INTERIOR BOARD OF INDIAN APPEALS

Northern Cheyenne Livestock Association and Its Members v. Acting Rocky Mountain Regional Director, Bureau of Indian Affairs

48 IBIA 131 (11/26/2008)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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NORTHERN CHEYENNE LIVESTOCK ASSOCIATION AND ITS MEMBERS,	)	Order Affirming Decision
Appellants,	)	
v.	)	
	)	Docket No. IBIA 06-105-A
ACTING ROCKY MOUNTAIN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	November 26, 2008

The Northern Cheyenne Livestock Association (NCLA) and its members (collectively, Appellants) appeal to the Board of Indian Appeals (Board) from a June 23, 2006, decision of the Acting Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), dismissing Appellants' challenge to a grazing rental rate of $14.75/Animal Unit Month (AUM)[1] for new permits issued for individually owned Indian lands on the Northern Cheyenne Indian Reservation (Reservation) for a new 3-year permit period beginning on February 15, 2006. The rate was adopted by BIA and the Northern Cheyenne Tribe (Tribe) and was included in new permits offered to and accepted by appellant NCLA members. Appellants challenge the rate as too high. The Regional Director dismissed Appellants' challenge to the rate for lack of standing, relying on the Board's decision in *Hall v. Great Plains Regional Director*, 43 IBIA 39 (2006). In *Hall*, we held that prospective permittees lack standing to challenge the grazing rate at which new permits are offered because they have no legally protected interest that is adversely affected by being offered a new permit at a rate decided by BIA on behalf of the Indian landowners. *Id*. at 44-48. *See also Rosebud Indian Land and Grazing Ass'n v. Great Plains Regional Director*, 44 IBIA 36 (2006) (same).

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[1] An animal unit month is "the amount of forage required to sustain one cow or one cow with one calf for one month." 25 C.F.R. § 166.4.

On appeal to the Board, Appellants seek to distinguish *Hall* by claiming that (1) through the Executive Order that set aside the Reservation for the use of the Tribe and its members, they have a right to use Reservation lands, thereby creating an individual, legally protected interest; (2) the Tribe's ordinance allocating grazing privileges gives them a legally protected interest; and (3) NCLA's members' ownership interest in individually owned grazing lands on the Reservation constitutes a legally protected interest. According to Appellants, all of these legally protected interests have been adversely affected by BIA's decision to offer new permits at the rate of $14.75/AUM, and thus they have standing to challenge that rate.

We reject Appellants' argument that, as tribal members, they have a legally protected interest in allotted Reservation lands based on the Executive Order creating the Reservation. Even assuming that the Executive Order gave rise to an individual interest based on tribal membership, it was superseded—at least with respect to any grazing rights—when Reservation lands were allotted in severalty to individual Indians. The Tribe's ordinance allocating grazing privileges may give rise to a legally protected interest, but, as we held in *Hall* and *Rosebud,* that interest is not adversely affected by the new rate decision. And, although land ownership is undoubtedly a legally protected interest, we conclude that Appellants' claim that their ownership interest may be adversely affected by the $14.75/AUM grazing rate at which new permits were offered is too speculative to give them standing. Therefore, we affirm the Regional Director's dismissal of Appellants' challenge to the grazing rate.

Background

A. Regulatory Framework

The regulatory framework for administering grazing on individually owned Indian trust lands on Indian reservations has been described in several recent Board decisions, and need not be repeated here. *See, e.g.*, *Hall*, 43 IBIA at 39-40; *Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308 (2005). Briefly described, however, BIA establishes the grazing rental rate for individually owned trust lands on a reservation, based on BIA's determination of the fair annual rental value of those lands, and issues grazing permits accordingly for Reservation range units.[2] *See* 25 C.F.R. §§ 166.400(b)(1), 166.401. Nothing prevents Indian landowners from offering new permits at a higher rate,

[2] To administer grazing on individually owned Reservation lands, BIA consolidates Indian rangelands into "range units," after consulting with the Indian owners. *See* 25 C.F.R. §§ 166.4, 166.302.

and a lower rate may also be charged if it is in the best interest of the landowners to do so. *See, e.g.*, *id.* § 166.403.

When existing permits expire, and new permits are issued, a tribal preference system for allocating grazing privileges allows prospective permittees what is, in effect, a right of first refusal with respect to new permits that will be issued for the range units for which the prospective permittee holds an expiring permit.[3] *See Hall*, 43 IBIA at 46; *Rosebud*, 44 IBIA at 42. Any range units that are left over after the allocation permitting process are subject to advertisement, bidding, or negotiation to obtain a permittee.

In *Hall* and *Rosebud*, the Board held that prospective permittees who hold tribal preference rights for obtaining new permits do not have a legally protected interest that is injured by the grazing rate set for new permits, and thus do not have standing to challenge a BIA grazing rate decision for new permits. *See Rosebud*, 44 IBIA at 38-39. The Board rejected the arguments of the appellants in those cases that their "right of first refusal" (as the Board described the tribal allocation in *Hall*) or "right of first renewal" (as the *Rosebud* appellants described their tribal preference right) was a legally protected interest that was adversely affected by BIA's decision to set a rate at which to offer new permits. *Id*. at 42-43. As articulated in *Rosebud*,

> [n]othing in [BIA's] decision [establishing a grazing rate for new permits] interferes with the right of first renewal: If the holder of that right wishes to obtain a new permit at the rate set by [BIA], he or she is first in line to do so. [BIA's] decision does not adversely affect that right, and therefore the right of first renewal provides no basis for Appellants to claim standing.

Id. at 43.

B. Factual History

NCLA is an association of Indian ranchers who are members of the Northern Cheyenne Tribe and graze livestock on individually owned trust lands on the Reservation under BIA permits. Appellants are members of NCLA.[4] Appellants held grazing permits

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[3] If a tribe has not adopted allocation procedures, BIA issues the permits through negotiation or advertisement. *See* 25 C.F.R. § 166.217(c).

[4] This appeal is brought in the name of NCLA and its members, but for convenience, and unless otherwise indicated, we use "Appellants" to refer to NCLA's individual member-

(continued...)

on the Reservation for a period ending on February 14, 2006. Nine Appellants ("NCLA Landowners") claim some ownership interest in Indian trust or restricted real property in the range units subject to the newly established grazing rate.

In September of 2005, BIA obtained an independent appraisal report, on which it relied to determine that $14.75/AUM was an appropriate rate for new grazing permits for the 2006-2009 grazing period.

On October 17, 2005, the Tribe adopted Ordinance No. DOI-001, which set the rate for tribal land permitted to grazing at $14.75/AUM, based on the Tribe's understanding of the then-current Federally appraised rate for allotted land. *See* Tribal Ordinance No. DOI-001 (Oct. 17, 2005) (Tribal Ordinance) at Part II, sec. A. On November 15, 2005, the Superintendent approved the ordinance. *Id*. at 12 (signature page).

With respect to the grazing rate, the ordinance provides that

> [t]he grazing rate charged for tribal original, tribal acquisition and allotted land permitted to grazing by allocation shall be the same flat rate based upon the [F]ederally appraised rates. There shall be no difference in AUM prices based on land status, for example tribal and allotted lands will have the same grazing rate. The appraised rate at the time of the adoption of this Ordinance is $14.75.

Id. at Part II, sec. A.[5] With respect to grazing privileges, the ordinance provides, in relevant part, that "[c]urrent permittees have first privilege for renewing their current allocation." *Id*. at Part III, sec. B(1)(a).

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[4](...continued)
appellants. Because NCLA does not claim standing in its own right as an association, the only issue in this appeal is whether NCLA's members (and thus NCLA as well, by derivation) have standing.

[5] Notwithstanding the language of the Tribal Ordinance, the Tribe may only set the rate for tribal lands. *See* 25 C.F.R. § 166.404. BIA has the duty to either set the rate for individual allotted lands, or approve the rate set by the individual Indian landowner. *See* 25 C.F.R. § 166.405.

By letter dated November 22, 2005, the Superintendent contacted existing permit holders concerning the allocation of new grazing permits. The letter advised permit holders that the "Tribe ha[d] adopted a new grazing rental rate of $14.75 per AUM" and asked the permit holders to "factor in this new rate when applying for primary allocation." Letter from Superintendent to "Dear Permit Holder," Nov. 22, 2005. Although the ordinance expressly characterizes the $14.75/AUM rate as the Federally appraised rate, the Superintendent's letter did not expressly identify this rate as the rate that BIA would use for new permits for individually owned Indian lands, nor did it include appeal rights. Thereafter, NCLA members applied for, and received, permits through the allocation process for the 2006-2009 grazing period at the rate of $14.75/AUM. The new permits became effective on February 15, 2006.

On March 9, 2006, the Superintendent sent a letter addressed both to permittees and Indian landowners. This letter asserted that its purpose was to "reiterate that the Northern Cheyenne Agency established the grazing rental rate of $14.75 an AUM beginning with the 2006 grazing season." Letter from Superintendent to "Dear Permit Holder and Indian Trust Beneficiary," Mar. 9, 2006, at 1. The letter provided appeal rights.

Various permittees timely appealed to the Regional Director from the Superintendent's decision establishing $14.75/AUM as the new grazing rate for individually owned Indian lands. The Regional Director consolidated the appeals, and, on June 23, 2006, he dismissed them for lack of standing because the permittees "do not have any legally protected interest that has been adversely affected by the Superintendent's decision setting a grazing rate for the new permit period beginning February 15, 2006." Letter from Regional Director to Calvin and Roxanna Wilson, Jun. 23, 2006, at 6. In dismissing the appeals, the Regional Director relied on the Board's decision in *Hall*.

Appellants timely appealed the Regional Director's decision, filing a Notice of Appeal and Statement of Reasons, followed by an opening brief. The Regional Director filed an answer brief. Appellants did not file a reply brief.

Discussion

I. Standard of Review

Appellant bears the burden of proving error in the Regional Director's decision. *Gardner v. Acting Western Regional Director*, 46 IBIA 79, 85 (2007). Unsupported allegations are insufficient to sustain this burden of proof. *See id*. A determination that an

appellant lacks standing is a legal determination, which we review de novo. *See O'Bryan v. Great Plains Regional Director*, 48 IBIA 109, 116 (2008).

II. Standing

In order to have standing, an appellant must be an interested party whose interests could be adversely affected by the decision being appealed. *See* 25 C.F.R. § 2.2 (definitions of "Appellant" and "Interested Party"); 43 C.F.R. § 4.331 (Who may appeal); *see also DuBray v. Great Plains Regional Director*, 48 IBIA 1, 19 (2008). To evaluate standing, the Board follows the three elements of constitutional standing described in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992): An appellant to the Board must show that (1) he has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. *Id*. at 560-61.

III. Analysis

Appellants contend that they have three separate grounds on which they can demonstrate standing to challenge the substance of the new grazing rate decision.[6] First, Appellants contend that the Executive Order that established the Reservation gives all tribal members, which includes them, a legally protected, right-of-use interest in Reservation lands, which is adversely affected by the Superintendent's rate decision. Second, Appellants contend that the Tribal Ordinance gives individual members of the NCLA a legally protected interest in their allocations sufficient to challenge the Superintendent's rate decision. Third, Appellants contend that their individual ownership interest in individually owned Indian trust lands in the range units that are subject to the new grazing rate gives the NCLA Landowners a legally protected interest that is injured by the rate decided by the Superintendent, which they contend is too high.

We address each of these contentions below.

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[6] In addition to Appellants' substantive objections to the new permit rate, Appellants' notice of appeal includes two procedural challenges: lack of proper notice and lack of consultation. Both issues were squarely addressed by the Board in *Hall*, 43 IBIA at 48-50, where we rejected the same procedural arguments made by the appellants in that case. We therefore consider these arguments no further.

A. The Executive Order of November 26, 1884

Appellants contend that the November 26, 1884, Executive Order establishing the Reservation gives all tribal members, including Appellants, a legally protected, right-of-use interest in Reservation lands. This legally protected interest, Appellants argue, is adversely affected by the newly established grazing rate because it burdens their use of Reservation lands. After examining the language of the Executive Order and the effect of the Northern Cheyenne Allotment Act, Pub. L. No. 69-330 (Jun. 3, 1926), 44 Stat. 690, we find Appellants' argument unpersuasive.

The Executive Order provides that certain property "lying within the boundaries of the Territory of Montana . . . [shall] be, and . . . is hereby, withheld from sale and settlement, and set apart as a reservation for the use and occupation of the Northern Cheyenne Indians, now residing in the southern portion of Montana Territory, and such other Indians as the Secretary of the Interior may see fit to locate thereon . . . ." Exec. Order of Nov. 26, 1884; 1 Charles J. Kappler, Indian Affairs: Laws and Treaties 860 (1904).

Appellants would have us interpret the phrase "set aside as a reservation for the use and occupation of the Northern Cheyenne Indians" to mean that the Executive Order gave all tribal members an individual right of use and thus a legally protected interest in all Indian lands within the exterior boundaries of the Reservation. Whether or not that was the case—an issue we need not decide—the Northern Cheyenne Allotment Act vested beneficial ownership in individual allottees and severed any tribal or collective ownership interests in the lands that were allotted. *See* Pub. L. No. 69-330, § 2, 44 Stat. 691. As a result of allotments, the Executive Order cannot serve as the source of a legally protected interest held by Appellants, as tribal members, in the individually owned lands that are subject to the $14.75/AUM grazing rate at which BIA offered new permits. Thus, the Executive Order provides no basis for us to reverse the Regional Director's determination that Appellants lack standing to challenge the new permit rate.

B. Tribal Ordinance

Appellants contend that the Tribal Ordinance bestows individual NCLA members with a legally protected interest that could be adversely affected by the newly established grazing rate. The ordinance provides, in pertinent part, that "[c]urrent permittees have first privilege for renewing their current allocation." Tribal Ordinance at Part III., sec. B(1)(a). Appellants argue that, based upon this ordinance, "once an operator has a permit for a range unit, they have a vested interest in that range unit and not just a preference as was argued in the *Hall* case. This vested interest gives rise to a legally protected interest

sufficient enough to challenge [the] new grazing rate . . . ." Appellants' Brief at 4. We disagree with this analysis.

The Board addressed a similar argument in *Rosebud*, wherein the appellants posited that a "right of first renewal" vested permittees with rights that are somehow greater than a mere "right of first refusal." *See Rosebud*, 44 IBIA at 42-43. We rejected this contention, holding that a "right of first renewal" does not constitute an interest that is adversely affected by a grazing rate decision for offering new permits and is no different, for the Board's standing analysis, than the "right of first refusal" discussed in *Hall*. *Id*. at 43. We conclude that, for the reasons given in *Rosebud*, the Tribal Ordinance gives a current permittee a preferential privilege with respect to the opportunity, without competition, to obtain a grazing permit for a particular range unit—not a right to obtain a permit at a price other than the rate set by BIA on behalf of Indian landowners. *See id*. at 43.

As a result, the Tribal Ordinance does not bestow Appellants with a legally protected interest that is adversely affected by the grazing rate at which BIA offered new permits for individually owned Indian lands. Thus, the Tribal Ordinance provides no basis to set aside the Regional Director's decision that Appellants do not have standing to challenge the grazing rate.

C. NCLA Landowners

Appellants contend that the NCLA Landowners, by virtue of their landownership, have a legally protected "interest in the proper care of the land for sustainable use as well as an interest in the rate paid for a right to graze on that land." *See* Notice of Appeal and Statement of Reasons at 1. We agree.[7] The focus of our inquiry, therefore, is whether Appellants have made any allegations of injury to their ownership interest that are fairly traceable to BIA's decision to set the new grazing rate at $14.75/AUM for the 2006-2009 grazing period. We conclude that they have not made any such allegations, and that it would be pure speculation to infer injury and causation based solely on Appellants'

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[7] Solely for purposes of this appeal, the Board assumes that the legally protected interests of the NCLA Landowners, as landowners, are germane to NCLA's purposes. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs*., 528 U.S. 167, 181 (2000), citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) ("An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, *the interests at stake are germane to the organization's purpose*, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (emphasis added).)

generalized description of their interest in protecting unidentified lands in which some of them apparently own undivided fractional interests.

The first prong of standing requires Appellants to show that the NCLA Landowners have suffered an actual or imminent, concrete or particularized injury to a legally protected interest. In this instance, we conclude that Appellants have failed to allege any actual or imminent, concrete or particularized injury to their ownership interest. Appellants argue that implementation of the grazing rental rate of $14.75/AUM "does not take [i]nto account and does not adequately provide for necessary improvements to and maintenance of the land resource, [and] is both a violation of the American Indian [Agricultural Resource] Management Act and the trust responsibility of the Department [of the Interior] to [Indian] landowners." Notice of Appeal and Statement of Reasons at 3. In essence, Appellants' argument is that offering and issuing permits at the $14.75/AUM grazing rate will result in poor land stewardship, and, that instead of obtaining $14.75/AUM for them as landowners, BIA should have reduced that rate so that permittees would take better care of the land. According to Appellants, poor land stewardship—which the $14.75/AUM rate will result in—will negatively effect the NCLA Landowners' interest because the price commanded for degraded land is less than the price commanded for better-maintained lands. But recitation of these arguments, without any clear and specific allegations of particularized injury to their lands, does not establish that the NCLA Landowners' lands have suffered an injury nor does it establish that such an injury is imminent.

Appellants' arguments concerning the adverse effect that implementation of the $14.75/AUM rate may have on the land is conjectural and speculative, and causation between the new grazing rate and reasonably foreseeable environmental damage is too attenuated. Indeed, Appellants have not even alleged that permittees are likely to take the difference between a grazing rental rate of $14.75/AUM, and an undefined, lower grazing rate, and invest this difference in improvements to, and maintenance of, lands in which the NCLA Landowners share an ownership interest. *Cf. DuBray*, 48 IBIA at 20 n.21.[8]

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[8] We note that Appellant have failed to identify or describe the ownership interests held by the NCLA Landowners. Of course, to the extent that the NCLA Landowners own a majority interest in certain allotted lands that are included within range units for which BIA permits are issued, they are not precluded from requesting that their lands be withdrawn from the permit (i.e., range unit), so that they may be allowed to negotiate a lower grazing rental rate separately with a prospective permittee (e.g., in exchange for specific commitments to implement additional conservation practices). *See generally* 25 C.F.R. §§ 166.203, 166.216, 166.217 (b), 166.227(a)(2). Presumably, in the present case, the NCLA Landowners hold minority fractional interests in the range units to which the new rate applies—a rate to which the other landowners have not objected.

We therefore conclude that Appellants have not alleged any facts from which we could conclude that they have demonstrated that the grazing rate for new permits will result in a concrete and particularized environmental injury to the individually owned lands in which NCLA Landowners have ownership interest. Thus, Appellants' mere identification of the NCLA Landowners' ownership interest, and speculation that a too-high rate could result in injury to the land, are insufficient to demonstrate error in the Regional Director's decision that Appellants lack standing to challenge BIA's rate decision based on infirmities in the $14.75/AUM grazing rental rate with respect to improvements to, and maintenance of, the land.[9]

D. Summary

Neither the Executive Order nor the Tribal Ordinance can serve as the source of a legally protected interest that has been adversely affected by BIA's grazing rate decision for offering new permits. Similarly, although the NCLA Landowners have a legally protected interest in some individually owned Indian lands that are subject to the new grazing rate, Appellants have failed to identify any concrete and particularized injury, and their allegations that the grazing rate of $14.75/AUM for the 2006-2009 grazing period will result in environmental injury to their lands is at best speculative. Accordingly, Appellants have failed to show error in the Regional Director's decision that they lack standing to challenge the Superintendent's grazing rate decision.

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 June 23, 2006, decision.

I concur:

// original signed
Maria Lurie
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

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[9] Appellants also contend that the NCLA Landowners have a legally protected interest in ensuring that the grazing rental rate set by BIA provides a fair annual rental value. In this instance, however, Appellants have not alleged, let alone demonstrated, that $14.75/AUM is less than fair annual rental value. We therefore consider the argument no further.