INTERIOR BOARD OF INDIAN APPEALS

Wilson Dahozy, Sr. v. Acting Navajo Regional Director, Bureau of Indian Affairs

42 IBIA 16 (11/15/2005)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

WILSON DAHOZY, SR., Appellant,	:	Order Vacating and Remanding Decision
v.	:	
ACTING NAVAJO REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	Docket No. IBIA 03-79-A November 15, 2005

Appellant Wilson Dahozy, Sr. appeals from a February 28, 2003 decision of the Acting Navajo Regional Director, Bureau of Indian Affairs (Regional Director; BIA), finding that (1) Appellant's Application to Fence a Customary Use Area was incomplete and therefore invalid; (2) Appellant's purchase of grazing permit number 18-21-76 from Calvin Ben may be used only to obtain a new grazing permit for use in the customary use area formerly used by Mr. Ben; and (3) Appellant's grazing permit number 18-21-95, purchased from Thompson Gail, may be used only in the customary use area formerly used by Mr. Gail. For the reasons discussed below, the Board vacates the Regional Director's decision, and remands the case with instructions concerning his second and third findings.

Background

Appellant is an enrolled member of the Navajo Nation, living in Ft. Defiance, Arizona. Since approximately 1975, he has attempted to establish and maintain what he refers to as the "Dahozy Range Management Unit." 1/ The Dahozy Range Management Unit consists of a segment of Navajo tribal trust land enclosed by a fence. It is variously

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1/ The record is insufficient to determine whether Appellant's description is generic, or whether it purports to classify the defined area in accordance with Navajo Nation law. For purposes of this appeal, the Board will use the name Dahozy Range Management Unit to refer to this particular property without determining the extent to which it qualifies as a range management unit under tribal law.

described as containing 210 acres or 219.6 acres, though its size does not appear to be a point of contention in this matter. Its location is described in general as east of the Navajo Housing Authority complex and north of Coalmine Road, in the vicinity of Ft. Defiance, Arizona. It is also described as being one mile east of Henry's Corner Café.

Appellant contends that between at least 1977 and 1995, he, his family and his father continuously used the Dahozy Range Management Unit and the surrounding area for grazing. The record in this case does not contradict that assertion, though it appears that at times Appellant may have conducted grazing under inadequate permits.

On May 4, 1975, Appellant submitted an "Application for Approval to Fence Customary Use Area" to the District 18 Grazing Committee, a local branch of the Navajo Nation government with special duties relating to the regulation of livestock grazing. The named applicants were Appellant, Louva Dahozy (Appellant's wife), and William Dahozy (Appellant's father). Next to Appellant's name, under a column entitled "Permitted S. U.," 2/ the applicants listed grazing permit number 18-23-75. Appellant did not actually own grazing permit number 18-23-75 at the time of his fencing application, but acquired it before the application was approved. The application delineates an area to be fenced within Ft. Defiance, District 18, Unit 3. A map in the record, dated October 21, 1975, shows the area to be fenced, which straddles Arizona's border with New Mexico. It is labeled "Fencing Proposal for Wilson Dahozy" and "Rose Dahozy Project."

The application form was also signed by adjoining livestock owners and others having a direct interest in the area, to indicate their approval. Appellant's mother, Rose Dahozy, is one of the parties who signed in this capacity. Under the column for "Permitted S. U." next to her name, the fencing application lists grazing permit number 18-15. 3/

2/ The Board takes this as a reference to "sheep units," presumably seeking the basis for the applicants' proposed use of the fenced property. A sheep unit is a measurement of the sustainable forage capacity of a given parcel of land, measured in terms of what a sheep will consume over the course of a year. See 25 C.F.R. § 167.6(d) (formerly 25 C.F.R. § 152.6(d)). It is analogous to an "animal unit." See, e.g., Ewing v. Rocky Mountain Regional Director, 40 IBIA 176, 178 n.4 (2005).

3/ Grazing permit number 18-15 was issued to Ms. Dahozy on Oct. 16, 1943, and allowed the grazing of five sheep-units of livestock, not to exceed one horse, in District 18. The area in which her grazing permit was traditionally used is generally described as east of Navajo Route 12, and north of Navajo Route 54. It is also described as an area of approximately 20 acres north of the Dahozy trailer park. It is not clear to the Board,

(continued...)

The application was next signed by four members of the District 18 Grazing Committee, indicating that body's approval of the application in a regular meeting held on May 6, 1975. The Vice-Chairman's signature is individually dated February 2, 1976.

The application was then signed by several other officials in spaces marked for "concurrals." Signatories include the Ft. Defiance Chapter President and Vice President, the Council Representative, and the Chairman of the Resources Committee of the Navajo Nation Council. All of these signatures are specifically dated January 21, 1976, except for the Chairman of the Resources Committee, who signed on March 18, 1977.

Acting BIA Ft. Defiance Agency Superintendent (Superintendent) Dr. Samuel Billison, Sr. was the last to sign Appellant's fencing application, which he did on April 13, 1977. There is no indication on the application itself whether the Superintendent signed to approve or deny the application, but a subsequent affidavit by Dr. Billison dated September 9, 1999, makes clear that he intended for his signature to indicate approval.

While Appellant's fencing application was pending, he bought grazing permit number 18-23-75 from Bert Wesley on July 9, 1975. The Superintendent re-issued this permit for 15 sheep units, including three horses, in Appellant's name on September 24, 1975. Appellant apparently believed this permit could be used for grazing on the Dahozy Range Management Unit.

Shortly after Appellant secured the Superintendent's approval on his fencing application, Irene Moore (Appellant's sister) approached the District 18 Grazing Committee and objected to the erection of Appellant's fence. 4/ Minutes from the District 18 Grazing Committee's meeting on August 2, 1977 note the dispute, but indicate that

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3/(...continued)
however, whether this area was inside, outside, or overlapping the Dahozy Range Management Unit. Appellant does not claim to have ever owned grazing permit number 18-15.

4/ The Board has omitted from this order many facts relating to Ms. Moore, because they are irrelevant to our conclusions. Nonetheless, this entire appeal appears to owe its existence to a dispute between Appellant and his sister. Appellant wanted to establish the Dahozy Range Management Unit for grazing livestock; Ms. Moore wanted to establish home sites, apparently on at least some of the same land. Both Appellant and Ms. Moore seem to have been successful over the years in establishing sympathizers among various tribal and local or Regional BIA officials, as they pursued their conflicting interests.

"Wilson's fencing application has been approved through all proper stages and completed on April 13, 1977."

The District 18 Grazing Committee again addressed the dispute over Appellant's range fencing at a meeting held on November 2, 1977. Ruth Hickman presented an undated petition opposing Appellant's fencing efforts, signed by 26 persons, including Ms. Moore. The petition declared that Appellant was "wrongfully fencing and taking land without consulting all the parties who may have use rights and interest in the area and who may be affected by such fencing." 5/ The minutes of the Grazing Committee meeting reflect that, of all the petitioners, a "[m]ajority of names are close relatives to Mr. Dahozy. Only one is a grazing permit holder, Mrs. Ruth S. Hickman." The District 18 Grazing Committee referred the conflict to the Navajo Nation Resources Committee for "further settlement," but noted that "the Grazing Committee will support their signatures [on the fencing application]."

In a letter dated April 11, 1995, Superintendent Rebecca Lynch wrote to Roger Dahozy (son of Appellant), apparently in his capacity as the Fort Defiance Chapter representative of the District 18 Grazing Committee, stating that

> It has been brought to our attention that "The Proposed Dahozy Range Management Unit Application" is incomplete and is under Rose Dahozy's name. The Navajo Nation Resources Committee does not have any records on their action on the approval of the range management unit filed in their office or in the Agency Superintendent's. Before any range management unit is approved, the Navajo Nation Resources Committee needs to give their approval.
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> The District Grazing Committee did not grant any authorization to transfer the Grazing Permit No. 18-23-75 from Unit 18-2 to Fort Defiance Unit 18-3 grazing area. Therefore, Grazing Permit No. 18-23-75 can not be used to obtain the subject Range Management Unit.
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> Rose Dahozy's grazing permit needs to be probated. [6/]

5/ It is unclear from the record exactly when Appellant built the fence that encloses the Dahozy Range Management Unit. It appears that some sections of the fence may already have been in place, due to bordering uses, before Appellant submitted his fencing application.

6/ Appellant's mother, Rose Dahozy, died on Dec. 9, 1987.

Appellant evidently learned of this letter, and did several things in response. On May 3, 1995, he sold his grazing permit number 18-23-75 to Tom Billiman, who was able to use it in the Sawmill unit from which it originally came. Appellant then purchased grazing permit number 18-16-89 from Thompson Gail. Mr. Gail had previously used his grazing permit in the same Ft. Defiance area (District 18, Unit 3) as the Dahozy Range Management Unit. The permit purchased from Mr. Gail was then re-issued to Appellant as grazing permit number 18-21-95 on August 29, 1995, for 20 sheep units.

While Appellant was in the process of making these adjustments, Superintendent Lynch sent Roger Dahozy a second letter dated May 31, 1995. In it she said:

> A complaint has been filed with our Office from Fort Defiance Chapter and the concerned people [say] that a range unit boundary fencing is being constructed on the Proposed Dahozy Range Management Unit. This fencing construction is with out proper authorization and approval from the appropriate committee and it has not gone through procedural processes.
>
> Reference the letter dated April 11, 1995 it mentioned that the application for the Dahozy Range Management Unit was incomplete and is under Rose Dahozy's name. And the Navajo Nation Resources Committee did not have any records on their action on the approval of the range management unit file in their Office or in the Agency Superintendent's. It was also recommended that Rose Dahozy's grazing permit be probated.
>
> Before any range management unit is proposed or planned a valid grazing permit has to exist in the name of the person who is making the request and a favorable recommendation from the respective district grazing committee and approval by the Navajo Nation Resources Committee. These procedural processes are within the Tribal Code and 25 CFR.

On May 3, 1999, Appellant sought and obtained the recommendation of the District 18 Grazing Committee to approve the acquisition of another grazing permit, number 18-21-76, for use on the Dahozy Range Management Unit. The seller, Calvin Ben, had used the permit in the Ft. Defiance area. The permit authorized grazing for 63 sheep units, including two horses. Appellant submitted his newly-purchased permit together with his existing permit, number 18-21-95 (for 20 sheep units), so that the two could be combined and result in the issuance of a single grazing permit in Appellant's name for use at the Dahozy Range Management Unit.

BIA did not issue Appellant a new grazing permit. On October 4, 1999, the District 18 Grazing Committee passed a resolution requesting that BIA approve the transfer of grazing permit number 18-21-76 to Appellant, and specifically asked that the permit

authorize grazing in Appellant's "designated and fenced grazing use area at Ft. Defiance, Arizona." There is no record of a response from BIA to this resolution.

In a memorandum dated October 12, 2000, the Regional Director informed the Supervisory Rangeland Management Specialist of BIA's Ft. Defiance Agency that a recent forage inventory had been conducted for the Dahozy Range Management Unit. The inventory purportedly concluded that the Dahozy Range Management Unit had a sustainable carrying capacity of just six sheep units. 7/

On October 3, 2002, Nelson Roanhorse, Natural Resource Manager for BIA's Ft. Defiance Agency, wrote to Appellant regarding certain listed court orders emanating from the Navajo Nation court system, specifically Supreme Court order No. SC-CV-49-99 and Window Rock District Court Order No. WR-CV-574-98. 8/ Mr. Roanhorse also purported in his letter to decide a series of other issues. First, he "reaffirm[ed]" the Agency Branch of Natural Resource's "1995 cancellation of the Dahozy range unit for reasons that the May 4, 1975 fencing application was incomplete and using an incongruous permit transferred from another grazing unit," rendering the application invalid. Second, he stated that the transfer of grazing permit 18-21-76 from Calvin Ben to Appellant was "void" because the carrying capacity of the Dahozy Range Management Unit would not support additional sheep. Third, he stated that "all permits acquired elsewhere must be returned to its original assigned use area * * *." And fourth, he said that "the illegal fence constructed must be taken down within 90 calendar days as you were instructed by the BIA Navajo Regional Director through a letter to you dated July 14, 2000." 9/ Appellant appealed these supposed decisions to the Regional Director.

On November 4, 2002, the District 18 Grazing Committee approved another resolution, this time asking BIA to return Appellant's "valid grazing permit [number 18-21-95] so he can make beneficial use of it," and to "return the purchased grazing permit from Mr. Calvin J. Ben [number 18-21-76] on the grounds that it was legally purchased by

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7/ There was no copy of the forage inventory included with the administrative record filed in this case.

8/ The record does not contain a full account of these orders, but it does not appear that they are relevant to the conclusions of the Board in this case.

9/ There is no copy of a July 14, 2000 letter in the administrative record filed with the Board.

Mr. Wilson Dahozy Sr. so he can use it at the original designated grazing area of that grazing permit."

On February 28, 2003, the Regional Director issued a decision on Appellant's appeal from Mr. Roanhorse's October 3, 2002 letter. The Regional Director first concluded that the letter from Mr. Roanhorse "was not an official agency decision. Mr. Roanhorse is not the authorized officer within the Bureau of Indian Affairs, Navajo Region, to issue formal decisions on these matters." Notwithstanding this finding, and without explaining how or why the underlying substantive issues were properly before him for a decision, the Regional Director proceeded to make several findings:

1. [Appellant's] Application To Fence a Customary Use Area is incomplete and therefore, invalid. The Resources Committee does not have any records approving the range management unit filed in their office or in the BIA Agency Natural Resource office at Ft. Defiance, Arizona.
2. The permit transfer sales agreement from Mr. Calvin Ben to [Appellant for grazing permit number 18-21-76] is valid only for a permit in Mr. Calvin Ben's original location or customary use area.
3. [Appellant's] grazing permit (18-21-95) which was purchased from Mr. Thompson Gail, is valid only in the original customary use area based on Navajo Nation Grazing Regulations.

The Regional Director used the balance of his letter to explain his basis for each of these findings, and to provide a statement of Appellant's appeal rights. We will quote from his decision letter as needed in the discussion portion of this order.

Appellant appealed each of the findings and decisions in the Regional Director's February 28, 2003 decision.

Discussion

Appellant bears the burden of proving that the Regional Director's decision was erroneous or not supported by substantial evidence. See, e.g., Van Gorden v. Acting Midwest Regional Director, 41 IBIA 195, 198 (2005); Aloha Lumber Corp. v. Alaska Area Director, 41 IBIA 147, 156 (2005). In an effort to meet this burden, Appellant raises a variety of issues, only some of which need to be addressed by the Board. 10/

10/ Appellant's first issue, for example, concerns the issuance by BIA of grazing permit number 18-10-99 to Ms. Moore. That matter was not discussed in the Regional Director's (continued...)

Appellant argues that he has the right to maintain the fence that defines the Dahozy Range Management Unit, because he followed proper procedures when applying for the fence and obtained all required approvals. 11/ The Board does not need to reach the issue of Appellant's ultimate right to maintain his fence, however, because the Regional Director's decision to invalidate Appellant's fencing application is not supported by the record in this case, and we must therefore vacate his decision.

The grazing of livestock on the Navajo reservation is the joint responsibility of BIA and the Navajo Nation. Estate of Peshlakai v. Navajo Area Director, 15 IBIA 24, 36 (1986). With respect to BIA's duties, the governing law is not ordinarily Navajo tribal law, but Federal law embodied in Federal regulations. Id. The law most directly applicable to this matter is found in the Navajo Grazing Regulations, 25 C.F.R. Part 167 (formerly Part 152). 12/ With respect to fences, 25 C.F.R. § 167.16 says

> Favorable recommendation from the District Grazing Committee and a written authorization from the Superintendent or his authorized representative must be secured before any fences may be constructed in non-agricultural areas. [13/]

10/(...continued)
decision, so the Board will not address it. See 43 C.F.R. § 4.318 ("An appeal will be limited to those issues that were before * * * the BIA official on review.") Regardless, the Regional Director now acknowledges that grazing permit number 18-10-99 should not have been issued, and says that it has in fact been cancelled. Thus, even if the Board had jurisdiction to review this matter, the issue would be moot.

11/ Appellant actually argues much more — that he has a "vested right" to maintain the Dahozy Range Management Unit, by which he appears to mean a range management unit as defined by Navajo law. In evaluating the Regional Director's decision, however, the Board limits its review to what the Regional Director actually decided.

12/ Former Part 152, as in effect in 1975, is identical in substance to current Part 167, as re-designated in 1982. For simplicity, the Board will cite the current version of these regulations.

13/ The parties assume that this provision applies to the present case, despite the arguably inconsistent restriction of this language to "non-agricultural areas." For purposes of this appeal, the Board will assume that 25 C.F.R. § 167.16 is the proper regulatory standard by
(continued...)

The District 18 Grazing Committee recommended Appellant's fencing application, and the Superintendent authorized it in writing. Those actions alone met all requirements imposed by 25 C.F.R. § 167.16. The Regional Director cites no Federal law in support of his contention that the application was somehow incomplete. Instead, he cites a provision from the Navajo Reservation Grazing Handbook and Livestock Laws. But nothing in the record explains how or why the Regional Director was obliged to interpret or apply Navajo law in this case, an aspect of his decision that seems particularly inappropriate since BIA's authorization *followed* review and a favorable recommendation by the District 18 Grazing Committee — a body of Navajo officials presumably charged with interpreting and applying Navajo law.

Moreover, even if the fencing application were somehow reasonably deemed incomplete, the fact is that it was accepted for processing, recommended for approval, and then signed by the Superintendent. The subsequent identification of some manner in which the application could be deemed incomplete does not automatically render it "invalid." BIA presumably would have a basis for calling the perceived defect to the attention of the District 18 Grazing Committee, to allow that body to determine whether to reconsider authorization for the fence, or otherwise pursue some remedy for the supposed defect. But the Regional Director cannot simply claim — after more than two decades — that perceived procedural or qualification defects, based upon tribal law, are a sufficient basis for BIA to unilaterally declare that Appellant's application is "incomplete and therefore, invalid."

We are reinforced in our view by closely examining the Regional Director's stated reasons for finding Appellant's fencing application to be incomplete. First, he says that the fencing application should have been in the name of Rose Dahozy, Appellant's mother, because she owned grazing permit number 18-15. 14/

13/(...continued)
which to gauge the Regional Director's decision on Appellant's fencing application. Even if this assumption were wrong, however, the Board would still vacate the Regional Director's decision because it is not supported by the record, and the Board is unaware of any other authority for his decision.

14/ As stated previously at 42 IBIA 17–18 n.3, the Board cannot determine whether grazing permit 18-15 was traditionally used within any portion of the Dahozy Range Management Unit. The Regional Director's apparent assumption that it was is not supported by the record.

Appellant's fencing application does not suggest that he owned grazing permit number 18-15, or that he relied upon grazing permit number 18-15 in any way. In fact, theapplication clearly associates grazing permit number 18-15 with Rose Dahozy, who signed in approval of the application as either an adjoining livestock owner or else someone with adirect interest in the area. Appellant is shown to own grazing permit number 18-23-75, and that he planned to use it at the Dahozy Range Management Unit. It is therefore factually inaccurate to say that the fencing application should have been in the name of Rose Dahozy; Appellant and his mother clearly intended for the fencing application to reflect Appellant as the applicant, and grazing permit number 18-23-75 as the permit he would use at the Dahozy Range Management Unit.

The Regional Director now notes that at the time Appellant submitted his fencing application, he did not in fact own grazing permit number 18-23-75, and that "in order to properly apply to fence a Customary Use Area, the applicant must first provide proof of a valid and effective grazing permit." Regional Director's Response at 3. This was not a stated rationale in the Regional Director's February 28, 2003 decision. But even if it had been, Appellant owned the permit in his own name well before he obtained the approvals required by 25 C.F.R. § 167.16. Of greater significance still, nothing in 25 C.F.R. § 167.16 even requires a fencing applicant to have a grazing permit. The requirement to which the Regional Director now alludes is evidently derived from tribal law, not Federal law. The Board therefore finds this reason for invalidating Appellant's fencing application inadequate; it is neither supported by Federal authority nor the record.

The Regional Director also contends that grazing permit number 18-23-75 was never authorized by the District 18 Grazing Committee for use in Unit 3, the Ft. Defiance area. 15/ He cites Navajo Reservation Grazing Handbook and Livestock Laws, Negotiability of Regular Grazing Permits, paragraph 9 as the basis for this requirement. Again, this sort of concern, if called to the attention of the District 18 Grazing Committee, might warrant some action by that body. But it is no justification under *Federal* law for the Regional Director to unilaterally declare Appellant's fencing application "invalid" or purport to revoke BIA's authorization. We have already observed that 25 C.F.R. § 167.16 does not require a fencing applicant to have a grazing permit at all, and we are unaware of any other Federal law that might apply to this topic. We conclude that it was improper in this instance for the Regional Director to go beyond Federal requirements and attempt to enforce tribal law, particularly considering that the District 18 Grazing Committee had an

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15/ The Regional Director's February 28, 2003 decision refers to grazing permit number 18-21-75, rather than 18-23-75. The Board presumes this to be a typographical error.

earlier opportunity to consider where Appellant proposed to use grazing permit number 18-23-75, and did not identify it as a problem. 16/

The Regional Director also suggests in his decision that the complaint referenced in Superintendent Lynch's May 31, 1995 letter has some bearing upon whether or not Appellant's fence was properly authorized. The reason the Regional Director cites this information is unclear; perhaps he means to argue that BIA should not have approved the fencing application until the referenced complaint was resolved. That policy tends to promote tribal sovereignty and helps BIA avoid taking actions that are inconsistent with those of the affected Tribe. See Hunter v. Navajo Area Director, 34 IBIA 13, 14 (1999). Even so, we do not see how a complaint raised *after* the Superintendent approved Appellant's fencing application on April 13, 1977, can render the underlying application "incomplete and therefore, invalid."

Even if a complaint existed at the time of the Superintendent's approval in 1977, moreover, the question of whether or not he should have given his approval must yield to the fact that he approved the fencing application. Perhaps deferring his decision might have been more appropriate, but that does not mean the application, which was signed by all necessary parties, was somehow "incomplete." We do not find Appellant's fencing application incomplete or — on this record — invalid due to an outstanding complaint about construction of the fence.

Finally, the Regional Director says

> On September 9, 1999, Dr. Samuel Billison, former Acting Superintendent, Ft. Defiance Agency, submitted an affidavit that stated he did approve an Application to Fence a Customary Use Area for [Appellant] on or about April 18, 1977. My staff has reviewed the official file folder and finds no evidence to support Mr. Billison's approved action which reverses, Superintendent Rebecca Lynch's decision. Therefore, Superintendent Lynch's decision is affirmed.

The Board has several problems with this rationale. Most importantly, the Regional Director makes no serious argument that former Acting Superintendent Billison's affidavit

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16/ Federal law gives local District Grazing Committees within the Navajo Reservation primary responsibility for addressing the proposed movement of permit areas within their districts. See 25 C.F.R. § 167.9(a) ("District Grazing Committees shall act on all grazing permit changes resulting from negotiability within their respective Districts.")

is either inauthentic or inaccurate. We are therefore at a loss to understand how the Regional Director could maintain, as he apparently still does, that the fencing application was never approved, regardless of the contents of BIA's "official file folder." 17/

In addition, the premise of this part of the Regional Director's decision seems to be that special confirmation of Acting Superintendent Billison's action is required and that it would "reverse" Superintendent Lynch's decision. That premise has two flaws.

First, confirmation of a BIA approval rendered in 1977 does not "reverse" the decision of an official acting in the same capacity in 1995, no matter when confirmation is attained. The date of the original action is the one to consider, not the date of the confirmation. Thus, if BIA rendered its approval of the fencing application in 1977, that fact (once established) may *contradict* a decision made 18 years later, but it does not *reverse* it. One cannot reverse a decision that has not yet been made. This observation is not mere nit-picking; the implication in this case is that the Regional Director may have been applying an unreasonably high standard of proof — one sufficient to overturn a settled agency position — to determine whether or not Appellant's fencing application was initially approved. Perhaps that is why the Regional Director wanted to find some corroboration for Dr. Billison's affidavit in BIA's official file folder and, finding none, ignored the affidavit.

Second, Superintendent Lynch never issued a final decision, so there was nothing to reverse anyway. Her letters of April 11, 1995 and May 31, 1995, were not addressed to Appellant, and there is no evidence that they otherwise complied with 25 C.F.R. § 2.7 (requiring, among other things, written notice of the decision and specified appeal rights). 18/

17/ If the Regional Director truly meant to challenge the authenticity of Dr. Billison's affidavit, it hardly bears mentioning that he should have stated his reasons in his Feb. 28, 2003 decision, or not referenced the affidavit at all. If, on the other hand, the affidavit's only flaw was that BIA did not maintain a copy of it in BIA's "official file folder," the remedy is to insert the affidavit in the folder. We give no weight to the Regional Director's other vague allegations that filings with the Board include "questionable document[s]," see Regional Director's Response at 7, because those allegations lack any elaboration or supporting evidence. See also id. at 11 ("[T]he Regional Director now questions the authenticity of any additional documents provided by Appellant.")

18/ Despite language in the Regional Director's decision that purports to "affirm" Superintendent Lynch's "decision," the Regional Director now concedes that

(continued...)

The Board finds that Appellant's fencing application is neither incomplete nor invalid for lack of Superintendent approval, or for any other reason specified in the Regional Director's February 28, 2003 decision letter. We therefore vacate this portion of the Regional Director's decision.

The extent to which Appellant is entitled under Navajo law to maintain his fence, or to use it to claim a vested right in the Dahozy Range Management Unit, are other matters entirely. These issues were not subject to the Regional Director's determination under Federal law, and correspondingly are not topics for our review. 19/ We conclude only that the Regional Director's decision that Appellant's Application to Fence a Customary Use Area was "incomplete and therefore, invalid" is not supported by the record, or by any Federal law called to our attention. 20/ Assuming the provisions of 25 C.F.R. § 167.16 apply, it appears that any further recommendations with respect to Appellant's fence ought to originate with the District 18 Grazing Committee, and not BIA. 21/

18/(...continued)
Superintendent Lynch's Apr. 11, 1995 and May 31, 1995 letters were never intended as notice to Appellant of a BIA decision. Rather, they were sent to Appellant's son, Roger Dahozy, because he was the Fort Defiance representative to the District 18 Grazing Committee. According to the Regional Director, these sorts of letters were "common practice," as a means of communicating problems to the District 18 Grazing Committee. Regional Director's Response at 7.

19/ The Regional Director improperly cites 25 C.F.R. § 166.302 as a basis for reaching decisions concerning Navajo range management units. The provisions of 25 C.F.R. Pt. 166 do not apply to Navajo grazing issues at all. See 25 C.F.R. § 167.2 ("Part 166 of this subchapter authorizes the Commissioner of Indian Affairs to regulate the grazing of livestock on Indian lands under conditions set forth therein. * * * *[T]he grazing of livestock on the Navajo Reservation shall be governed by the regulations in this part* [167]." (Emphasis added.))

20/ Sometimes, BIA officials are also explicitly authorized under tribal law to make certain categories of decisions. There is nothing in the record to indicate that the Regional Director was granted such authority in this case, so the Board does not address that possibility, or the extent to which such decisions are subject to Board review.

21/ If the Regional Director believes that Navajo law does not support the continued existence of Appellant's fence, he may certainly refer his reasons for holding that view to appropriate Navajo officials for their consideration.

Another issue Appellant identifies for our review is the extent to which he ought to be allowed to use the grazing permit he purchased from Calvin Ben, i.e. grazing permit number 18-21-76, in the Dahozy Range Management Unit. Appellant notes that the District 18 Grazing Committee recommended to BIA that the permit be reissued in Appellant's name for that purpose. See Appellant's Opening Brief at 14-15. In rejecting that recommendation, the Regional Director's February 28, 2003 decision says:

> The permit transfer sales agreement from Mr. Calvin Ben to Mr. Wilson Dahozy, Sr. is valid only in the original customary use area based on Navajo Nation Grazing Regulations.
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> * * * * *
>
> My decision not to approve a permit for Mr. Wilson Dahozy, Sr. based on a purchase of a permit from Mr. Calvin Ben is based on the following: [22/]
>
> A Bill of Sale and Transfer Agreement between Calvin Ben and Wilson Dahozy, Sr. was never completed with an official Grazing Permit approved by the Bureau of Indian Affairs.
>
> On October 4, 1999, the District 18 Grazing Committee approved a transfer agreement between Calvin Ben (18-21-76) and Wilson Dahozy, Sr. for 63 sheep units (SU). The Bureau of Indian Affairs did not process this action approved by the Grazing committee because of a dispute between Wilson Dahozy, Sr., and Irene Moore over the grazing area where this permit was intended to be used. Therefore, a grazing permit was not issued in 1999. The Navajo Reservation Grazing Handbook and Livestock Laws, "Negotiability of Regular Grazing Permits, paragraph #2 states, *"The District Grazing Committee must make certain that the Grantee has sufficient range area not in conflict with other range users before recommending approval of any Grazing Permit Transfer."*
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> In reviewing the transfer agreement, the BIA cannot approve the transfer based on the fact that the area where the permit is to be used cannot support 63 sheep units. This fact was brought out in a range assessment

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22/ The Board notes that this segment of the Regional Director's decision could be read to mean not only that Appellant cannot use the grazing permit at the Dahozy Range Management Unit, but that Appellant cannot use the grazing permit in his own name at all — not even on the property customarily grazed by Mr. Ben. The Regional Director now clarifies that he had no such intention. See Regional Director's Response at 8 ("Furthermore, the BIA has not prevented Appellant from utilizing the grazing permit, so long as the grazing takes place within the original Customary Use area to which that permit attaches. That area is the Calvin Ben Customary Use area.")

> survey conducted by Mr. Ken Gishie, Soil and Land Inventory Section, Branch of Natural Resources, in October, 2000. His report stated that the area in dispute between the Dahozy's and Moore's can only support 6 sheep units, year long. However, issuing a permit for 6 sheep units would violate Navajo Reservation Grazing Handbook and Livestock Laws, "Negotiability of Regular Grazing Permits", paragraph #1 that states, *"In no event can portions of Grazing Permits be transferred in blocks of less than ten (10) sheep units."*
>
> The Navajo Nation has developed and is proposing a new Grazing regulation entitled the "Navajo Nation Grazing Act." This piece of legislation deals with all issues pertaining to issuance of grazing permits and management for the main portion of the Navajo Reservation. Although this legislation has not yet been formally adopted by the Nation, it does indicate that the tribal government does not want to issue grazing permits for less than 10 Animal Units (AU), which is equivalent to 50 sheep units (Section 709.E) under any circumstances. Viewing this legislation together with the Navajo Reservation Handbook and Livestock Laws, it is clear that the Navajo Nation government policy is to prevent and eliminate grazing permits for less than 10 animal units. [Emphasis in original; references to exhibits deleted.]

On May 3, 1999, the District 18 Grazing Committee voted to recommend to BIA that grazing permit number 18-21-76 be transferred to Appellant. The District 18 Grazing Committee later clarified that it intended for the permit to be used at the Dahozy Range Management Unit. 23/

The Regional Director acknowledges in his decision that at first BIA delayed responding to this recommendation, due to a dispute between Appellant and Irene Moore over the intended grazing area. 24/ His decision then rejects the District 18 Grazing Committee's recommendation on the substantive grounds that, according to an October 2000 range assessment survey, the requested permit would allow far more grazing than the Dahozy Range Management Unit could sustain. The Regional Director also concludes that

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23/ Minutes from the May 3, 1999 meeting of the District 18 Grazing Committee do not indicate where the permit was to be used, but a subsequent resolution of the District 18 Grazing Committee dated Oct. 4, 1999, specifies use at the Dahozy Range Management Unit.

24/ This dispute appears to be resolved. The record shows that all previously issued grazing permits in favor of Ms. Moore, that might have conflicted with Appellant's rights, were cancelled by the date of the Regional Director's decision.

the option of issuing a permit for a lesser number of sheep units, i.e., a sustainable number of sheep units in accordance with the findings of the range assessment survey, would violate an existing Navajo policy limiting the transfer of less than 10 sheep units, and proposed Navajo legislation that would prohibit the transfer of less than 50 sheep units. 25/

Under Federal law, the adjustment of previously established district carrying capacities is to follow the procedure described in 25 C.F.R. § 167.6(b) and (c):

> (b) Recommended adjustment in carrying capacities shall be referred by the Superintendent to District Grazing Committee, Central Grazing Committee, and the Navajo Tribal Council for review and recommendations prior to presentation to the Area Director and the Commissioner of Indian Affairs for Approval.
>
> (c) Upon the request of the District Grazing Committee, Central Grazing Committee and Navajo Tribal Council to the Superintendent; recommendations for future adjustments to the established carrying capacities shall be made by Range Technicians based on the best information available through annual utilization studies and range condition studies analyzed along with numbers of livestock and precipitation data. The recommendations of the Range Technicians shall be submitted to the Superintendent, the Area Director and the Commissioner of Indian Affairs.

The first thing to notice about these procedures is that they are intended to establish authorized carrying capacities for entire Districts, and not individual range management units. See 25 C.F.R. § 167.6(a). 26/ The range assessment survey conducted in the present case, in contrast, evidently covered just the Dahozy Range Management Unit, and not all of District 18.

The second thing to notice is that adjustment of authorized carrying capacities is intended to be a collaborative process, involving both BIA and tribal officials. Under 25 C.F.R. § 167.6(b), BIA is to refer its proposed adjustments to Navajo officials for "review and recommendations" before approval. Under 25 C.F.R. § 167.6(c), Navajo officials may initiate a regular process of updating established carrying capacities through the work of Range Technicians. The record in this case reflects neither of these procedures.

25/ The Board does not know whether the proposed Navajo legislation, cited by the Regional Director in his Feb. 28, 2003 decision, has since become law.

26/ "The Commissioner of Indian Affairs on June 26, 1943, promulgated the authorized carrying capacity for each land management district of the Navajo Reservation."

Rather, it appears that the Regional Director used a range assessment survey prepared for BIA, covering just a subset of District 18, to unilaterally justify denying the recommendation of the District 18 Grazing Committee concerning grazing permit number 18-21-76. There is no indication in the record that tribal officials either requested this survey in accordance with 25 C.F.R. § 167.6(c), or had an opportunity to review or provide recommendations concerning it in accordance with 25 C.F.R. § 167.6(b).

Given that there is an established Federal regulatory process for adjusting authorized carrying capacities on the Navajo Reservation, we cannot assume BIA has the right to disregard that process and deny a request from the District 18 Grazing Committee concerning a grazing permit, based upon a perceived carrying capacity problem that has not, as far as we can tell from the record, previously been raised with tribal officials. The fact that the range management study in question was confined to a single portion of District 18, and did not encompass the entire District, appears to be a further basis for finding that the Regional Director's decision is without adequate explanation or support.

The Board is also concerned that the Regional Director took it upon himself in this instance to interpret tribal policy and pending tribal legislation. Well-established Federal policy encourages respect for tribal self-government, including the right of tribes to interpret their own laws. The Board has often cautioned restraint on the part of BIA in undertaking to interpret tribal laws. Maroquin v. Anadarko Area Director, 29 IBIA 45, 48 (1996) See also Keweenaw Bay Indian Community v. Minneapolis Area Director, 29 IBIA 72, 78 (1996). We see no reason to abandon that approach merely because, as is the case here, BIA and the Navajo Nation share responsibility for regulating the grazing of livestock on the Navajo Reservation.

In the division of responsibility for managing grazing on the Navajo Reservation, BIA's role is defined by 25 C.F.R. Part 167. Nothing in that set of regulations, and no other Federal law of which the Board is aware, would have prevented BIA from issuing a grazing permit for the Dahozy Range Management Unit in the amount of six sheep units. The Regional Director failed to consider that option solely because he perceived that doing so would offend Navajo law. That is not a sufficient basis when the Tribe itself has not even been given a reasonable opportunity to consider the matter.

In accordance with 25 C.F.R. § 167.9(d), the District 18 Grazing Committee in this case recommended the transfer to Appellant of a grazing permit for 63 sheep units for use at the Dahozy Range Management Unit. After that recommendation was issued, the Regional Director learned that such a permit might result in severe overgrazing. Rather than simply denying the District 18 Grazing Committee's request, the Board believes that the nature of the relationship intended by the Navajo Grazing Regulations indicates that the

Regional Director should have referred the request back to the District 18 Grazing Committee, bringing to its attention the important new information contained in the October 2000 range assessment survey for the Dahozy Range Management Unit. Doing so would have preserved the cooperative nature of the shared duties for managing grazing on the Navajo Reservation, as envisioned by 25 C.F.R. § 167.3. 27/ It might also have been used to start the process of adjusting the overall carrying capacity of the District, as envisioned in 25 C.F.R. § 167.6. And in any event, referring the matter back to the District 18 Grazing Committee would have given that body the opportunity to decide, in the first instance, whether to revise or abandon its recommendation, while considering tribal policies identified by the Regional Director that might discourage or even prohibit the transfer of small blocks of grazing rights.

We therefor vacate the Regional Director's second finding, to the effect that the grazing permit Appellant purchased from Calvin Ben may only be used in Mr. Ben's original location or customary use area, and remand with instructions to refer the request of the District 18 Grazing Committee back to that body, together with the most recent information available to BIA on the carrying capacity of the Dahozy Range Management Unit, and ask whether the District 18 Grazing Committee would like to revise its recommendation prior to BIA action. The Regional Director may of course initiate any other efforts he would like in order to have the carrying capacity of Navajo District 18 reassessed in accordance with the provisions of 25 C.F.R. § 167.6. 28/

The Regional Director's third finding, to the effect that grazing permit number 18-21-95 could only be used in Thompson Gail's original customary use area, is bound in some respects to the determination of what happens to grazing permit number 18-21-76. As with permit number 18-21-76, the Board cannot identify any Federal authority for the

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27/ The purpose of 25 C.F.R. Part 167 is in part "[t]o secure increasing responsibility and participation of the Navajo people, including tribal participation in all basic policy decisions, in the sound management of one of the Tribe's greatest assets, its grazing lands, and to foster a better relationship and a clearer understanding between the Navajo people and the Federal Government in carrying out the grazing regulations."

28/ We do not decide in this case what choices the Regional Director will have if, after referral to the District 18 Grazing Committee, that body responds with a recommendation that the Regional Director is convinced would result in long-term damage to the Dahozy Range Management Unit. We have determined only that, under existing regulations, the Regional Director erred when he denied the District 18 Grazing Committee's request based solely on his unilateral determinations about carrying capacity and the application of tribal law.

Regional Director's decision concerning grazing permit number 18-21-95. Instead, the Regional Director's decision is based exclusively on his interpretation of Navajo law, which is insufficient under the circumstances.

The District 18 Grazing Committee initially asked to have grazing permit number 18-21-95 combined with grazing permit number 18-21-76, for use at the Dahozy Range Management Unit. After a long delay, during which it became evident that BIA approval was not forthcoming, the District 18 Grazing Committee apparently modified its initial request to simply ask for the return of both permits, so that Appellant could use permit number 18-21-95 at the Dahozy Range Management Unit, and permit number 18-21-76 at Mr. Ben's original designated grazing area. See November 4, 2002 Resolution of the District 18 Grazing Committee.

Under these circumstances — a delay of approximately three years between the District 18 Grazing Committee's first recommendation and BIA's answer; the existence of a range assessment survey that the District 18 Grazing Committee has never had a chance to incorporate into its recommendations; and the failure of the Regional Director to render his ultimate decisions on Appellant's grazing permits in accordance with Federal law — the Board concludes that it must vacate and remand the Regional Director's decision with respect to both grazing permit number 18-21-76 and grazing permit number 18-21-95, and have the Regional Director refer the District 18 Grazing Committee's recommendations back to that body for reconsideration. This result is consonant both with the letter and the spirit of 25 C.F.R. Part 167, and will properly place initial consideration of what to do about the supposed limited carrying capacity of the Dahozy Range Management Unit with the District 18 Grazing Committee.

Given the outcome in this case, the Board does not address the other arguments raised by Appellant.

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 first finding of the Regional Director's February 28, 2003 decision, to the effect that Appellant's fencing application was incomplete and invalid. The Board vacates and remands the Regional Director's second and third findings from that decision, to the effect that grazing permits number 18-21-76 (from Calvin Ben) and 18-21-95 (from Thompson Gail) cannot be combined or otherwise issued in the name of Appellant for use within the Dahozy Range Management Unit, with instructions to refer the recommendations concerning these grazing permits back to the District 18 Grazing Committee for reconsideration. The

Regional Director should supply the District 18 Grazing Committee with the most current and accurate information available to the Regional Director concerning the carrying capacity of District 18 in general, and the Dahozy Range Management Unit in particular, so that the District 18 Grazing Committee has before it all of the factors that the Regional Director believes should bear upon any new recommendation the District 18 Grazing Committee may choose to make.

I concur:

// original signed
David B. Johnson
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge