



## INTERIOR BOARD OF INDIAN APPEALS

Lyle Ducheneaux, Eagle Hunter, Marty Hebb, Keith Annis, James Pearman,  
Lance Lesmeister, Rhonda Lesmeister, Raymond Longbrake, Mark Knight,  
Connie Knight, Jess Ducheneaux, Gregg Mowrer, Todd Ducheneaux, Kim Hollenbeck,  
Delbert F. Longbrake, Rocky Longbrake, Lila Farlee, Rick Farlee, Jeff Hunt, Gene Hunt,  
Sean Deal, Fred Dubray, Robert Ducheneaux, Don Aberle, and Bud Longbrake v.  
Acting Great Plains Regional Director, Bureau of Indian Affairs

52 IBIA 213 (10/27/2010)



# 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

LYLE DUCHENEAX, EAGLE	)	Order Dismissing Appeal
HUNTER, MARTY HEBB, KEITH	)	
ANNIS, JAMES PEARMAN, LANCE	)	
LESMEISTER, RHONDA	)	
LESMEISTER, RAYMOND	)	
LongBRAKE, MARK KNIGHT,	)	
CONNIE KNIGHT, JESS	)	
DUCHENEAX, GREGG	)	
MOWRER, TODD DUCHENEAX,	)	
KIM HOLLENBECK, DELBERT F.	)	
LongBRAKE, ROCKY	)	
LongBRAKE, LILA FARLEE,	)	
RICK FARLEE, JEFF HUNT,	)	Docket No. IBIA 09-45-A
GENE HUNT, SEAN DEAL,	)	
FRED DUBRAY, ROBERT	)	
DUCHENEAX, DON ABERLE,	)	
AND BUD LongBRAKE,	)	
Appellants,	)	
	)	
v.	)	
	)	
ACTING GREAT PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	October 27, 2010

The above-named twenty-five appellant individuals (Appellants), who identify themselves as ranchers on the Cheyenne River Sioux Reservation (Reservation), appeal to the Board of Indian Appeals (Board) from the \$17.72/Animal Unit Month (AUM)<sup>1</sup> grazing rate that was included in new permits offered to and accepted by Appellants for the

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1 An AUM 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.

new 2009-2013 permit period for allotted lands within range units<sup>2</sup> on the Reservation. The grazing rental rate was established in an August 6, 2008, decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which became effective and final for the Department when the 30-day period for filing appeals expired and no appeals were filed.

Appellants concede that the Regional Director's \$17.72/AUM rate decision became effective, and therefore final, and they also concede that, under Board precedent, they lacked standing to challenge that decision.<sup>3</sup> Appellants seek to resurrect both the timeliness of their appeal and their standing to challenge the rate by arguing that they were led to believe that BIA might revisit that final decision, and that BIA's approval of their permits (which Appellants signed and which included the \$17.72/AUM rate) thus triggered a new appeal period and apparently gave them standing that they would not otherwise have. Appellants candidly acknowledge that they seek review of the August 6, 2008, decision, *see* Appellants' Response to Order to Show Cause (Appellants' Response) at 1, but argue that they are also appealing "from the decision of the Regional Director to apply the rate that was established," *see* Appellants' Reply to Regional Director's Answer at 3, or appealing from "decisions entered into by [BIA's Cheyenne River Agency] Superintendent" (Superintendent) to issue and approve Appellants' permits, *see id.* at 2.

Regardless of how Appellants choose to characterize their appeal, it must be dismissed for lack of jurisdiction. Appellants' arguments are an unsuccessful attempt to bring an untimely appeal from the Regional Director's August 6, 2008, decision. Because

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2 Various tracts of Indian rangelands may be consolidated into range units for managing and administering grazing. 25 C.F.R. § 166.4. The Bureau of Indian Affairs creates such range units, after consultation with the Indian landowners. *Id.* § 166.302.

3 On receipt of the appeal, the Board ordered Appellants to show cause why their appeal should not be summarily dismissed as untimely or dismissed on the ground that Appellants have identified no claim or decision over which the Board has jurisdiction. *See* Pre-Docketing Notice and Order for Appellants to Show Cause at 2-3, Jan. 30, 2009. The Board noted that, in substance, this matter appears to be an untimely attempt to appeal from the Regional Director's August 6, 2008, decision. The Board also stated that to the extent that Appellants seek to challenge the decision to offer new permits to prospective permittees at a rate of \$17.72/AUM, it would appear that their appeal, or at least that claim, is both untimely and one for which they would lack standing. Appellants jointly filed a response to the show cause order and a reply brief. The Regional Director filed an answer brief in opposition to Appellants' response.

the appeal is untimely, our disposition does not depend on whether or not Appellants would otherwise have standing. In the alternative, if we were to accept Appellants' additional characterization of this appeal as one that is not from the Regional Director's decision, but from the Superintendent's approval of Appellants' permits, we would still lack jurisdiction because such an appeal must first be filed with and decided by the Regional Director.

### Background

In previous cases, the Board has described the regulatory framework for grazing permits and grazing rental rates for Indian trust or restricted lands. *See Hall v. Great Plains Regional Director*, 43 IBIA 39, 39-41 (2006); *Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 308-09 (2005). With limited exceptions, anyone wishing to graze livestock on Indian trust or restricted land must first obtain a permit to do so. *See* 25 C.F.R. § 166.200. BIA establishes the grazing rental rate for individually-owned Indian lands, based on the fair annual rental value. *See id.* §§ 166.400(b)(1), 166.401.

Indian tribes may develop allocation procedures to apportion grazing privileges that give tribal members an opportunity to accept a new permit for a specified range unit without a competitive bidding process. *See id.* §§ 166.218(a) & (b) (acquiring a permit through allocation), 166.4 (definition of "allocation"). *See generally Rosebud Indian Land and Grazing Ass'n v. Acting Great Plains Regional Director*, 50 IBIA 46, 48 (2009) (describing tribal allocation system); *Northern Cheyenne Livestock Ass'n v. Acting Rocky Mountain Regional Director*, 48 IBIA 131, 133 (2008) (same). BIA implements a tribe's allocation decisions by authorizing the allocated grazing privileges through granting or approving grazing permits, subject to the regulatory provisions giving BIA and Indian landowners authority to set rental rates when offering new permits for individually-owned lands. *See* 25 C.F.R. §§ 166.218(c), 166.400(b) & (c). The allocation preference awarded by a tribe provides what is, in effect, a "right of first refusal" or "right of first renewal" for receiving a new permit without competition, but it does not afford a right to obtain a permit at a price other than at the rate offered by BIA on behalf of the landowners. *See Northern Cheyenne Livestock Ass'n*, 48 IBIA at 138.

On August 6, 2008, the Regional Director issued the decision establishing a minimum grazing rental rate of \$17.72/AUM for new permits issued for allotted lands within range units on the Reservation. The decision became effective (and therefore final

for the Department) when the 30-day period for appealing the decision expired and no appeals were filed. *See* 25 C.F.R. § 2.6(b); 43 C.F.R. § 4.332(a).<sup>4</sup>

Following the Regional Director's decision, the Cheyenne River Sioux Tribe (Tribe) made its allocation decisions for range unit permits for the period beginning November 1, 2008, and ending no later than October 31, 2013.<sup>5</sup> Appellants contend that they received allocations from the Tribe for range units. *See* Appellants' Response at 4. According to Appellants, they had individual meetings with BIA in December of 2008 to go over the terms of their new permits, which included the \$17.72/AUM rate. Appellants contend, however, that BIA had also indicated that it was reviewing the rate-setting process, and thus Appellants believed, until they were presented with their permits, that BIA might ultimately adjust the rate downward. *See id.*; *see also id.* Ex. C, Affidavit of Fred DuBray ¶¶ 2-4. Appellants aver that until they were actually presented at the December 2008 meetings with the permits for signature and invoiced for payment, they had no "actual notice of the decision of the Regional Director to maintain the current [rate of \$17.72/AUM]." Appellants' Reply to Regional Director's Answer to Appellants' Response to Order to Show Cause (Appellants' Reply) at 3-4. But Appellants do not dispute that they signed their grazing permits with the \$17.72/AUM rate included and made their rental payments to BIA. They contend, however, that they made their payments "under protest." *Id.* at 4.<sup>6</sup>

Appellants challenge the Regional Director's August 6, 2008, rental rate decision as arbitrary and capricious, and contrary to BIA grazing regulations. Appellants further argue that the decision does not comply with the Board's instructions in two previous cases involving grazing rental rates on the Reservation. *See Longbrake v. Acting Great Plains Regional Director*, 48 IBIA 70 (2008) (vacating decision to adjust grazing rate in existing permits); *DuBray v. Great Plains Regional Director*, 48 IBIA 1 (2008) (same). For the same

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4 The 30-day deadline for appealing a decision is triggered by the date of receipt. In the present case, Appellants concede that the Regional Director's decision became effective, and identify the date of effectiveness as September 6, 2008. *See* Notice of Appeal at 2.

5 The permits for the prior grazing period expired on October 31, 2008, and the 2009 grazing season began on November 1, 2008. Thus, the new 5-year permits issued were for the 2009-2013 grazing period.

6 Although Appellants contend that they made payment "under protest," *see id.* and Appellants' Response at 5, the affidavits on which Appellants rely do not support that contention. *See* Appellants' Response, Exhibits C, D, and E.

reasons, Appellants also challenge the Superintendent's approval of their grazing permits at the \$17.72/AUM rate after the Regional Director purportedly separately decided to apply the rate to the new permits.

## Discussion

### I. The Appeal from the Regional Director's Decision is Untimely

We dismiss this appeal as an untimely attempt by Appellants to appeal from the Regional Director's August 6, 2008, decision establishing a minimum grazing rental rate of \$17.72/AUM for new permits. A notice of appeal from a decision of a BIA regional director must be filed with the Board within 30 days after an appellant receives the decision from which the appeal is taken. 43 C.F.R. § 4.332(a). The 30-day deadline for filing a notice of appeal is jurisdictional. *Id.*; *Wick v. Midwest Regional Director*, 44 IBIA 20, 20 (2006); *Claymore v. Great Plains Regional Director*, 43 IBIA 274, 274 (2006). Additional time cannot be granted for filing notices of appeal. 43 C.F.R. §§ 4.310(d)(1), 4.334; *Siemion v. Rocky Mountain Regional Director*, 48 IBIA 249, 257 (2009). Untimely appeals must be dismissed. 43 C.F.R. § 4.332(a); *Claymore*, 43 IBIA at 274; *Saguaro Chevrolet, Inc. v. Western Regional Director*, 43 IBIA 85, 85 (2006).

Appellants' appeal of the August 6, 2008, decision, which was filed over five months after the decision issued, is untimely. In fact, Appellants concede that the Regional Director's decision became effective well before they filed their notice of appeal. *See* Notice of Appeal at 2.<sup>7</sup> Appellants did not file their appeal until January 20, 2009, *see id.* at 6, and they make no attempt to argue that it was filed within 30 days of receipt of the August 6, 2008, decision. Because Appellants' challenge to the rental rate decision was filed with the Board after the 30-day deadline expired and the decision had become final for the Department, the appeal from that decision must be dismissed as untimely.

Appellants argue, however, that they "do not appeal directly" from the August 6, 2008, rental rate decision. Appellants' Reply at 2.<sup>8</sup> Appellants contend that BIA led them

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<sup>7</sup> The Regional Director's decision, which was addressed to "Landowners, Tribes, Permittees and Other Interested Parties," included accurate appeal instructions.

<sup>8</sup> This statement stands in stark contrast to Appellants' opening statement in response to the Board's show cause order: "Appellants filed a notice of appeal . . . seeking review of the August 6, 2008, decision of the Great Plains Regional Director. . . ." Appellants' Response at 1.

to believe that the \$17.72/AUM rate decision was being reviewed and might be reopened. Appellants argue that the Regional Director was not obligated to apply the \$17.72/AUM rate, thus implying that BIA's presentment to them of new permits that included the rate that was in the final decision constituted a new "decision" of the Regional Director "to apply" the rate established in the final decision. Appellants' Reply at 3. According to Appellants, the Superintendent's approval of their new permits with the \$17.72/AUM rate thus triggered a new appeal period.

We disagree. The inclusion of the \$17.72/AUM rate in the new permits for the 2009-2013 permit period did not constitute a new or appealable decision of the Regional Director. Contrary to Appellants' argument, once the Regional Director's decision became final for the Department, BIA's application of the rate did not constitute or reflect a new and appealable "decision" by the Regional Director to "apply" that rate. Moreover, BIA *was* obligated to apply that rate, unless or until the Regional Director issued a new decision actually reopening and modifying the prior decision (which he did not do).<sup>9</sup> Appellants' attempt to appeal from the Regional Director's purported "application" of the final decision is nothing more than an untimely attempt to challenge the August 6, 2008, decision itself. The actual subject of Appellants' appeal is made even more clear by the fact that Appellants' merits arguments do not address any purported "decision" not to reopen the final decision, but address only the August 6, 2008, decision.<sup>10</sup>

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9 We express no opinion on what circumstances might allow or justify a decision by BIA to reopen a previous final grazing rate decision. Undoubtedly, however, if the Regional Director had decided to reduce the rate for new permits below the rate set in the August 6, 2008, decision, he would have been required to advise landowners of their appeal rights, and the status quo — the final August 6, 2008, rate — would have remained in effect pending resolution of any appeals.

10 Even if there were any support for Appellants' argument that the Regional Director made a new "decision" to apply the \$17.72/AUM rate to the new permits, Appellants would still be faced with the issue of their standing to challenge that "new" decision. See *Northern Cheyenne*, 48 IBIA at 136-40; *Rosebud Indian Land and Grazing Ass'n v. Great Plains Regional Director*, 44 IBIA 36, 41-43 (2006); *Hall*, 43 IBIA at 43-51. Appellants chose to sign the new permits, which as BIA notes, included the clear language, "I accept this permit and the attached stipulations," next to the signature line for the permittee. See Regional Director's Answer at 7, citing Appellant's Response, Ex. B. And the permit attached to Appellants' Response clearly states the annual rental amount to which the permittee agrees by signing the permit. Appellant's Response, Ex. B.

## II. The Superintendent's Approval of the Permits is Not Appealable to the Board

As noted earlier, Appellants also characterize their appeal as a challenge to the Superintendent's approval of their permits at the \$17.72/AUM rate. If we were to accept this characterization, we would still dismiss the appeal. The Board's jurisdiction to review and decide appeals from administrative action (or alleged inaction) of BIA officials is prescribed by 25 C.F.R. § 2.4(e), and does not include the authority to review appeals from action or inaction by a superintendent. *See Demery v. Standing Rock Agency Superintendent*, 50 IBIA 136, 137 (2009). With exceptions not relevant here,<sup>11</sup> Appellants are simply incorrect in asserting that "[t]here is no requirement that only decisions of the Regional Director are appealable [to the Board]." Appellants' Reply at 8-9. Because the Board lacks jurisdiction over an appeal from actions taken by a superintendent, we dismiss Appellants' appeal on this basis as well.

### Conclusion

In summary, Appellants filed their appeal too late to challenge the Regional Director's August 6, 2008, decision establishing a minimum grazing rental rate of \$17.72/AUM. Their attempt to re-cast the appeal as challenging a "decision" by the Regional Director "to apply" or "to maintain" that final rate is unavailing. Finally, to the extent that Appellants seek to challenge the Superintendent's approval of their grazing permits at the \$17.72/AUM rate, the appeal must also be dismissed because a decision by the Superintendent is not appealable to 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 dismisses this appeal for lack of jurisdiction.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge

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<sup>11</sup> See, e.g., 25 C.F.R. Part 900, Subpart L (Indian Self-Determination Act appeals).