



## INTERIOR BOARD OF INDIAN APPEALS

Fort Berthold Land & Livestock Ass'n v. Aberdeen Area Director,  
Bureau of Indian Affairs

8 IBIA 90 (06/06/1980)

Also published at 87 Interior Decisions 201

Disapproved in part:  
35 IBIA 266

Earlier judicial review of this case:  
Remanded, *Danks v. Fields*, Civil No. A4-80-39 (D.N.D. Mar. 31, 1980)

Related case:  
8 IBIA 230  
Summary judgment for defendants, *Danks v. Fields*, Civil No. A4-80-39  
(D.N.D.)  
Reversed and remanded, 696 F.2d 572 (8th Cir. 1982)  
Stipulated Judgment, *Danks v. Brockie*, Civil No. A4-80-39  
(D.N.D. Apr. 2, 1984)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

## ADMINISTRATIVE APPEAL OF FORT BERTHOLD LAND AND LIVESTOCK ASSOCIATION

v.

AREA DIRECTOR, ABERDEEN AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 80-17-A

Decided June 6, 1980

Appeal from decision of Area Director raising grazing fees.

Sustained in part; referred for hearing.

1. Indian Lands: Grazing: Generally--Indian Lands: Grazing: Rental Rates

The Bureau's decision to increase grazing fees for the fourth year of the permit period is not inconsistent with the general regulatory provisions of 25 CFR Part 151, which are incorporated by reference in the permit.

2. Indian Lands: Grazing: Generally--Indian Lands: Grazing: Rental Rates

The plain wording of the grazing permit does not convey the stipulation that new fees may be pronounced by August 1, 1979, but not thereafter. As there is no legal requirement that permittees be given prior notice of grazing fee increases, it is not unreasonable to conclude that the August 1

date cited in the permit refers merely to a goal or objective for the completion of fee reevaluations.

3. Indian Lands: Grazing: Generally--Indian Lands: Grazing: Appeals--Indian Lands: Grazing: Rental Rates

The appellant association and members thereof have not been denied substantive due process through the readjustment of a grazing permit which specifically provides for readjustment. Appellant's procedural due process rights are secured through the opportunity to appeal the Area Director's action to the Commissioner and the Board of Indian Appeals pursuant to the provisions of 25 CFR Part 2 and 43 CFR 4.350-4.369.

APPEARANCES: Jon R. Keriam, Esq., Minot, North Dakota, for appellant; Wallace G. Dunker, Esq., Office of the Field Solicitor, Aberdeen, South Dakota, for respondent; Austin H. Gillette for the Three Affiliated Tribes, Fort Berthold Reservation.

#### OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Appellant in this case is the Fort Berthold Land and Livestock Association, a nonprofit corporation chartered by the Secretary of the Interior as an Indian Association. The Association, composed primarily of Indian ranchers, has appealed from an action of the Aberdeen Area Director, Bureau of Indian Affairs, dated October 4, 1979, raising the minimum acceptable grazing rental rate on the Fort Berthold Indian Reservation.

Appeal of the Area Director's action was before the Commissioner of Indian Affairs until February 1, 1980. On that date, the Commissioner referred the matter to the Board of Indian Appeals for review and final decision pursuant to the provisions of 25 CFR 2.19(b). <sup>1/</sup> By order dated February 13, 1980, the Board referred the appeal to the Hearings Division of the Office of Hearings and Appeals for a fact-finding hearing and recommended decision by an Administrative Law Judge in accordance with the provisions of 43 CFR 4.361-4.367.

On April 11, 1980, Administrative Law Judge Keith L. Burrowes filed a recommended decision with the Board. Based on his review of the administrative record, Judge Burrowes concluded that the respondent Bureau could not as a matter of law increase rental rates for the final year of the grazing permit period. Accordingly, no evidentiary hearing was conducted. Pursuant to 43 CFR 4.368, interested parties were afforded an opportunity by the Board to submit exceptions to the recommended decision. Formal exceptions were filed by the Aberdeen Field Solicitor on behalf of the Area Director on April 28, 1980. A letter addressed to the Chief Administrative Law Judge of the Hearings

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<sup>1/</sup> Paragraph (b) of section 2.19 must be read in conjunction with paragraph (a). Together, they provide as follows:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

"(1) Render a written decision on the appeal or

"(2) Refer the appeal to the Board of Indian Appeals for decision.

"(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the final decision."

Division from the Tribal Chairman of the Three Affiliated Tribes, dated April 14, 1980, has also been received by the Board as an exception to the recommended decision.

The Board has completed a review of the administrative record, the recommended decision and exceptions thereto, and the memorandum and order entered by the United States District Court for the District of North Dakota on March 31, 1980, in Danks v. Fields (Civ. No. A4-80-39), an action for declaratory and injunctive relief brought by individual grazing permittees and the Fort Berthold Land and Livestock Association involving, among other things, the subject matter of this appeal. Contrary to the recommended ruling of Judge Burrowes, it is the consensus of the Board that the Area Director was authorized to increase the grazing fees for the permit year commencing November 1, 1979. Based on the record as constituted, the Board remains unable to pass judgment on the reasonableness of the new rate and this issue shall again be referred to the Hearings Division with a request for an expedited fact-finding hearing and recommended decision thereon.

#### Authority to Adjust Rental Rate

The general authority of the Secretary of the Interior to protect and manage individually owned and tribal trust lands through the regulation of grazing on such lands is summarized at 25 CFR 151.2. Among other Acts, the general grazing regulations set forth in 25 CFR

Part 151 were promulgated in response to Federal statutes codified at 25 U.S.C. §§ 393, 397, 403 and 466 (1976). Appellant does not challenge the validity of any of the foregoing laws in this appeal; instead, it is alleged on numerous grounds that the action of the Area Director in raising the rental rate at issue exceeded the limits of his authority as prescribed by contract and regulation.

The factual background necessary to an understanding of appellant's case is summarized in the court's order in Danks v. Fields, *supra*, as follows:

In 1976 the Bureau of Indian Affairs (BIA), was preparing to grant permits to graze on Fort Berthold range units. The tribe, on June 10 and 11, 1976, and acting within the framework of the general grazing regulations, passed Range Resolution 76-173 (Exhibit 7), in conformance with 25 CFR 151.2, 3 and 4. The Area Director at Aberdeen, South Dakota, reviewed the resolution, expanded it to include necessary and advisable elements, and returned it as a proposed final resolution to the tribe.

As explained in the redrawn resolution and the covering letter, the Area Director was concerned that the grazing fees of \$27.00 for tribal land, and \$36.00 for individual land, were too low. But, under 25 CFR 151.13, he accepted the tribal fee as to its lands, and under 25 CFR 151.13(6) [2/] he set the minimum fee for lands under his jurisdiction at \$42.00 per animal unit per year.

The original tribal resolution had provided:

"That grazing permits shall be issued for four (4) years contract period beginning November 1, 1976, and terminate October 31, 1980, with a re-evaluation period after three (3) years."

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2/ So in original. Should probably read "25 CFR 151.13(b)."

The Area Director changed that provision to read:

"That grazing permits shall be issued for a four (4) year contract period beginning November 1, 1976, and terminating October 31, 1980. Grazing fees shall be re-evaluated in accordance with 25 CFR by Augst [sic] 1, prior to the beginning of the fourth year and such rate shall prevail for the balance of the permit period."

He explained that the proposed four year permits should be re-evaluated after three years only as to the fee.

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In 1979, the BIA had an independent evaluator [sic] review the grazing land and the market. Based on the evaluation, on October 3, 1979, and pursuant to the grazing permit requirements, both the BIA and the Three Affiliated Tribes, established [sic] for the fourth year of the permit an "animal unit year" fee at \$57.00. In a letter dated October 3, 1979, the permittees were informed that they would be billed on the new fee basis and were expected to pay the fee by November 1, 1979, the beginning of the last year of the permit.

Slip Op. at 5-7.

Certain of appellant's grounds for reversal set forth in its notice of appeal have been dismissed by the court in the above-cited opinion. For example, appellant alleges that the Area Director had no authority to alter the permit terms agreed upon by the Three Affiliated Tribes in Resolution No. 76-173 and secondly, that the Area Director could not in any event adjust grazing fees on permits under less than 5 years' duration. In addressing the Area Director's modification of the permit terms contained in Resolution No. 76-173, the court states in Danks v. Fields: "Plaintiffs maintain that the change above quoted was done in violation of 25 CFR 151.13(a) and 151.14. I

disagree. I find the changes were consistent with the regulations, and were in fact beneficial to the permittees, limiting as it did, the scope of permissible re-evaluation." Slip Op. at 6.

Noting that grazing permits as defined by 25 CFR 151.1(k), are a revocable privilege, the court declined to adopt appellant-plaintiffs' position that range permits are complete contracts, fixing, for the duration of the permits, all of the relationships of the parties. Ibid.

Based on the foregoing, it appears that appellant is left with a single unresolved challenge to the authority of the Bureau to increase grazing fees on the Fort Berthold Reservation for the 1979-1980 season, viz., that under the purported terms of the approved permit no increase could be decreed after August 1, 1979. This is the position which Judge Burrowes adopts in his recommended decision to the Board.

The provision in controversy is stated in the permits issued in 1976 as follows: "Grazing fees shall be re-evaluated in accordance with 25 CFR by August 1, prior to the beginning of the fourth year and such rate shall prevail for the balance of the permit period."

[1] Appellant is correct in stating that the only specific regulation found in 25 CFR concerning the adjustment of grazing fees is section 151.14(c), which pertains to permits for a period in excess of

5 years. <sup>3/</sup> (As previously noted, however, the court in Danks v. Fields was not persuaded that a regulatory scheme which requires 5-year permits to provide for fee adjustments at the expiration of the permit period, could not be interpreted to preclude fee adjustments for permits of lesser duration).

In the absence in the regulations of specific reevaluation or adjustment provisions for 4-year permits, it is reasonable to conclude that the phrase "shall be re-evaluated in accordance with 25 CFR" as found in the subject permits, refers to the general statements of the Secretary's authority and goals as contained in 25 CFR 151.2 and 151.3. As pertinent to the matter of fee adjustment, the foregoing general regulations require the Secretary "to improve the economic well being of the Indian people" and to administer grazing privileges in a manner which will yield the highest return consistent with sustained yield land management principles and the fulfillment of the rights and objectives of tribal governing bodies and individual land owners." Without addressing the reasonableness of the specific rate increase effected by the Bureau in this case, we hold that the Bureau's decision to increase grazing fees for the fourth year of the permit period is not inconsistent with the general regulatory provisions of 25 CFR Part 151, which are incorporated by reference in the 1976 permits.

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<sup>3/</sup> This regulation provides:

"(c) Permits for a period in excess of 5 years shall provide for review of the grazing fees by the Superintendent at the end of the first 5 years and for adjustment as necessary."

[2] With respect to the permit provision that fees shall be reevaluated by August 1, <sup>4/</sup> we do not agree that this language precludes the Bureau from setting new fees after August 1. In the first place, in our opinion the plain wording of the permit does not convey the stipulation that new fees may be pronounced by August 1, 1979, but not thereafter. Further, since there is no legal requirement that permittees be given prior notice of grazing fee increases, <sup>5/</sup> it is not unreasonable to conclude that the August 1 date cited in the permit refers merely to a goal or objective for the completion of fee reevaluations.

While we have found no related Indian grazing cases, the Board of Land Appeals has held that it was not improper for the Bureau of Land Management to readjust a coal lease issued pursuant to the Mineral Leasing Act, Feb. 25, 1920, 41 Stat. 439, as amended, 30 U.S.C. § 207 (1976), "within a reasonable time" after expiration of the initial lease period, with or without notice by the Bureau to the lessee prior to the anniversary date of the lease, and notwithstanding the fact that the statute specifically authorizes the readjustment of lease terms "at the end of" each lease period. California Portland Cement

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<sup>4/</sup> It is acknowledged by all parties that the complete date referred to is August 1, 1979.

<sup>5/</sup> Appellant asserts that prior notice is a contractual right of the members of the Association. First Notice of Appeal dated November 5, 1979, at 4. We disagree. The permits granting grazing privileges to members of the Association contain no mention of notice. Neither do the applicable statutes, regulations or BIA manual provisions (55 BIAM Supp. I).

Co., 40 IBLA 339 (1979), appeal pending sub nom., Rosebud v. Andrus, Civ. No. 79-160 (D. Wyo., filed June 6, 1979). Among other things, the Board of Land Appeals noted that appellants' argument that readjustment could not be made after the technical expiration of the lease period "ignores the difficulties attendant upon readjustment and the realities of the coal industry during the period prior to the lease anniversary dates in 1975." 40 IBLA 345. The Board went on to hold that appellants' rights to substantive due process were not violated by the readjustment of a lease which specifically provides for readjustment. 40 IBLA 347. With respect to procedural due process, the Board noted that existing procedures allow objections to be filed to readjustment determinations, including a right of appeal to the Board. Ibid.

Similarly, in the case at hand we find that the appellant Association and the members thereof have not been denied substantive due process through the readjustment of a grazing permit which specifically provides for readjustment. Moreover, unlike California Portland Cement Co., supra, the readjustment before us was pronounced prior to the expiration of the lease period. In addition, appellant's procedural due process rights are secured through the opportunity to appeal the Area Director's decision to the Commissioner and this Board pursuant to the provisions of 25 CFR Part 2 and 43 CFR 4.350-4.369. 6/

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6/ The Field Solicitor's contention that the subject matter of this case is not appealable under 25 CFR Part 2 is without merit. The provisions of 25 CFR Part 2 apply to requested correction of actions by

Reasonableness of Rental Rate Increase

Appellant alternatively alleges in this case that "the data upon which the Agency based its re-evaluation of the grazing fees constitutes an invalid and inadequate data base." Second Notice of Appeal, dated November 5, 1979, at 4. In support of this allegation, appellant refers to numerous alleged shortcomings and inaccuracies in the independent appraisal furnished the Bureau in September 1979. Based on the record as constituted, it is not possible for the Board to evaluate the merits of appellant's contention. While we do not believe that permittees are entitled to a formal evidentiary hearing whenever a rental adjustment is proposed by the Bureau, under the circumstances of this case an evidentiary hearing seems necessary and appropriate.

This matter shall therefore be referred to the Hearings Division for reassignment to an Administrative Law Judge to conduct a hearing and render a recommended decision to the Board on the reasonableness of the grazing fee increase at issue. Expedited consideration will be requested in light of the important interests at stake and in view of the court's conclusion in Danks v. Fields that Indian ranchers and

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fn. 6 (continued)

BIA officials where the matter is protested as a violation of a right or privilege of the appellant. 25 CFR 2.2. See also, 43 CFR 4.351. Allegations that an increase in grazing fees were unauthorized and in the alternative, not based on valid data or considerations, present issues cognizable under the appeal provisions of 25 CFR Part 2.

Indian landowners are being harmed by the continuing failure of the Department to resolve this controversy.

ORDER

Appellant's request that the Aberdeen Area Director's decision of October 4, 1979, raising the grazing fees on the Fort Berthold Indian Reservation, be reversed as a matter of law is denied. This case is referred to the Hearings Division pursuant to 43 CFR 4.361(a) for an evidentiary hearing and recommended decision by an Administrative Law Judge on the sole issue of the reasonableness of the fees set by the Area Director. By this order, it is requested that the Hearings Division provide expedited consideration of this case.

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Wm. Philip Horton  
Chief Administrative Judge

We concur:

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//original signed  
Franklin Arness  
Administrative Judge

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Mitchell J. Sabagh  
Administrative Judge