INTERIOR BOARD OF INDIAN APPEALS

Bret W. Larsen, d.b.a. Larsen Farms v. Acting Pacific Regional Director,
Bureau of Indian Affairs

39 IBIA 202 (12/03/2003)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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BRET W. LARSEN, d.b.a. LARSEN FARMS, Appellant	:	Order Affirming Decision
v.	:	Docket No. IBIA 02-136-A
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	December 3, 2003

Appellant Bret W. Larsen, d.b.a. Larsen Farms, seeks review of a June 10, 2002, decision issued by the Acting Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), revoking Revocable Permit 4003229900 (permit), covering 20 acres within Torres-Martinez Allotment No. 294. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision. 1/

The permit was entered into on September 10, 1999, between Appellant and landowner Geraldine C. Ibanez. It was amended almost immediately in order to clarify certain aspects of its terms.

The property included in the permit was described in Paragraph 1 as being

> N½ SW¼, Section 10, T. 7 S., R. 8 E., SBBM, California, containing 20 acres, More or less, being the Northern half of Torres-Martinez Allotment # 294 (approximately 1320' east/west X 660' north/south or 871,200 square feet).
>
> [Appellant] also has the right of ingress & egress over the westerly most portion of Torres-Martinez Allotments # 292, 294 & 296 via a dirt roadway currently existing thereon.

1/ On Nov. 28, 2003, the Board received a motion from the Regional Director for expedited consideration of this appeal. Because the appeal was already under consideration when the motion was received, the motion is denied.

The original term of the permit was for one year from the date the permit was approved by BIA. The amendment changed the term, giving Appellant the option to renew the permit on a year-to-year basis for a period of five additional years.

Paragraph 5 of the permit describes its purpose:

> In consideration for the granting of this permit, [Appellant] agrees to use the property herein permitted for the specific purposes of a storage operation. Deposition of semi-truck loads of clean grass clippings from country clubs & sod farms in the Coachella Valley will be effected followed by a minimal amount of drying and sorting. Same will then be removed by semi-trucks. In addition, [Appellant] intends to construct a small water reservoir (size subject to approval by [the landowner]) for the purposes of "wetting down" the dirt, etc. to minimize air pollution and to firm up the soil. If [Appellant] uses the permitted premises for any purpose not set forth herein without consent and written approval of the [landowner] and the Secretary [of the Interior], such use shall constitute grounds for revocation of this permit.

The permit is entitled "Revocable Permit." Paragraph 1 states: "This Permit is not a Permit of real property, but a Permit which is revocable at will, at the discretion of the Secretary and may not be encumbered and is not assignable." Paragraph 6 states:

> It is further understood and agreed that this instrument is merely a temporary permit, terminal [sic, probably should be "terminable"] and revocable at the discretion of the Superintendent of the Southern California Agency, and is not to be taken or construed as granting any leasehold right or interest in or to the lands herein described. [Appellant] shall not encumber, assign or transfer all or any part of its interest in this Permit.

BIA determined that the proposed operation was not subject to any categorical exclusion from compliance with the requirements of the National Environmental Policy Act, and therefore prepared an Environmental Assessment (EA) of the impacts of the proposed operation. Under "Proposed Action," the EA stated: "Occupy a portion of allotment No. 294 approximately 20 acres in size on the North half of this allotment for the purpose of storage, drying and sorting grass clippings from the local Coachella Valley area." Based on the findings of the EA, on October 18, 1999, BIA prepared a Finding of No Significant Impact (FONSI).

Both the original permit and the amendment were approved by the Superintendent, Southern California Agency, BIA (Superintendent), on October 22, 1999.

Geraldine Ibanez died on September 23, 2001. Her estate has not yet been probated. The family apparently believes that the allotments at issue here will pass to Geraldine's husband, Vincent Ibanez. On November 28, 2001, Vincent signed a power-of-attorney authorizing his son, David Ibanez, to act for him in all matters. Since that time, it appears that David has been handling matters relating to this permit. No one has challenged David's right to act in regard to the permit.

By letter dated December 13, 2001, the Superintendent ordered Larry Burkett, of Coachella Valley Organics, to cease and desist from entering the three allotments and from removing any product from them. 2/

On December 14, 2001, the Superintendent wrote Appellant, setting out the reasons for the December 13, 2001 cease-and-desist order to Coachella Valley Organics. This letter explained that a site visit had been conducted on December 7, 2001, after BIA received photographs from Ibanez family members allegedly showing that Appellant was trespassing on areas of the allotments that were not covered by the permit. In this letter, the Superintendent listed ten matters which he believed constituted violations of the permit:

1. A new utility pole has been erected without BIA approval.
2. Disturbance and reconstruction of Mount San Diego [3/] without legal authority.
3. Improper storage of hazardous waste, i.e., oil, diesel, plastic containers. A statement providing direction on clean up will be sent under separate cover from the Natural Resources Department of the BIA.
4. Dumping of vegetables (tomatoes) without approval.
5. Dumping of material other than grass clippings (palm trees, shrub, tree stumps etc.).
6. Dumping/storing of junk automobiles and trucks.
7. Dumping and/or processing of construction waste.

2/ The record shows that Appellant also used the company name, Premier Gardening Nursery & Supplies, Ltd. The Board did not find evidence that Appellant used the name Coachella Valley Organics. It is not clear why this company was engaged in operations on the allotments since Paragraphs 1 and 6 of the permit, quoted in text above, prohibited Appellant from assigning or transferring any part of his interest in the permit. The record does not contain anything indicating that BIA approved the use of the allotments by a third party.

3/ According to Appellant, Mount San Diego is the name given to "a mountain of dried human excrement in the center of the property." Opening Brief at 3. Appellant indicates that he was informed by the landowners, the Tribal Chairwoman, and/or BIA that the pile "was dregs from the San Diego, California, human waste lagoons." Id. at 6.

> 8. Unauthorized burning of material.
>
> 9. Disturbing the earth and removing materials from Mount San Diego without just compensation to the owner's Estate.
>
> 10. Trespassing on Torres-Martinez Allotment Nos. 294, 295 [sic, probably should be 292], and 296. Trespass is on the additional one hundred acres, while [the permit] only encumbers 20 acres of Torres-Martinez Allotment No. 294.

Dec. 14, 2001, Letter at 2. The Superintendent continued:

> As a result of the above findings, you are hereby ordered within thirty (30) days of receipt of this letter to remove all operations from the additional 100 acres and confine your current operation to the permitted area only. This includes the security-building unit. You are further ordered to immediately **cease and desist** the acceptance of construction waste, materials not permitted, unauthorized burning, and the reconstruction/disturbing of product from Mount San Diego.
>
> In addition, you are ordered to immediately provide an additional $12,000 bond to assure your good faith performance of the removal of your operation to the permitted area, and pending negotiation of a Business Lease for an additional 20 acres.
>
> Further, it is our belief that at any time, you were free to contact the BIA, and/or the landowner when you wanted to modify the [permit]. It is our understanding that you chose not to do so. By not informing and obtaining approval of the BIA or the landowner, it appears that you have taken advantage of the landowner, and denied possible income to the landowner.

Id.

Appellant responded to the Superintendent's letter by requesting an additional explanation of the points raised in the letter and additional time to reply. Appellant responded more fully on January 23, 2002. Appellant indicated that he had had oral communications with BIA and Geraldine about changes to the permit; that there were latent ambiguities in the permit because of the use of words such as "on the property," without a specific statement as to what portion of the property was being referenced; no one, including Geraldine, BIA, the Tribal Chairwoman, and representatives of the Environmental Protection Agency (EPA), had objected to his use of the property; and his letter to the Tribal Chairwoman and the EPA representative constituted a modification of the permit. Appellant further contested the characterization and description of some of the issues raised, such as storing junk automobiles and burning material.

He also stated that he had simply attempted unsuccessfully to assist Geraldine in finding a use for the material in Mount San Diego. Appellant contended that he had always intended to recycle "green waste," including tree branches and stumps, and that the permit had been written incorrectly to mention only grass clippings. Appellant informed BIA of how he would like to proceed.

By letter dated February 4, 2002, the Superintendent informed Appellant that the matters raised in BIA's December 14, 2001, letter had not been addressed, materials other than grass clippings had been deposited at the site, burning continued, and the alleged trespass had not been cured. The Superintendent notified Appellant that his permit was revoked but did not inform him of any right to appeal the decision.

Despite not yet having been given appeal information, on February 20, 2002, Appellant appealed the Superintendent's decision to the Regional Director. Both Appellant and David Ibanez filed briefs in the appeal. On June 10, 2002, the Regional Director affirmed the revocation of the permit in the decision presently under appeal. Appellant appealed the Regional Director's decision to the Board. Both Appellant and David filed briefs on appeal.

Appellant raises the same arguments before the Board as he raised before the Regional Director. In general, most of Appellant's arguments can be categorized either as denials of the allegations or contentions that the permit should be read other than it is written. For instance, Appellant denies the allegations that he erected a new utility pole, stored hazardous waste and junk motor vehicles, and burned material. He contends that the permit should be read to include the dumping of vegetables (which he also contends have been disposed of) and receipt of materials other than grass clippings, and to allow him to use parts of the allotments that are not clearly included in the permit. Appellant also asserts that he was merely trying to help the landowner dispose of the material in Mount San Diego and did not in any way profit from his actions in regard to that material.

For purposes of this portion of its opinion, the Board assumes that Appellant is totally correct in his assertions. However, Appellant overlooks one important fact in regard to his permit; i.e., by its explicit terms, the permit is revocable at the discretion of BIA. Although Paragraph 5 states that using the permitted property other than as specified will constitute grounds for revocation of the permit, Paragraphs 1 and 6, respectively, state that the permit "is revocable at will, at the discretion of the Secretary" and "is merely a temporary permit, terminal [sic, probably should be "terminable"] and revocable at the discretion of the Superintendent * * *, and is not to be taken or construed as granting any leasehold right or interest in or to the lands herein described." Appellant voluntarily accepted a permit that could be revoked at any time, with or without a reason, and ultimately subject only to the exercise of discretion by BIA.

The Board has discussed revocable permits on several occasions. See Lewis v. Acting Pacific Regional Director, 34 IBIA 289 (2000); Murphy v. Acting Sacramento Area Director,

19 IBIA 228 (1991); Nix v. Acting Sacramento Area Director, 18 IBIA 387 (1990); Imperial County, California v. Acting Phoenix Area Director, 17 IBIA 271 (1989); and Kenneth J. Wanless, 2 IBIA 70 (1973). The Board has limited authority to review BIA decisions that are based on an exercise of discretion. In general, the Board will review the decision to ensure that any legal prerequisites to the exercise of discretion were met. Imperial County. If there are no legal prerequisites, the Board lacks jurisdiction to review the matter further. Lewis.

Here, the only legal prerequisites which the Board has found are set out in Paragraph 7 of the permit and Paragraph 3 of the permit Amendment. Paragraph 7 provides that

> at the termination and/or expiration of this permit and at the option of the [landowner]:
>
> A. All buildings and improvements, excluding removable personal property and trade fixtures, in the property shall remain on said property after the termination of this permit and shall thereupon become the property of the [landowner]. The term "removable personal property" as used in this paragraph shall not include property which normally would be attached or affixed to the buildings, improvements or land in such a way that it would become a part of the realty, regardless of whether such property is in fact so placed in or on, or affixed or attached to, the buildings, improvements or land in such a way as to legally retain the characteristics of personal property.
>
> B. [Appellant] shall raze and cleanup the premises and shall restore subject property to its original condition at no cost to the [landowner] within fifteen days after the termination and/or expiration of this permit unless [Appellant] or its successors have negotiated a new permit or lease with [the landowner].

Paragraph 3 of the permit Amendment states that it is amending Paragraph 4 of the permit. It appears more likely that it was intended to amend Paragraph 7 of the permit, quoted above. In any case, Paragraph 3 provides that Appellant

> may remove personal property such as water pumps and like items at the termination of the lease, and that if [the landowner] chooses she may authorize [Appellant] in writing to leave the water reservoir in place. Also, at the termination of the lease, and [Appellant] completes restoration of the property, [BIA] will release the $6,000.00 [bond required under Paragraph 2 of the permit Amendment] back to [Appellant].

The Superintendent's February 4, 2002, decision gave Appellant 15 days in which to remove "improvements" and reclaim the property. Although the Regional Director's June 10,

2002, decision did not specifically state that Appellant could remove appropriate property, it affirmed the Superintendent's decision. The Board finds that BIA complied with the legal prerequisites to the exercise of its discretionary authority to revoke this revocable permit and therefore it affirms the revocation decision.

For purposes of this next portion of its opinion, the Board assumes that once the Superintendent alleged that Appellant had violated the permit, BIA could not then revoke the permit except on those grounds--in other words, that the Superintendent limited his discretion when he apparently chose to revoke the permit for cause.

The Superintendent listed ten alleged violations of the permit. The Board addresses three of those alleged violations--dumping of organic material other than grass clippings; dumping of construction materials; and trespassing on portions of Allotments 292, 294, and 296 that were not covered by the permit.

Paragraph 5 of the permit specifically stated that the purpose of the permit was to allow Appellant to conduct "a storage operation." The only materials to be stored that were listed in the permit were "clean grass clippings from country clubs & sod farms in the Coachella Valley." The FONSI prepared for Appellant's operation was based solely on the processing of grass clippings. However, Appellant now contends that "storage operation" should be read broadly to include all of the types of materials he was processing prior to moving his operation onto the allotment. The Board declines this invitation to expand the language of the permit. Based on Appellant's own statements in regard to his prior operation, Appellant knew that he wanted to store more than grass clippings. A simple reading of the permit would have clearly shown that it mentioned only grass clippings. It was Appellant's responsibility to ensure that a permit he negotiated addressed his intended use of the property. The record shows that Appellant was capable of protecting his interests through the negotiation of an amendment to the original permit. The Board declines to amend the permit for Appellant by reading into it something it does not contain. Therefore, the Board finds that the processing of any materials other than clean grass clippings constituted a violation of the permit.

Paragraph 1 of the permit described the permitted property. The property described included, and was limited to, 20 acres in Allotment No. 294, and the dirt roadway then crossing Allotment Nos. 292, 294, and 296. Appellant contends that his use of other portions of the allotments was authorized by Paragraph 6 of the permit Amendment and Geraldine's verbal agreement. Paragraph 6 of the permit Amendment provides that Appellant "may erect necessary security fences and a movable security building unit on the property, which will be removed upon termination of the permit." Appellant argues that the phrase "on the property" is ambiguous and could easily mean on any part of the three allotments.

The Board rejects these arguments. Initially, it declines to construe the phrase "on the property" to mean anything other than on the property covered by the permit. If anything else was intended, Appellant should have ensured that the amendment clearly stated that it was adding acreage to the permit. The amendment should then also have provided for additional rent.

More importantly, Indian trust property cannot be permitted, leased, or otherwise encumbered without the written approval of BIA. See, e.g., Jackson v. Portland Area Director, 35 IBIA 197 (2000); Smith v. Acting Anadarko Area Director, 34 IBIA 283 (2000); Brooks v. Muskogee Area Director, 25 IBIA 31, 34 (1993); HCB Industries, Inc. v. Muskogee Area Director, 18 IBIA 222 (1990). There is no written BIA approval increasing the acreage permitted to Appellant. Therefore, even if Appellant believed that he was using additional portions of the allotments with the approval of the landowner, there is no legal basis on which the Board can approve his actions.

The Board finds that these two violations, either together or standing alone, are sufficient to uphold BIA's decision to revoke Appellant's permit for cause. Therefore, it is unnecessary to address the remaining alleged violations.

Based on this discussion, the Board finds that the Regional Director's decision should be affirmed whether it is viewed as a discretionary revocation not needing a reason, or as a revocation based on cause.

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 Regional Director's June 10, 2002, decision is affirmed.

// original signed
Kathryn A. Lynn
Administrative Judge

// original signed
Kathleen R. Supernaw
Acting Administrative Judge