



INTERIOR BOARD OF INDIAN APPEALS

Rodney Frank v. Acting Great Plains Regional Director, Bureau of Indian Affairs

46 IBIA 133 (12/13/2007)



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

RODNEY FRANK,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 05-95-A
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	December 13, 2007

Appellant Rodney Frank appealed to the Board of Indian Appeals (Board) from a July 15, 2005, decision (Decision) of the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director upheld the February 25, 2005, decision of the Standing Rock Agency Superintendent (Agency; Superintendent) to issue grazing permits on Range Unit (RU) Nos. 247, 250, 706, and 723, located on the Standing Rock Reservation (Reservation) in South Dakota, to Ronald Brown Otter. Appellant had had grazing permits for these RUs during the previous permit period, and the Standing Rock Sioux Tribal Council (Tribal Council) initially allocated grazing privileges to Appellant for the new permit period. Before the permits were issued by BIA, the Tribal Council revoked its allocation to Appellant after determining that Appellant failed to satisfy the Standing Rock Sioux Tribe’s residency requirement. The Tribal Council then allocated the grazing privileges to Brown Otter, and the Superintendent subsequently issued grazing permits for the new permit period to Brown Otter.

Appellant challenges the Regional Director’s decision on the grounds that (1) the Standing Rock Sioux Tribe (Tribe) did not timely promulgate allocation eligibility requirements, and therefore, pursuant to regulations, BIA should have developed its own requirements instead of implementing a tribal allocation decision based on the Tribe’s belated requirements, (2) BIA is required to determine whether the Tribe violated Appellant’s due process and equal protection rights under the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, when it applied the Tribe’s allocation procedure and denied him preference for grazing permits for the new grazing period, and (3) the Tribe’s determination — that Appellant was ineligible for a grazing allocation because he did not

“live on the reservation” — was not supported by the evidence. Appellant also seeks a hearing before an administrative law judge (ALJ) to determine his residency and his eligibility for the grazing permits.

We conclude that Appellant has failed to meet his burden of showing error in the Decision and we therefore affirm: The Tribe’s allocation procedures were not adopted or applied out of time and, therefore, BIA was not required to implement its own eligibility requirements; and BIA is not required to determine whether the Tribe afforded Appellant procedural due process in accordance with Federal law in applying tribal law to make its grazing allocation decisions. Because the Board concludes that BIA was not required to review the Tribe’s procedures for making its grazing allocation decisions, we do not reach the merits of Appellant’s challenge to those procedures or to his residency nor do we refer this matter to an ALJ.¹

Regulatory Framework

Grazing on Indian trust or restricted lands is administered through permits issued or approved by BIA for range units. *See* 25 C.F.R. § 166.200. These “range units” are consolidated tracts of rangelands that BIA creates after consultation with the Indian landowners. *Id.* §§ 166.4, 166.302. With limited exceptions not relevant here, a permit is required to exercise grazing privileges on Indian land. *Id.* § 166.200; *Jacobs v. Great Plains Regional Director*, 43 IBIA 249 (2006).

Permits may be obtained through the “allocation process,” through which tribes may apportion grazing privileges among tribal members without competition. 25 C.F.R. §§ 166.4 (definition of “allocation”); 166.218 (acquiring a permit through allocation); *Jacobs*, 43 IBIA at 249. Tribes must adopt an allocation process either 60 days prior to the expiration of an existing permit *or* 60 days before granting a new permit. 25 C.F.R. § 166.218(d). Where a tribe fails to adopt an allocation process in keeping with subsection 166.218(d), BIA must then “prescribe the eligibility requirements” for grazing permits. *Id.* § 166.218(f).

¹ Appellant raises other issues for the first time on appeal, e.g., the Tribal Council lacked authority to reconsider or rescind its initial decision to allocate three of the RUs to Appellant, that the issuance of grazing permits to Brown Otter effected a “taking” of Appellant’s property. We dismiss these and other claims because they are raised for the first time on appeal.

BIA implements a tribe's allocation decisions by authorizing the allocated grazing privileges through granting or approving grazing permits, *Jacobs*, 43 IBIA at 250 (citing 25 C.F.R. § 166.218(c)), subject to certain regulatory provisions not relevant here, *see* 25 C.F.R. § 166.400(b) & (c). Any RUs left over after the tribe completes the allocation process are subject to advertisement, bidding, or negotiation to find a permittee. *Hall v. Great Plains Regional Director*, 43 IBIA 39, 40 (2006).

On November 2, 2004, the Tribe promulgated policies and procedures governing the allocation process on the Reservation for the period between November 1, 2004, through October 31, 2009. Standing Rock Sioux Tribe, Policies and Procedures, Range Unit Grazing Privileges, Resolution No. 374-04.² Resolution No. 374-04 establishes eligibility requirements for allocations, including a requirement that an applicant "live on the [R]eservation." *Id.* § III.G.³ Applications must include "[p]roof of residency . . . : physical address of ranch, letter from neighbors, or any other proof of residency." *Id.* § V.C.1c. Resolution No. 374-04 provides that, in case of doubt or dispute, the Tribal Council determines eligibility for RU allocations, and "their decision shall be final." *Id.* § III.F. Resolution No. 374-04 also provides that first preference for an allocation is given to "current permittees that meet all requirements, provided that the permittee has not had any violations during the previous permit period." *Id.* § IV.A.

Factual Background

Appellant is an enrolled member of the Tribe. According to Appellant, he had held grazing permits for RU Nos. 247, 250, 706, and 723 — located in Corson County, South Dakota — since 1985. Appellant's most recent permits expired on October 31, 2004. On December 9, 2004, Appellant applied for a reallocation of grazing privileges on the same RUs for the new permit period from November 2004 through October 2009. Attached to Appellant's application were (1) a Grazing Resolution Certification, in which he certified that he understood and agreed to the Tribe's grazing policies and procedures;⁴ and (2) a

² Resolution No. 374-04 amended Resolution 317-04, which was enacted on September 3, 2004. Resolution No. 317-04 was not included in the administrative record.

³ The Tribe's previous allocation eligibility requirements apparently included a requirement that an applicant be a resident of or adjacent to the Reservation. *See* Appellant's Notice of Appeal to Regional Director, Mar. 7, 2005, at 1.

⁴ Appellant agreed to Resolution No. 317-04, which was in effect until amended by Resolution No. 374-04 on November 2, 2004. The record does not reflect whether

(continued...)

Residency Certification, in which he certified that he resided within the boundaries of the Reservation in Isabel, South Dakota. Three witnesses signed the Residence Certification, attesting to Appellant's residence on the Reservation.

In December 2004, the Tribe's Economics Committee recommended that the units be allocated to Appellant. Apparently, the Economics Committee forwards its allocation recommendations to the Tribal Council for final decision. On January 6, 2005, the Tribal Council met and allocated RU Nos. 250, 706, and 723 to Appellant, but voted against allocating him RU No. 247. There is no indication in the record that the Tribal Council's January 6 allocation decisions were communicated to BIA.

On January 10, 2005, Ronald Brown Otter, another tribal member, submitted a "formal[] challenge" to Appellant's "residency and allocation privileges." Letter from Brown Otter to Economics Committee, Jan. 10, 2005. He explained that he traveled to Isabel to talk with Appellant about sharing RU No. 247. Apparently, in an effort to locate Appellant, Brown Otter had several conversations on January 8, 2005, with individuals who knew Appellant and raised questions in Brown Otter's mind concerning Appellant's residency.

The Economics Committee took Brown Otter's challenge under consideration. According to Mike Claymore, Chairman of the Economics Committee and a member of the Tribal Council, the Economics Committee "wanted to hear [Appellant's] side of the story," and therefore Claymore made "numerous attempts" to contact Appellant. Affidavit of Claymore ¶ 6. Claymore stated that he reached Appellant by cell phone on January 21, 2005, and advised him that the Economics Committee would be meeting on January 26 to afford Appellant an opportunity to rebut Brown Otter's challenge to his residency.

At some point after Claymore contacted Appellant but before January 26, 2005, Appellant sent an undated letter to Claymore. Appellant stated that he "hope[d] this letter will clarify any questions you had on our conversation on the phone." Letter from Appellant to Claymore, undated. Appellant said that he was on the road in Nebraska. He asserted that his "permanent address" was in Isabel, that he received his mail there, that he always stayed there when he was in town, and that he only occasionally stayed at a motel in Timberlake when he was visiting his sisters. *Id.* He encouraged Claymore to contact the postmaster in Isabel to verify his permanent address.

⁴(...continued)

Appellant may have agreed to Resolution No. 374-04, but Appellant does not claim to have been unaware of Resolution No. 374-04.

On January 26, 2005, the Economics Committee met to consider Brown Otter's challenge to Appellant's residency. Appellant did not attend the meeting. According to Claymore, the Economics Committee considered the facts before them, including Appellant's letter. The Economics Committee recommended that the allocations to Appellant be rescinded and that the allocations be granted instead to Brown Otter for RU Nos. 247, 250, 706, and 723.

According to Claymore, he received a call from Appellant after the January 26 meeting.⁵ Claymore told Appellant that the Economics Committee voted to recommend disapproval of his application and voted to recommend that the Tribal Council grant Brown Otter's application for the RUs. Claymore explained that the matter would be submitted to the Tribal Council. He told Appellant that "he should attend the meeting of the [Tribal Council] and that the recommendation of the Economics Committee to rescind the allocations of the Range Units would be considered by the Tribal Council." Affidavit of Claymore ¶ 10. The record does not reflect whether Appellant was informed of the date of the Tribal Council's meeting.

On February 2, 2005, the Tribal Council met and voted to rescind its previous motions awarding allocations for RU Nos. 250, 706, and 723, to Appellant. Appellant did not attend the meeting, nor did he submit a statement on his behalf. The Tribal Council also voted to allocate RU Nos. 247, 250, 706, and 723 to Brown Otter. The Tribe then submitted the allocation decisions to the Superintendent for issuance of the permits.

On February 4, 2005, two days after the Tribal Council voted to rescind Appellant's allocations, Appellant wrote to the Tribal Council and requested the opportunity to appeal the decision. The record does not reflect whether Appellant received a response.

On February 25, 2005, pursuant to the Tribe's allocation decisions, the Superintendent issued four grazing permits to Brown Otter, for RU Nos. 247, 250, 706, and 723, for the period beginning November 1, 2004, and ending October 31, 2009. Around the same time, Brown Otter paid the annual rental for each of the four RUs. On March 7, 2005, Appellant (1) filed a complaint in tribal court against the individual members of the Tribal Council, the Tribal Council, and Brown Otter, and (2) appealed to the Regional Director from the Superintendent's February 25, 2005, decision to issue the grazing permits to Brown Otter.

⁵ The record does not reflect the date of the phone call.

Tribal Court Proceedings

In his tribal court action, Appellant asserted that defendants violated tribal law and Federal law, including ICRA, in “refusing to grant [Appellant] first preference and the right to continued use of the range units.” Complaint at 3, *Frank v. Murphy* (Standing Rock Sioux Tribal Court). Appellant asserted that he lived on the Reservation and satisfied all other eligibility requirements. Appellant sought (1) a preliminary injunction prohibiting defendants or BIA from taking any action with regard to the RUs; (2) a declaration that Appellant was at all relevant times living and residing on the Reservation and was entitled to first preference; and (3) an order that Appellant be granted grazing privileges for the current permit period.

The tribal court held a hearing on March 16, 2005, and Appellant testified about his residency. On April 7, 2005, the tribal court dismissed Appellant’s complaint for lack of jurisdiction. The court determined that, because BIA had issued permits to Brown Otter, Appellant’s relief lay with BIA, not with the Tribe. The court found that it lacked authority to order Federal officials to act.

Appellant appealed the tribal court’s decision to the Standing Rock Sioux Supreme Court. The Tribe submitted a brief in which it argued that residency on the Reservation, for purposes of allocating grazing privileges, means that permittees are “required to maintain a ‘domicile,’ a *continuous physical presence* on the reservation, in addition to maintaining a residence.” Tribe’s Brief, *Frank v. Murphy*, at 7 (emphasis added).⁶ On September 9, 2005, the court affirmed the lower court’s judgment. The court concluded that (1) it lacked jurisdiction over BIA and (2) the Tribe was immune from suit. The court also concluded that Appellant could not maintain an action against the Tribe “over matters which are strictly administrative and political by nature.” Memorandum Opinion and Order at 4, *Frank v. Murphy* (Standing Rock Sioux Supreme Court Sept. 9, 2005).

Appeal to the Regional Director

In his appeal to the Regional Director, Appellant argued that he was entitled to first preference for the allocation and the permits, and that he was deprived of due process and equal protection of the laws when he was not awarded the permits and did not receive notice that the January 6, 2005, decision to award him allocations was going to be reconsidered. Appellant stated that he was not present at the February 2, 2005, Tribal

⁶ The Tribe maintained that Appellant conceded in tribal court that “approximately ninety percent of the year, he [is] on the road trucking.” *Id.*

Council meeting and was not offered a reasonable opportunity to present any evidence to refute Brown Otter's assertions and evidence regarding Appellant's residency. Appellant asserted that BIA should have conducted its own independent examination prior to issuing the permits. Appellant also argued that, because the Tribe did not enact eligibility requirements for the new permits 60 days before expiration of the old permits, BIA was required to prescribe the eligibility requirements, which it did not do.

Brown Otter filed an answer brief with the Regional Director, in which he argued that (1) Appellant was notified of the Economics Committee and Tribal Council meetings and had an opportunity to attend, but did not attend; (2) The Tribal Council's decision on eligibility under Resolution No. 374-04 is final; (3) Resolution 374-04 was passed more than 60 days before the allocations were made by the Tribe to Brown Otter, and therefore the Tribe prescribed eligibility requirements within the time provided for in 25 C.F.R. § 166.218. Subsequently, Brown Otter submitted a supplemental answer, to which he attached Claymore's affidavit and a letter from Appellant to Claymore, and asserted that the Tribal Council acted after providing Appellant with notice and an opportunity to be heard.

On July 15, 2006, the Regional Director issued the decision that is the subject of the present appeal. The Regional Director determined that this appeal fell squarely within the Board's decision in *Hunt v. Aberdeen Area Director*, 27 IBIA 173 (1995), which the Regional Director described as concluding that "the allocation of grazing permits is an intra-tribal matter." Decision at 1. The Regional Director concluded that BIA's only involvement in this case was to implement the Tribal Council's allocation decision, and "BIA's decision is secondary to [Appellant's] dispute with the Tribe and [Appellant's appeal] belongs in a tribal forum." *Id.* The Regional Director noted that Appellant's tribal court action had been dismissed; however, he stated that exhaustion of tribal remedies means that the tribal appellate courts must have the opportunity to review the lower court's decision. The Regional Director concluded that BIA did not have authority to order the allocation of tribal land in a manner inconsistent with the expressed wishes of the Tribe. The Regional Director found that the record "suggests that [Appellant] was provided notice that his residency was in question," and referred to Claymore's affidavit and Appellant's letter to Claymore. *Id.* The Regional Director upheld the Superintendent's decision to issue the permits to Brown Otter.⁷

Appellant appealed to the Board, and included a statement of reasons in his notice of appeal. Appellant, BIA, and Brown Otter filed briefs.

⁷ The Regional Director did not address Appellant's contention that BIA was required to draft eligibility requirements.

Discussion

1. Standard of Review

Appellant bears the burden of proving error in the Regional Director's decision. *Birdtail v. Rocky Mountain Regional Director*, 45 IBIA 1, 5 (2007). We will review the decision to determine whether it comports with the law, whether it is supported by substantial evidence, and whether it is arbitrary or capricious. *Hardy v. Midwest Regional Director*, 46 IBIA 47, 53 (2007). We review questions of law *de novo*. *Id.*

2. Analysis

We consider the following arguments raised by Appellant: (1) BIA was required to prescribe eligibility requirements for Reservation grazing permits because the Tribe did not enact Resolution 374-04 prior to the expiration of his permits; and (2) BIA should have declined to recognize the Tribe's allocation decisions to Brown Otter because the Tribe did not comply with ICRA's due process and equal protection requirements in revoking the initial allocations to Appellant. Because we disagree with Appellant's first two contentions, we do not reach Appellant's remaining challenges to the merits of the Tribe's decision or whether notice and opportunity were afforded to Appellant by the Tribe nor do we grant Appellant's request to set this matter before an ALJ for a "due process hearing on whether [Appellant] met the applicable eligibility requirements [for the allocations]." Opening Brief at 37.

In addition, we decline to consider several additional issues raised for the first time by Appellant on appeal: Whether the Tribal Council's January 6, 2005, approval of allocations to Appellant was irrevocable;⁸ whether Resolution No. 374-04 is defective because it does not provide for due process protections, whether tribal law permits or

⁸ Before the Regional Director, Appellant argued that BIA was "required" to immediately issue him his grazing permits when the Tribal Council approved his allocations and claims that he was prejudiced by BIA's "delay" in acting on the allocations because the Tribe then changed its mind, rescinded the allocations to Appellant, and reallocated them to Brown Otter. Notice of Appeal to the Regional Director at 3. On appeal to the Board, Appellant abandons this argument to argue instead that the Tribe's allocation decisions are irrevocable because there are no provisions in Resolution No. 374-04 for persons to challenge the allocation decisions. This latter argument was not made to BIA and we decline to consider it for the first time on appeal. *Gardner v. Acting Western Regional Director*, 46 IBIA 79, 83 (2007).

prescribes challenges to tribal members' eligibility for grazing permits;⁹ whether the Tribe and BIA effected a taking of Appellant's property in declining to reallocate the RUs to him; and whether the Tribal Council is required to follow Robert's Rules of Order in its proceedings. As a general rule, the Board declines to consider arguments that have not first been presented to BIA for review. *Gardner*, 46 IBIA at 83. We see no reason to depart from that rule here.

We turn now to a discussion of Appellant's first two contentions.

a. Was BIA required to establish eligibility requirements for allocations?

Appellant argues that the Tribe did not prescribe eligibility requirements, i.e., Resolution No. 374-04, within the time period established in 25 C.F.R. § 166.218 and, therefore, BIA was required to prescribe eligibility requirements. We disagree.

Subsection 166.218(d) provides two dates by which tribes are to prescribe eligibility requirements for tribal allocations of grazing privileges: (1) 60 days before granting a new permit¹⁰ or (2) 60 days before an existing permit expires.¹¹ If a tribe fails to meet one of these timeframes, subsection 166.218(f) requires BIA to prescribe the eligibility requirements. In the present case, the Tribe's enactment of eligibility requirements on November 2, 2004, clearly occurred more than 60 days before the Superintendent issued

⁹ The Tribe's authority to reconsider its allocation of grazing privileges and whether eligibility for tribal allocations may be challenged within the Tribe are questions of tribal law appropriately resolved in a tribal forum. See *Peltier v. Great Plains Regional Director*, 46 IBIA 16, 21 (2007); *Ewing v. Rocky Mountain Regional Director*, 40 IBIA 176, 183 (2005).

¹⁰ The regulations define "grant/granting" to mean "the process of the BIA or the Indian landowner agreeing or consenting to a permit." 25 C.F.R. § 166.4.

¹¹ In relevant part, section 166.218 of 25 C.F.R. provides:

(d) A tribe may prescribe the eligibility requirements for allocations 60 days before granting a new permit or before an existing permit expires.

...

(f) [BIA] will prescribe the eligibility requirements after the expiration of the 60-day period in the event satisfactory action is not taken by the tribe.

new permits for the RUs on February 25, 2005. Therefore, the Tribe's grazing resolution was timely promulgated for purposes of subsection 166.218(d).¹²

Appellant relies on *Coomes v. Adkinson*, 414 F. Supp. 975 (D.S.D. 1976), to argue that the tribal allocation eligibility requirement is valid only if promulgated 60 days prior to the expiration date of existing grazing permits and not thereafter, as permitted by section 166.218(d). *Coomes* has no applicability here. As part of the remedy for the plaintiffs in *Coomes*, the Secretary was ordered to "establish procedures and time schedules in accordance with [the court's] opinion to commence at least sixty days before termination of leases on [four specific range] units to expedite an orderly process of *advertisement*, *bidding*, appeal and awarding of leases on these units in 1977." 414 F. Supp. at 997 (emphasis added). Nothing in *Coomes* addresses tribal allocation policies and procedures for noncompetitive grazing privileges nor did the court interpret subsections 166.218(d) or (f).¹³

Because Resolution No. 374-04 was adopted more than 60 days prior to the Tribe's allocation decisions, as required by 25 C.F.R. § 166.218(d), BIA was not required to prescribe the eligibility requirements for new grazing permits on the Reservation.

- b. Was BIA Required to Conduct an Independent Review of the Tribe's Revocation Decision to Determine Whether Appellant's Federal Procedural Rights Were Violated?

Appellant contends that the failure of the Tribal Council to provide him with notice or an opportunity to be heard violated his due process and equal protection rights under ICRA. Appellant argues without support that "[o]ral notice [by the Tribe to reconsider his eligibility for grazing permits] has never been recognized as adequate notice." Opening Brief at 14. Appellant also claims that he never saw the Brown Otter statement that challenged his residency on the Reservation nor was he notified of the evidence relied on by the Tribal Council for its February 2, 2005, decision to revoke or cancel the allocations it previously granted to Appellant. In addition, Appellant argues that he was denied "equal protection" and "substantive due process," but fails to explain how he perceives he was

¹² Appellant does not argue that he did not receive notice of the amended grazing regulation or that he could not amend or supplement his application to conform to any new requirements.

¹³ At the time of the decision in *Coomes*, subsections 166.218(d) and (f) did not exist in their present form. An earlier version appeared at 25 C.F.R. § 151.10 (1977). The regulations were revised in 2001. 66 Fed. Reg. 7126, 7132 (Jan. 22, 2001).

denied these safeguards. Appellant maintains that the Tribe wrongfully revoked his allocations and, therefore, BIA must rescind the permits granted to Brown Otter on these grounds. We conclude that the law does not require BIA to review the decision of the Tribal Council to rescind the allocations to Appellant.

Clearly, Appellant believes he was wronged by the Tribe when it concluded that he did not meet the residency requirement in Tribal Resolution No. 374-04 for a grazing permit and rescinded his allocations. Appellant raised his arguments against the Tribal Council in tribal court and did not prevail. He apparently also sought further review or reconsideration from the Tribal Council, although we have not been informed of the result.

Appellant contends that BIA erred in recognizing the Tribe's allocation decisions because the Tribe violated ICRA. Appellant argues that BIA should have undertaken "its own independent examination of the facts" concerning his eligibility before issuing the permits. Notice of Appeal at 2. Appellant relies on a number of Board cases holding that, in maintaining the government-to-government relationship with Indian tribes, BIA has the authority and responsibility to decline to recognize a tribal action where it finds that the action is tainted by a violation of ICRA, and argues that this holding should be expanded to cover BIA's issuance of grazing permits. *See Alan-Wilson v. Sacramento Area Director*, 30 IBIA 241, 260 (1997); *Wadena v. Acting Minneapolis Area Director*, 30 IBIA 130, 148 (1996). We decline to do so.

Generally, the procedures by which tribes determine noncompetitive grazing allocations — whether made by a tribal allocation committee, tribal council, tribal court, or other tribal body — are not subject to review by BIA or by this Board, even where they form the basis of BIA's decision to grant a grazing permit. *See Ewing*, 40 IBIA at 183; *Hunt*, 27 IBIA at 179-80; *see also Johnson v. Acting Phoenix Area Director*, 25 IBIA 18, 27 n.9 (1993). This policy is grounded in respect for tribal self-government and autonomy in determining whether and on what grounds tribal members or tribal entities should be eligible for noncompetitive grazing allocations on tribal or individually-owned Indian lands. Therefore — and in keeping with the Board's policy of deference — we hold that BIA need not examine the particular process by which the Tribe determines eligibility for grazing allocations, including any process it may have for revoking any previously-granted allocations.¹⁴

¹⁴ We note that BIA did not act on the Tribe's initial decision to allocate three RUs to Appellant. Thus, the Tribe's revocation of allocations to Appellant had no impact on existing grazing permits to Appellant because BIA had not issued them. We express no

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To the extent Appellant urges us to apply the same scrutiny to the Tribe's grazing allocation decisions as required for the recognition of tribal governments, we decline. The government-to-government relationship between tribes and the United States is a highly important and unique relationship that is deserving of and appropriately accorded significant scrutiny. In that context, the Board has long held that BIA can and, in some cases, must determine whether tribes have adhered to applicable tribal and Federal law, including ICRA, in the selection of the governing body with whom the United States will communicate concerning inter-governmental matters. *Naylor v. Sacramento Area Director*, 23 IBIA 76, 80 (1992); *cf. United Keetoowah of Cherokee Indians in Oklahoma v. Muskogee Area Director*, 22 IBIA, 75, 83 (1992) (where tribal ordinances or constitutions are required by Federal or tribal law to have BIA approval, BIA may review tribal compliance with ICRA).

In contrast, Federal law specifically delegates to the tribes the right to determine grazing allocations on tribally-owned or controlled land and on individually-owned Indian land without oversight by BIA, *compare* 25 C.F.R. §§ 166.217-.218 (2005) *with* 25 C.F.R. § 166.10 (2000),¹⁵ while BIA's role is "essentially a ministerial one" of issuing the grazing permits. *Ewing*, 40 IBIA at 183. BIA's responsibility in issuing grazing permits is threefold: First, to ensure that the issuance of the permit is in the best interests of the landowner, for whom BIA manages the land as trustee, *see generally Smith v. Acting Billings Area Director*, 17 IBIA 231, 236 (1989); second, to implement the Tribe's allocation procedures, 25 C.F.R. § 166.218; and third, to record the permit with its Land Titles and Records Office, 25 C.F.R. § 166.209. Accordingly, grazing *allocations* are made under tribal law, and the Superintendent issues *permits* in accordance with decisions made by the Tribe. *Ewing*, 40 IBIA at 183. As a general rule, neither the Board nor BIA has authority to order the allocation of grazing privileges in a manner inconsistent with the expressed wishes of the Tribe. *See Hunt*, 27 IBIA at 180.

¹⁴(...continued)

opinion on whether our decision might be different had BIA issued grazing permits to Appellant and the Tribe *subsequently* revoked Appellant's allocations.

¹⁵ Formerly, BIA was required to approve tribal allocation procedures. *See* 25 C.F.R. § 166.10 (2000). This requirement was removed when the regulation was revised in 2001. *See* 66 Fed. Reg. 7068, 7132 (Jan. 22, 2001) (text of section 166.218). Thus, the change in the regulations supports a decreased role for BIA with respect to tribal allocation procedures and decisions.

Appellant stands in the same shoes as one of the appellants in *Hunt*. In *Hunt*, several appellants challenged certain grazing permit allocation decisions by the Cheyenne River Sioux Tribe. They claimed that their due process and ICRA rights were violated by the Tribe in its allocation decisions. All but one of the appellants had failed to exhaust tribal remedies and their claims were dismissed on that ground. *Hunt*, 27 IBIA at 179. However, the remaining appellant had exhausted tribal remedies and, like Appellant herein, failed to obtain a decision on the merits of her claim because the Tribe had not waived sovereign immunity. We observed that

[t]o the extent [appellant] alleges improprieties by the Area Director [in issuing the grazing permits], BIA's only involvement . . . was to implement the Tribal Council's decision as to the tribal land in the RU sought by [appellant], and to allow that decision to apply to the individually owned land in the unit. Neither this Board nor BIA has authority to order the allocation of tribal land in a manner inconsistent with the expressed wishes of the Tribe.

Id. at 180.¹⁶

To the extent that *Hunt* may be read to suggest that BIA merely rubber-stamps the allocation decisions made by tribes, as suggested by Appellant, we clarify that both *Hunt* and the present case involve allegations of procedural due process related to a tribe's allocation of grazing privileges. Thus, we have no occasion to address whether BIA may — in appropriate, narrow circumstances not present here — disapprove an allocation decision. See, e.g., *Estate of Mary Dodge Peshlakai v. Navajo Area Director*, 15 IBIA 24, 38 (1986) (tribal court issued order authorizing estate to lease grazing privileges belonging to decedent, pursuant to which order estate administrator sublet the grazing privileges; BIA declined to approve the sublease or transfer of the grazing permit because the tribal court acted *ultra vires*).¹⁷

¹⁶ Appellant argues that BIA has an independent duty and responsibility to “review the circumstances” of a tribal allocation decision and cites to that portion of our decision in *Hunt* that addressed the Superintendent's duty to review tribal allocation procedures. Opening Brief at 9. As we discuss *supra* at n.15, the regulations at the time of the Board's decision in *Hunt* required BIA to approve tribal allocation procedures. However, that provision was eliminated when the regulations were revised in 2001.

¹⁷ Appellant cites to *Estate of Peshlakai* to show that BIA and the Board have declined to issue some grazing permits in accordance with a Tribe's allocation decision. However,

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Appellant makes two further arguments in support of his contention that BIA is required to review the circumstances of a tribe's allocation decision. First, Appellant relies on *Brown v. United States*, 86 F.3d 1554 (Fed. Cir. 1996), and *Webster v. United States*, 823 F. Supp. 1544 (D. Mont. 1992), *aff'd*, 22 F.3d 221 (9th Cir. 1994), to support the proposition that "BIA has a responsibility and legal duty, prior to approving a permit or lease, to review the circumstances under which a permit or lease has been granted." Opening Brief at 9. Appellant suggests that this duty requires BIA to decline to issue a permit that violates ICRA. Neither of these decisions support Appellant's contention. *Brown* was a breach-of-trust suit brought by the beneficial owner of Indian trust land and the decision addressed the fiduciary duties owed by the Secretary of the Interior to the *owner* of Indian trust land in considering a commercial lease of the land. 86 F.3d at 1563. The court discussed the scope of the Government's duty in approving commercial leases of Indian trust lands but does not address or otherwise impose on the Government any duty to review a tribal decision to authorize a preference for an otherwise suitable, prospective lessee for compliance with ICRA.¹⁸ In *Webster*, appellant sought damages from the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, and the suit was dismissed.¹⁹

Second, Appellant argues that 25 C.F.R. § 166.103(a) requires BIA to ensure that the Tribe's allocation decisions comport with ICRA. We disagree. Section 166.103(a)

¹⁷(...continued)

Estate of Peshlakai was not an appeal involving a tribal *allocation*. Appellants cite also to a tribal court decision in *Leingang v. Standing Rock Sioux Tribe Economics Committee* (Standing Rock Sioux Tribal Court Mar. 3, 2005). In *Leingang*, the tribal court's decision states that BIA refused to issue Leingang a grazing permit because BIA determined that the tribal allocation to him was granted in violation of tribal law. The actual response by BIA concerning the allocation to Leingang is not part of the record before us nor was it appealed to the Board, for which reason we are unable to comment upon it.

¹⁸ As the court observed in *Brown*, the government's fiduciary responsibility as the trustee of Indian land is to protect it "for traditional general welfare purposes [and] also for the purpose of protecting the [Indians'] financial interests. This protection of another's financial interests by the exercise of independent judgment and control is, of course, the essence of a fiduciary's duty to the beneficial owner of a trust corpus." 86 F.3d at 1563.

¹⁹ In *Webster*, plaintiff's decedent was killed in a racing incident on a racetrack constructed with BIA approval on Indian trust land. The court dismissed the action as barred by the discretionary function exception to the FTCA. 823 F.Supp. at 1552.

provides that “unless prohibited by federal law, [BIA] will recognize and comply with tribal laws regulating activities on Indian agricultural land, including tribal laws relating to land use, environmental protection, and historic or cultural preservation.” Nothing in ICRA or any other Federal law “prohibits” BIA from “recognizing and complying” with the allocation decisions challenged by Appellant.²⁰

For the reasons set forth above, BIA was not required to look behind the Tribe’s decision to revoke Appellant’s allocations to determine whether the Tribe first complied with ICRA and provided Appellant with appropriate process and an opportunity to be heard. Therefore, we agree with the Regional Director’s conclusion that Appellant’s circumstances are virtually indistinguishable from those of the appellant in *Hunt* and, therefore, our decision in *Hunt* is controlling here.

Conclusion

Because we conclude that BIA appropriately declined to review the Tribe’s decision to revoke its prior allocation of grazing privileges to Appellant, we do not reach the merits of Appellant’s challenge to those procedures or to Appellant’s eligibility for the allocations, including, more particularly, whether he resides on the Reservation within the meaning of the Tribe’s allocation ordinance. Thus, we decline Appellant’s invitation to transfer this matter to an ALJ for a hearing.

²⁰ This is not to say or suggest that ICRA does not apply to tribes’ interactions with its members. It does. However, nothing in ICRA or in subsection 166.103(a) requires BIA to police the actions of the tribes with respect to allocations for grazing permits. *See Cahito Tribe of the Laytonville Rancheria v. Pacific Regional Director*, 38 IBIA 244, 249 (2002) (“ICRA is not an independent grant of authority and does not authorize BIA to scrutinize tribal actions not otherwise properly within its jurisdiction”). With respect to the revocation of Appellant’s allocations, we note that while Appellant contests the manner of notice to him by the Tribe, he does not contest that he was afforded the opportunity to appear before both the Economics Committee and the Tribal Council on the matter of his eligibility for the allocations. We note, too, that Appellant pursued his remedies through the tribal court system, although the courts did not reach the merits of Appellant’s claims. Therefore, Appellant did receive some form of due process and an opportunity to present his contentions to the Tribe. We express no opinion on whether the process and opportunity he received comports with ICRA. This determination is for the Tribe to make, not the Board.

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 July 15, 2005, decision.²¹

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

²¹ We recognize that the tribal trial court held, in *Frank v. Murphy*, that because BIA had issued the grazing permits to Brown Otter, BIA was the appropriate forum for Appellant's challenge. Dismissal Order at 3, *Frank v. Murphy* (Standing Rock Sioux Tribal Court Apr. 7, 2005) . Respectfully, we disagree with the tribal court's decision. As we have explained, BIA implements the allocation decisions of the Tribe. The decision remains with the Tribe to determine which tribal members or tribal entities shall be given a preference for obtaining a permit. If the tribal court were to reach the merits of a particular allocation decision after permits were issued by BIA, the Tribe might conclude that the appropriate remedy may be a remedy other than revocation (e.g., damages, preference for the next grazing season or next available allocation, etc.), in accordance with tribal law.