the estate beyond the duration of his life, thus retaining authority that otherwise would vest in the remaindermen when the life estate was created. But if that is what the Regional Director intended, he provided no support for that proposition, e.g., a copy of the conveyance instrument in which the life estate holder retained such authority. Nor is it clear how the retention of such authority would be consistent with the creation of a life estate.

estate cannot bind, nor consent on behalf of, the owner of a remainder interest because that interest is not "within the terms of" a life estate interest. 25 Am. Jur. 2d Easements and Licenses § 11.

It may well be that the holder of the 42.5% life estate interest in the Allotment in the present case may live for, or even well beyond, the next 20 years, but that is not a certainty, and is not the legally relevant issue.⁷ What is legally relevant, in this appeal, is that the life estate holder lacked authority to consent, on behalf of the full 42.5% interest, to a right-of-way renewal that was granted by BIA for a fixed *and unqualified* duration of 20 years. Only with the consent of the remaindermen could there be sufficient consent on behalf of that 42.5% interest for a 20-year right-of-way. And in the absence of that consent, it was arbitrary and capricious for the Regional Director to grant a right-of-way renewal for a 20-year term, because the other consents obtained by Western did not constitute a majority of the interests in the Allotment. *See also Enemy Hunter v. Acting Rocky Mountain Regional Director*, 51 IBIA 322, 327 (2010) ("There is good reason for BIA to require the consent of the remaindermen . . .").⁸

III. Other Issues Raised by Appellant

Because we resolve the appeal based on the numerical insufficiency of the consent obtained by Western, we decline to address the other issues raised by Appellant in this appeal, and instead leave them for consideration by the Regional Director on remand. Those issues include, but are not limited to, Appellant's assertion that the compensation offered by Western was below fair market value. Considering the fact that notice of the appraised value was only sent to some of the landowners, and that ownership has changed since the decision was issued, the Regional Director on remand shall give notice to all of the owners of the Allotment, whose whereabouts can reasonably be determined, of the

⁷ In 2008, when his consent was obtained, the life estate holder was 80 years old.

⁸ *Enemy Hunter* involved the application of 25 C.F.R. § 162.102(b) (2010), which was promulgated well after the right-of-way regulations, and which expressly addressed the life estate/remainderman issue by allowing life tenants to enter into leases for less than one year without the consent of the remaindermen, but requiring the remaindermen's consent for leases of a longer duration. Although Part 162 is not applicable to rights-of-way, our decision is consistent with § 162.102(b), and with the recently revised BIA leasing regulations. *See* Final Rule, 77 Fed. Reg. 72440, 72469 (Dec. 5, 2012) (§ 162.004) (incorporating rule that life tenant's authority is limited to leasing his or her own interest).

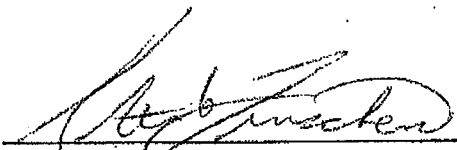
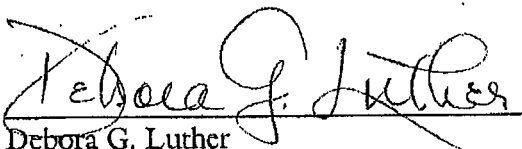
proposed right-of-way renewal and shall afford them an opportunity to offer evidence and/or arguments regarding fair market value.⁹

Appellant also contends in this appeal that some of the consents obtained (including that of the life estate holder) were not valid because the landowners speak or write little or no English, and were not provided adequate information and explanation to make an informed decision. Although Appellant lacks standing to assert the interests of other owners, *Hartman v. Acting Great Plains Regional Director*, 50 IBIA 138, 148 (2009), it would be advisable for BIA to consider and address, on remand, issues and concerns raised by Appellant that could give rise to a future challenge, if additional consents are obtained and if BIA again decides to grant the right-of-way renewal across the Allotment.

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 vacates the Regional Director's August 2, 2010, decision, and remands the matter for further proceedings consistent with this order.

I concur:


Steven K. Einscheid
Chief Administrative Judge
Debora G. Luther
Administrative Judge

⁹ We note that the record only shows that BIA mailed notices of the appraisal, of Western's offer, and of the right to object, to some, but not all, of the landowners. The fact that some landowners' whereabouts may be unknown does not appear to explain the omission of certain landowners from the notice letters. See *supra* at 106.

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