



## INTERIOR BOARD OF INDIAN APPEALS

Sheila Rutherford and Tim McDonald v. Rocky Mountain Regional Director, Bureau of  
Indian Affairs

42 IBIA 218 (02/27/2006)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

SHEILA RUTHERFORD and TIM	:	Order Affirming Decision
McDONALD,	:	
Appellants,	:	
	:	
v.	:	Docket No. IBIA 04-113-A
	:	
ROCKY MOUNTAIN REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	February 27, 2006

Sheila Rutherford and Tim McDonald (Appellants) 1/ appeal a May 13, 2004 decision of the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA). In his decision, the Regional Director affirmed a decision by the Superintendent, Blackfeet Agency (Superintendent) finding that Appellants were in trespass on Blackfeet Allotment No. 603, but remanded the matter so that the Superintendent could take formal action in accordance with the regulations governing trespass on Indian agricultural land, 25 C.F.R. §§ 166.800 - 166.819. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Regional Director's decision.

### Background

Blackfeet Allotment No. 603 is more particularly described as Sec. 23 NW<sup>1</sup>/<sub>4</sub> SE<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> T. 30 N., R.11 W. and is held in trust by the United States for the beneficial use of seven Blackfeet tribal members. Appellant Rutherford is the daughter of one of the co-owners. Neither Appellant owns any interest in the allotment. Appellants occupy a home on the allotment without a lease. Between 1998 and 2003, the Superintendent

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1/ This appeal was filed by Sheila Rutherford and her husband, Tim McDonald, and the Board has accordingly docketed the appeal with both Ms. Rutherford and Mr. McDonald as Appellants. The administrative record shows, however, that until September 2003, all correspondence related to this case was exclusively between BIA and Sheila Rutherford. For the sake of simplicity, the Board will use "Appellants" throughout this decision to refer to Ms. Rutherford either alone or in conjunction with Mr. McDonald.

notified Appellants three times that they were in trespass on the allotment and held several meetings with Appellants and the owners of the allotment in an attempt to resolve the situation. During these meetings, some of the owners consistently stated that they were unwilling to have a homesite lease on the allotment. The administrative record also reflects that at a meeting held on October 23, 2002, several owners reiterated their unwillingness to provide Appellants with a homesite lease, stated that they wanted Appellants to remove their house and belongings from the allotment by August 31, 2003, and demanded that Appellants pay a monthly rent of \$600 until Appellants removed the house from the allotment.

In a decision issued on October 24, 2003, the Superintendent found that Appellants had “knowingly and admittedly occupied this trust land illegally since at least 1986” and that Appellants had “failed to secure a valid homesite lease” that would have allowed them to live on the allotment. Oct. 24, 2003 Letter from Superintendent to Appellants. The Superintendent’s letter demanded that Appellants remit \$6,600 for rent as noted on a Bill for Collection sent to Appellants on September 26, 2003. 2/

Appellants appealed the Superintendent’s decision to the Regional Director. Appellants’ statement of reasons asserted that BIA did not have jurisdiction to enforce rental or trespass laws because the dispute was between tribal members. On May 13, 2004, the Regional Director affirmed the Superintendent’s finding that Appellants were in trespass under 25 C.F.R. § 166.800, but remanded the Superintendent’s decision so that the Superintendent could take formal action in accordance with the regulations governing trespass.

On June 4, 2004, on remand, the Superintendent formally cited 25 C.F.R. § 166.800 for the definition of trespass. 3/ The Superintendent notified Appellants, in accordance with 25 C.F.R. §§ 166.803 and 166.812, that they had ninety days to remove from the allotment their home and personal belongings, including any unauthorized livestock, and that once Appellants had removed their home and belongings, an inspection and appraisal report would be requested to determine the fair market value of past due

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2/ The amount of the Bill for Collection, \$6,600, was calculated based on a monthly rent of \$600 for eleven months (November 2002 through September 2003). The September 26, 2003 letter also stated that Appellants were to continue to pay \$600 every month until they removed their house from the property.

3/ Trespass is defined by 25 C.F.R. § 166.800 as “any unauthorized occupancy, use of, or action on Indian agricultural lands.”

trespass rental and an assessment of damages, penalties and any costs associated with the trespass. June 4, 2004 Letter from Superintendent to Appellants.

By letter dated June 10, 2004, Appellants appealed to the Board and filed a Statement of Reasons. No other briefs were filed. 4/

### Discussion

On appeal, Appellants do not dispute BIA's finding that they are in trespass. 5/ Rather, Appellants argue that the Regional Director improperly relied on the regulations found at 25 C.F.R. §§ 166.800 - 166.819, which govern trespass on Indian agricultural land. Because this dispute involves a homesite, they contend the regulations governing Indian agricultural land do not apply. Appellants argue in the alternative that if the regulations governing trespass on Indian agricultural land do apply, BIA nevertheless is without jurisdiction to enforce rental or trespass laws in this case because the dispute is an intra-tribal dispute between tribal members.

Appellants' first argument is without merit. The applicability of 25 C.F.R. §§ 162.106(b) and 166.800 is determined by the character of the lands, not by the nature of the use. 6/ Thus, so long as the trespass occurs on Indian agricultural land, it is immaterial that the trespass involves a home unlawfully placed on the land. Moreover, the general regulations governing leases and permits define trespass as "an unauthorized possession, occupancy or use of Indian land." 25 C.F.R. § 162.101. Therefore, even if

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4/ Appellants attached both the Regional Director's May 13, 2004 decision and the Superintendent's June 4, 2004 decision. The Board's jurisdiction is limited to reviewing the Regional Director's decision. However, because the only arguments Appellants make on appeal pertain to issues common to both the Regional Director's and Superintendent's decisions, we can fully consider and decide all of those arguments.

5/ With limited exceptions not relevant here, a lease, approved by the Secretary of the Interior or an authorized representative, is required before taking possession of Indian land. 25 C.F.R. §§ 162.104(d), 162.604(a).

6/ 25 C.F.R. § 162.106(b) provides: "Where a trespass involves Indian agricultural land, we will also assess civil penalties and costs under part 166, subpart I, of this chapter." 25 C.F.R. § 166.800 states in relevant part: "Under this part, trespass is any unauthorized occupancy, use of, or action on Indian agricultural lands."

25 U.S.C. § 166.800 did not apply in this case, Appellants undisputedly would be in trespass. <sup>7/</sup>

The regulations define Indian agricultural land broadly, as “Indian land or Government land suited or used for the production of crops, livestock or other agricultural products, or Indian land suited or used for a business that supports the surrounding agricultural community.” 25 C.F.R. § 162.101 (emphasis added). Appellants have offered no evidence to demonstrate that these lands do not fit within the definition of Indian agricultural land, and the record shows that Allotment No. 603 has been used for grazing. Contrary to what Appellants claim, the regulations do not require the existence of a “grazing issue” in order for land to qualify as agricultural land.

Because Appellants have failed to demonstrate that Allotment No. 603 does not fit within the definition of “Indian agricultural land,” the Board finds that the Regional Director appropriately relied on the trespass regulations found at 25 C.F.R. §§ 166.800 - 166.819 for assessing penalties against Appellants.

Turning to Appellants’ alternative argument — that BIA does not have jurisdiction to enforce rental or trespass laws when a dispute involves tribal members — the Board finds that it, too, is without merit. Appellants rely on United States v. Plainbull, 788 F. Supp. 1147 (D. Mont. 1990), to support their argument. The Plainbull decision, however, is inapposite. In Plainbull, the United States brought an action on behalf of the Crow Tribe of Indians alleging that defendant members of the tribe residing within the reservation had grazed livestock in trespass — i.e., without a grazing permit and without paying grazing fees. The United States sought to enforce BIA’s grazing regulations, which the Tribe had

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<sup>7/</sup> Appellants appear to be attempting to avoid the more specific remedies for trespass on Indian agricultural land found at 25 C.F.R. §§ 166.801 and 166.812. Where a trespass does not involve Indian agricultural land, the regulations do not call for the application of Part 166 to assess civil penalties and costs. Instead, the regulations simply provide that BIA “will take action to recover possession on behalf of the Indian landowners, and pursue any additional remedies available under applicable law.” 25 C.F.R. § 162.106(a).

adopted by resolution. 8/ The District Court for the District of Montana dismissed the case for lack of jurisdiction. The Court of Appeals concluded that the federal courts did have jurisdiction, but affirmed the dismissal based on principles of abstention. 957 F.2d 724 (9<sup>th</sup> Cir. 1992).

Appellants in this case argue that, just as in Plainbull, the trespass dispute between Appellants and the owners of Allotment No. 603 is an internal matter between tribal members. Appellants therefore assert that the Board does not have jurisdiction to resolve the dispute. Appellants, however, are misguided in their reliance on Plainbull. First, although the district court concluded that enforcement of a tribal resolution is an internal tribal matter, the Ninth Circuit recognized that the United States has authority to bring an action in federal court to enforce federal law against tribal members in trespass. 957 F.2d at 725-26. The Ninth Circuit nevertheless affirmed the district court's conclusion that the matter was appropriate for abstention based on the principle of promoting tribal self-government. Id. at 727. Second, 25 U.S.C. § 3713(c), enacted in 1993, expressly provides that the United States has jurisdiction to enforce the federal trespass regulations on Indian agricultural land, reinforcing the Ninth Circuit's finding that there is no automatic deferral to tribal courts. Section 3713(c) does provide for deferral to tribal prosecution of trespass under certain circumstances, but Appellants do not argue those circumstances are present here. Finally, the present case involves no issues of tribal law and the Board's assertion of jurisdiction in no way infringes on tribal sovereignty. 9/

The Board therefore finds that it has jurisdiction to resolve the issues in this case and, as noted above, finds that the Regional Director appropriately relied on the trespass regulations found at 25 C.F.R. §§ 166.800 - 166.819 as authority to assess penalties against Appellants.

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8/ The defendants contended that BIA's regulations did not apply because they were promulgated under the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461 et seq., and the Crow Tribe elected not to be subject to the IRA. The Crow Tribe had, however, passed Tribal Resolution No. 86-30, which adopted the BIA grazing regulations and authorized the United States to manage grazing lands within the reservation in accordance with these regulations, including assessment of penalties for trespass actions.

9/ Unlike this case, "in cases where the pivotal issues are issues of tribal law, the Board often refrains from exercising jurisdiction." Lynwood Ewing v. Rocky Mountain Regional Director, 40 IBIA 176, 183 (2005).

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 affirms the Regional Director's decision of May 13, 2004.

I concur:

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// original signed  
Amy B. Sosin  
Acting Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge