



## INTERIOR BOARD OF INDIAN APPEALS

Rosebud Indian Land and Grazing Association and its Members v. Great Plains Regional  
Director, Bureau of Indian Affairs

44 IBIA 36 (12/21/2006)



# 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

ROSEBUD INDIAN LAND AND : Order Dismissing Appeal  
GRAZING ASSOCIATION AND :  
ITS MEMBERS, :  
Appellants, :  
v. :  
GREAT PLAINS REGIONAL : Docket No. IBIA 07-19-A  
DIRECTOR, BUREAU OF :  
INDIAN AFFAIRS, :  
Appellee. : December 21, 2006

The Rosebud Indian Land and Grazing Association (Association) and its members (collectively “Appellants”) have appealed to the Board of Indian Appeals (Board) from an August 3, 2006, decision of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director’s decision established a grazing rental rate of \$14.61 an Animal Unit Month (AUM) for individually-owned Indian lands on the Rosebud Reservation (Reservation) for new permits issued for the 2007 grazing season, beginning December 1, 2006. We dismiss this appeal because we conclude that Appellants have not shown that they have a legally-protected interest that is adversely affected by the Regional Director’s decision setting a grazing rate for new permits, and therefore they lack standing. Additionally, we conclude that Appellants’ allegations that the new rate will be applied to existing permits are not ripe for review.

## Background

As described in greater detail in previous Board decisions, BIA establishes the rental rate and issues grazing permits for individually-owned Indian trust lands in range units<sup>1/</sup> based on the fair annual rental value. See Hall v. Great Plains Regional Director, 43 IBIA 39, 39-40 (2006); Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director,

---

<sup>1/</sup> After consulting the Indian owners, BIA may consolidate Indian rangelands into “range units” for purposes of managing and administering grazing. See 25 C.F.R. §§ 166.4, 166.302

41 IBIA 308 (2005). In January 2006, in anticipation of the expiration of grazing permits on the Reservation for the 2001-2006 permit period, the Regional Director requested an appraisal of the fair rental value to be used for new grazing permits issued for the 2007 grazing season. See Jan. 31, 2006 Memorandum from Great Plains Regional Director to Great Plains Regional Appraiser, Office of the Special Trustee. After receiving the appraisal, the Regional Director issued his August 3, 2006 decision establishing a grazing rental rate of \$14.61 an AUM to “be used for new permits issued [by BIA] for the 2007 grazing season” for individually-owned Indian lands on the Reservation. The Regional Director’s decision describes the rate as “a new reservation minimum grazing rental rate” that applies to the issuance of new permits. It does not state that the decision applies to, or is a rate adjustment for, any existing grazing permits that by their terms extend into the 2007 season. In a follow-up memorandum to the BIA Rosebud Agency Superintendent (Superintendent), the Regional Director states that “[t]his grazing rental rate is for new permits which will be issued for the 2007 grazing season.” Aug. 4, 2006 Memorandum from Regional Director to Superintendent.

An affidavit submitted by the Superintendent for this appeal states that all BIA-issued grazing permits on the Reservation “expire on November 30, 2006,” except for permits for range units (RUs) 26, 59, and 193. See Nov. 30, 2006 Declaration of Elton Hawk Wing ¶ 4. 2/

The Board recently held that prospective permittees who hold tribal preference rights for obtaining new permits do not have standing to challenge a BIA grazing rate decision for new permits. Hall, 43 IBIA 39. Standing requires, among other things, that an appellant show that he or she has suffered injury to a legally-protected interest.

---

2/ The permittee for RUs 26 and 59 is an individual whose permits extend to November 30, 2011. The permittee for RU 193 is the Rasmussen-Lehmann 33 Ranch, and its permit extends to November 30, 2009. All three permits with these extended terms were approved by the Superintendent.

According to the Regional Director, approximately 200 grazing permits are issued to approximately 150 permittees on the Reservation, and over 10,000 individuals own interests in individually-owned lands included in range units subject to grazing permits. The Superintendent’s affidavit states that 110 new permits containing the \$14.61 AUM rate for the 2007 grazing season have been signed and returned to BIA by the prospective permittees, apparently including some members of the Association who are identified in Appellants’ notice of appeal. Declaration of Elton Hawk Wing ¶¶ 10-12.

See id. at 44 & n.8. 3/ The Board concluded in Hall that the prospective permittees did not have a legally-protected interest that was injured by the grazing rate set for new permits, and therefore lacked standing. Id. at 44, 51.

Because both Hall and the present appeal involved a grazing rate decision for new permits, the Board ordered Appellants to show that they have standing to bring this appeal and why Hall would not dictate dismissal. 4/ Appellants and the Regional Director have filed briefs on the standing issue as well as on the underlying merits of the grazing rate decision.

With respect to standing, Appellants do not assert that the Association itself has standing in its own right, but only that it has standing as a representative of one or more of its members who, it alleges, have standing. Appellants make two arguments for why one or more of the Association's members have standing.

First, Appellants contend that the Regional Director's decision was not limited to new permits and "will likely automatically apply" to permits that did not expire on November 30, 2006. Opening Brief at 3. Appellants claim that some of the Association's members hold such permits, and therefore they have a legally-protected interest in challenging the rate set in the Regional Director's decision.

Initially, Appellants identified these Association members as (1) the two ranches that are subject to the three permits that BIA acknowledges have not expired, and (2) five members who received tribal approval for modifying and extending their permits, although Appellants conceded that BIA has not approved the extensions or modified the permits. Appellants now contend that the class of members with unexpired permits has grown considerably because on November 29, 2006, during the course of this appeal, the Tribal

---

3/ As noted in Hall, although the Board is an executive branch forum, it follows both the constitutional and prudential principles of standing applied by federal courts. Id. at 44.

4/ The Board also expedited briefing and its consideration of this appeal because the 2006 grazing season expired on November 30, 2006, because no new permits could issue absent resolution of this appeal or an order placing the Regional Director's decision into immediate effect, and because of the large number of individuals affected.

The Regional Director requested that the Board place his decision into immediate effect pending resolution of the appeal, or impose an appeal bond on Appellants, or allow prospective permittees to opt out of the appeal and receive permits. Because we are dismissing the appeal, these requests are moot.

Council passed an amendment to its tribal grazing resolution. That amendment states that the “Council extends the current grazing contracts for a period of one more year.” Resolution No. 01-137, sec. I.A., as amended Nov. 29, 2006. Appellants argue that the Council’s action automatically extends the terms of otherwise expiring permits as a matter of law, that a majority of the permits now remain in effect and are subject to the rate stated in the Regional Director’s decision, and therefore the permit holders have standing because they are adversely affected by that decision.

Second, Appellants contend — apparently now in the alternative — that even as to the Association’s members whose permits may have expired, they nevertheless have standing because they hold and have exercised a right of first renewal for new permits and are entitled to new permits, which gives them a legally-protected interest adversely affected by the grazing rate decision.

In response, the Regional Director reiterates that his decision “establish[es] the fair annual rental \* \* \* for new permits.” Answer Brief at 2; see also id. at 9 (“The new grazing rate \* \* \* is for \* \* \* permits set to begin on December 1, 2006.”). The Regional Director contends that, consistent with our conclusion in Hall, Appellants lack standing “to challenge the grazing rate for a new permit.” Id. at 10. The Regional Director also argues that even if Appellants could show the constitutional elements of standing, they would still lack standing under prudential rules of standing that require an appellant to show that it falls within the “zone of interests” protected or regulated by the statutory provision invoked.

### Discussion

According to Appellants, both of the grounds on which they rely give them a legally-protected interest that was injured by the Regional Director’s decision. We first conclude that even assuming that some of the Association’s members hold permits that have not expired — an issue not free from doubt — Appellants’ claim that the new permit rate in the Regional Director’s decision will also be applied to continuing permits as an adjusted rate is not ripe for our review and their claim of injury is speculative. The Regional Director’s decision only states that it was issued to set a rate for new permits, and we leave for future consideration and action by BIA any issues concerning modification of permits or rate adjustments for non-expiring permits. Second, we reject Appellants’ argument that their right of first renewal is a legally-protected interest that was adversely affected by the Regional Director’s decision, and therefore we reject their argument that this provides them with standing.

## Non-Expiring or Allegedly Non-Expiring Permits

Appellants initially argued that two of the Association's members held permits containing terms extending beyond the 2006 grazing season, citing the three permits, for RUs 26, 59, and 193, that BIA acknowledges have not expired. Appellants now contend, based on the November 29, 2006 Tribal Council action, that the majority of grazing permits have been extended beyond the 2006 grazing season, and that the Regional Director's decision "will likely automatically" apply, Opening Brief at 3, to those permits under 25 C.F.R. § 166.408, thus giving them a legally-protected interest affected by the decision.

Assuming, without deciding, that at least some of the Association's members hold permits that did not expire on November 30, 2006, we nevertheless lack jurisdiction to consider Appellants' claims in this appeal because they are not ripe for our review and because Appellants' claim of injury is speculative.<sup>5/</sup> First, the Regional Director's decision, on its face, only makes the new rate applicable to new permits and, in this appeal, the Regional Director reiterates that the decision was issued for new permits. Answer Brief

---

<sup>5/</sup> It is not clear that any members of the Association actually hold permits that extend beyond November 30, 2006, or if that is the case, that those members would share the same interest as prospective permittees with respect to challenging the Regional Director's decision for the new permit rate.

Neither of the two permittees for the three permits that BIA acknowledges have not expired was named as an appellant or a member of the Association in Appellants' notice of appeal. Appellants' opening brief includes an affidavit by Jeff Waln, an individual member of the Association, who states that the ranches subject to these permits or their owners are members of the Association. Mr. Waln does not state the basis for his competence to testify to the Association's membership rolls. Neither the individual permittee for RUs 26 and 59 nor any individual on behalf of the Rassmussen-Lehmann 33 Ranch (RU 193 permittee) has made any such representation of membership in the Association or sought to appeal the Regional Director's decision. If the Association wished to show standing based on a particularized injury to two members, and to show authorization from those individuals to represent them in this appeal, we would expect it to provide an affidavit from those members.

It is undisputed that BIA has not approved modifications to the five permits for which the Tribe approved extensions, or the permits that are the subject of the Tribe's November 29, 2006 resolution. Whether BIA is obligated to modify the permits, as Appellants contend, see infra note 7, is an issue not decided in the Regional Director's decision and not within the scope of this appeal.

at 2, 9. Second, the Regional Director makes no mention of applying the new rate to permits that do not expire in 2006 nor is there any evidence in the record that the Regional Director has taken action to apply the new rate, or his August 3, 2006 decision, to non-expiring permits. Whether the new rate will or must be applied to non-expiring permits is an issue that apparently has not been decided by BIA, and one that is outside the scope of this appeal and not ripe for Board review.<sup>6/</sup> The decision set a rate for new permits, and Appellants have not shown that those who claim to hold permits that have not expired have been affected by the grazing rate decision for new permits for the 2007 grazing season.<sup>7/</sup>

### Expired Permits

For permits that have expired, Appellants nevertheless contend that they have standing based on a “right of first renewal.” We disagree. The right of first renewal is not substantively different, for purposes of acquiring a new permit, from the tribally-granted

---

<sup>6/</sup> We note that although Appellants argue that the rate for new permits “will likely automatically” apply to non-expiring permits, Opening Brief at 3, they also acknowledge that BIA has authority in certain circumstances to set the rate on an existing permit at less than fair market value. *Id.* (citing 25 C.F.R. § 166.408). Appellants’ assertion that the record in this case contains no BIA findings pursuant to section 166.408 reinforces our conclusion that this issue is not ripe for our review. In addition, we note that the affidavit of Appellant Jeff Waln states that a modification of his permit sent to him by BIA in October 2006 (but not yet approved) contained the 2006 rate, again suggesting that BIA has not taken action to apply the new rate to permits that may be extended. Affidavit of Jeff Waln ¶ 4. Our conclusion that this issue is not ripe for review in this appeal is bolstered by a Motion for Extension of Time from the Regional Director, received by facsimile on December 20, 2006, in which the Regional Director requests additional time to respond to Appellants’ arguments concerning the Tribal Council action. The Motion requests additional time so that the BIA can consider the Council’s action “and seek from the Tribe its interpretation of the application and effectiveness of amendments to Tribal Resolution No. 01-137 and the implications [for an earlier Tribal resolution].” Motion at 1. Given the reasons stated for our disposition of this appeal, the Board denies the requested extension.

<sup>7/</sup> With respect to the effect of the Tribal Council’s November 29, 2006 action, Appellants apparently contend that a Tribe has the authority to unilaterally modify the duration of BIA-issued existing permits for individually-owned Indian lands, without landowner or BIA consent, leaving BIA with only a “ministerial” duty to modify the paperwork. Reply Brief at 5. That, of course, is a threshold issue that would have to be addressed before any issue arises with respect the rate applicable to such permits.

grazing allocations that give a preferential right, without competition, to obtain a permit for a particular range unit. See Hall, 43 IBIA at 46. Eligibility for “first renewal” is determined by the Tribe. See Tribal Resolution No. 01-137 (“Eligibility for first renewal are those permittees that currently hold Allocations or right of first renewal range units.”). The right of first renewal granted by the Tribe gives the holder an option of renewing a grazing permit currently held for a particular range unit, thereby receiving a new permit for that range unit — without competition from other ranchers — for a new permit period. As with other tribal grazing allocations, BIA will implement the tribal preference, “subject to” the regulatory provisions giving BIA and Indian landowners authority to set rental rates for individually-owned lands. See Hall, 43 IBIA at 40 (citing 25 C.F.R. §§ 166.218(c), 166.400(b) & (c)). Thus, the right of first renewal allows the holder to be first in line for obtaining a new permit for a range unit, but does not entitle him or her to obtain a permit at a rate other than that set by BIA or the landowners. Even after a permittee informs BIA of his or her intent to exercise the right of first renewal, so that BIA may prepare the permits, he or she may still, of course, decline to sign the new permit if the terms, including the grazing rate, are unacceptable. 8/

The appellants in Hall did not claim that they had any “right of renewal” for their permits, nor did they characterize their allocation preference as such. Nevertheless, we described the tribal allocation as “in effect a right of first refusal.” Id. at 46. We held that such a right or interest “is distinct from a right to obtain a permit at a price other than the rate set by BIA on behalf of the Indian landowners, and therefore creates no legally-protected interest that is adversely affected by BIA’s rate decision” for new permits. Id. The same rationale applies to Appellants in this case.

Appellants suggest, however, that their right of first renewal is somehow greater than a tribal preference right because the words “RIGHT OF FIRST RENEWAL” appear on certain permits and therefore vest a right as part of the permit. Opening Brief at 5. The Regional Director responds that the language on those permits is simply descriptive of how

---

8/ Appellants suggest that it is significant that they “exercised” their right of first renewal by returning forms sent by the Superintendent to permittees. The Superintendent, however, described the form as intended to expedite the permitting process by allowing permittees to “advise[] the Superintendent of [the permittee’s] intentions to exercise the Right of First Renewal option to retain [the permittee’s] range unit.” Aug. 16, 2006 letter from Supt. to Permittees (emphasis added). Even assuming that returning the forms actually “exercised” the right of renewal, rather than advising BIA of a future intention to do so, it would still only place the permittee first in line to accept (or decline to accept) the new permit — a right not affected by the Regional Director’s decision.

the permit was obtained (e.g., by exercising a right of first renewal, as opposed to a competitive bid), and confers no unqualified right to a future permit. Answer Brief at 9 n.9. We find the Regional Director’s explanation more convincing<sup>9/</sup>, but even if we agreed that the right-of-first-renewal language on the permits is not simply descriptive of how the permit was obtained, and conferred some right with respect to future permits, again there is no indication that it grants a right any greater than the allocation preference granted by the Tribe. That is, whether described as a right of first renewal or an allocation preference, any right that “vests” is still only a right to be first in line to accept (or not accept) a new permit offered for a particular range unit at the rate set by BIA or the landowner.

The right of first renewal does not, as Appellants argue, give the holder a “certain or virtually certain ‘future possessory right to land.’” See Reply Brief at 7. Appellants rely on Wilkinson v. United States, 440 F.3d 970 (8th Cir. 2006), but that case is distinguishable. In Wilkinson, the plaintiff-heirs held or were entitled to hold, a possessory interest in Indian trust property, although the property was subject to a mortgage. In the present case, a permittee’s possessory interest, as a threshold matter, is wholly contingent upon his or her agreement to the terms of a permit offered by BIA or a landowner, including agreement to the rental rate. Wilkinson did not suggest that a prospective permittee has any claim to a possessory interest in property until granted such a right by the landowner. Therefore, we reject Appellants’ argument that they hold a certain or virtually certain possessory interest that constitutes a legally-protected interest affected by the grazing rate decision. The “right of first renewal,” whether or not reflected on a permit, is no different, for our standing analysis, than the “right of first refusal” discussed in Hall.

Nothing in the Regional Director’s decision interferes with the right of first renewal: If the holder of that right wishes to obtain a new permit at the rate set by the Regional Director, he or she is first in line to do so. The Regional Director’s decision does not adversely affect that right, and therefore the right of first renewal provides no basis for Appellants to claim standing.

---

<sup>9/</sup> The right of first renewal apparently is available to all otherwise qualified tribal members who hold current permits. See Tribal Resolution No. 01-137 and Aug. 16, 2006 Letter from Superintendent to Permittees.

### 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 dismisses this appeal for lack of jurisdiction because Appellants lack standing to challenge the Regional Director's grazing rate decision for new permits and because claims regarding non-expiring permits are not ripe for our review. 10/

I concur:

          // original signed            
Steven K. Linscheid  
Chief Administrative Judge

          // original signed            
Debora G. Luther  
Administrative Judge

---

10/ Because we conclude that Appellants have not shown that they have any legally protected interest that is affected by the Regional Director's decision setting a grazing rate for new permits, we need not decide whether Appellants would fall within the "zone of interests" requirement for establishing prudential standing.