



## INTERIOR BOARD OF INDIAN APPEALS

Faith O'Connor v. Rocky Mountain Regional Director, Bureau of Indian Affairs

54 IBIA 308 (04/04/2012)



# 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

FAITH O'CONNOR,	)	Order Reversing Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 10-079
ROCKY MOUNTAIN REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	April 4, 2012

Faith O'Connor (Appellant) appeals to the Interior Board of Indian Appeals (Board) from a February 23, 2010, decision (Decision) by the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA). In his Decision, the Regional Director affirmed a decision by the Superintendent of BIA's Fort Peck Agency (Superintendent) that required Appellant to pay a deposit for unfenced land — Allotment No. 4056 — that was located within, but withdrawn from, the range unit for which Appellant had a permit, and to forfeit that deposit as liquidated damages for cattle allegedly grazing on Allotment No. 4056. We reverse. We find that there is no support in the record for BIA's determination that cattle under Appellant's control grazed on Allotment No. 4056 and even if BIA could establish that they had, BIA failed to comply with regulatory requirements prior to seeking liquidated damages from Appellant under the terms of her permit.

## Background

On March 10, 2009, BIA announced public bidding for grazing privileges on Range Unit 2 (RU 2), located on the Fort Peck Indian Reservation in Montana, for the 2009 grazing season. Administrative Record (AR) Tab 5.<sup>1</sup> At the time of the public bidding

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<sup>1</sup> Grazing permits on the Fort Peck Reservation are usually for 10-year terms; the current term runs from 2003-2012. This particular permit was for 1 year only, pursuant to the Board's authorization to BIA to lease the range unit during an appeal filed with the Board by the prior permittee. *See* Decision at 3.

notice, RU 2 included Allotment No. 4056, owned by Levi Olson (Olson).<sup>2</sup> The notice stated that RU 2 contained 26,000 acres of trust land and that it had a grazing capacity of 2,940 Animal Unit Months (AUMs). *Id.* Of those 2,940 AUMs, BIA determined that Allotment No. 4056 could support 116 AUMs. *See* Letter from Superintendent to Olson, Mar. 26, 2009 (AR Tab 2).

Appellant submitted the winning bid.<sup>3</sup> In mid-April 2009, Olson requested that his allotment be removed from RU 2. BIA conditionally approved his request, “contingent upon [Olson] providing an agricultural lease” with a lessee of his choice. *See* Letter from Superintendent to Olson, Apr. 17, 2009 (AR Tab 6). Thereafter, on April 22, 2009, BIA issued a 1-year permit to Appellant, Contract No. 14-20-0256-0759; it was approved by the Superintendent and signed by Appellant on May 4, 2009. AR Tab 7 at 1 (unnumbered). The signature block signed by Appellant contained the following statement: “I accept this permit *and the attached stipulations.*” *Id.* at 1 (unnumbered) (emphasis added). The permit stipulations were printed on the reverse side of the permit and included the following:

**Lands Not Covered By Permit.** — It is understood *and agreed by the permittee* that he shall fence out all open range lands which the owners have not authorized for inclusion under this permit, *or* deposit with the Superintendent annually a sum equal to the annual rental which would have accrued had the lands been covered by this permit. It is further understood and agreed that the deposit shall be retained as liquidated damages if the permittee’s livestock graze on such lands. Failure to comply with this requirement, . . . , shall be cause for termination of the permit. If the permittee’s livestock do not graze on such lands the deposit will be refunded.

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<sup>2</sup> Allotment 4056 is more particularly described as Section 3, Township 32 North, Range 40 East, W ½ NW ¼ SW ¼, Lots 3 and 4; and Section 4, Township 32 North, Range 40 East, NE ¼ SE ¼, Lots 1, 2, 3, 4, 5, 6, and 9; Montana Principal Meridian; containing 332.91 acres, more or less.

<sup>3</sup> The Decision states that Appellant’s bid was \$21.41/AUM. This statement appears to be in error inasmuch as the October 19, 2009, contract status report (CSR) and a July 29, 2009, letter to Appellant from BIA both state that the bid amount was \$20.41/AUM. *See* CSR (AR Tab 20); Letter from Superintendent to Appellant, July 29, 2009 (AR Tab 13).

*Id.* at 2 (unnumbered) (emphasis added). The permit authorized 2,902 AUMs<sup>4</sup> for the grazing season commencing May 15 and ending October 31. *Id.* at 1 (unnumbered).

On June 10, 2009, Appellant's permit was modified to remove 457.94 acres of tribal land from RU 2 and 332.91 acres of individually owned allotted land, which was Allotment No. 4056.<sup>5</sup> The permit modification also reduced the amount of rental due for RU 2 by \$1,061.30, from \$59,049.67 to \$57,988.37; the number of AUMs also was reduced by 52 AUMs, from 2,902 to 2,850.<sup>6</sup> No reduction in the rental rate or AUMs was made for the withdrawal of Allotment No. 4056.

Some time after the permit was awarded to Appellant, she apparently "exchanged grazing rights" on a portion of RU 2 known as the Britzman Pasture, which is adjacent to or surrounds Allotment No. 4056. *See* Superintendent's Decision, Aug. 25, 2009, at 1 (AR Tab 18).<sup>7</sup> Pursuant to this "exchange," we gather that the Tihista family was authorized by both Appellant and BIA to release cattle onto the Britzman Pasture, which was done on June 27, 2009. Notice of Stock Turnout, June 26, 2009 (AR Tab 11). Less than a month later, Olson submitted a request to BIA to re-include Allotment No. 4056 in RU 2 "because of numerous cows being on this allotment." Memorandum from Olson, July 21, 2009 (AR Tab 12). Olson provides no details, such as the date(s) the cows were on his allotment, brand on the cows, location on his allotment, etc., nor any photographs documenting the unauthorized grazing. The Superintendent then reminded Appellant that Allotment No. 4056 had not been included in RU 2 when the permit was approved, but stated that it would now be incorporated into the range unit, and Appellant would receive a

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<sup>4</sup> This number is 38 fewer AUMs than the 2,940 AUMs that were originally advertised. We cannot determine from the record whether these 38 AUMs represent the AUMs for Allotment No. 4056, which BIA had determined could support 116 AUMs, or whether the 38 AUMs are attributable to some other action.

<sup>5</sup> Nothing in the record identifies the 332.91 acres as Allotment No. 4056 but Appellant concedes that this allotment was withdrawn from RU 2 when her permit was modified, *see* Opening Brief at 1 (unnumbered), and Allotment No. 4056 consists of 332.91 acres.

<sup>6</sup> The grazing rental reduction of \$1,061.30 is consistent with the withdrawal of the tribal acreage. According to the CSR, AR Tab 20 at 1, the tribal acreage removed from RU 2 supported only 52 AUMs for which the rental would be \$1,061.32 (52 AUMs x \$20.41/AUM). The CSR contains no mention of Allotment No. 4056.

<sup>7</sup> Nothing in the record explains the history or significance of this "exchange" of grazing rights.

supplemental bill for \$2,367.56 (116 AUMs x \$20.41 per AUM). Letter from Superintendent to Appellant, July 29, 2009 (AR Tab 13). Appellant apparently declined to accept Allotment No. 4056, and explained to BIA that the season was half over and she was “undergrazing” on RU 2. Appellant’s Statement of Reasons to the Regional Director (AR Tab Q).

On August 13, 2009, two lease compliance technicians visited Allotment No. 4056. AR Tab 14.<sup>8</sup> They stated in their report that there were “no cattle present on the land during the inspection.” *Id.* at 3 (unnumbered). They also noted that Allotment No. 4056 was not fenced off from the rest of RU 2 and that there were 147 cows elsewhere on the range unit that “had unrestricted access to the allotment in question.” *Id.* These cattle were branded with the Tihistas’ registered brand.<sup>9</sup>

On August 25, 2009, the Superintendent issued the decision that has culminated in this appeal. In it, the Superintendent first states that Allotment No. 4056 was not included in Appellant’s permit and, therefore, under the terms of her permit, Appellant was required to post a deposit equal to the grazing rate for Allotment No. 4056, which was not fenced. The Superintendent’s decision does not mention the permit modification that purportedly removed Allotment No. 4056 from Appellant’s permit after her permit was granted nor did the Superintendent address whether BIA had retained a deposit from Appellant for Allotment No. 4056 at the time her permit was modified to remove Allotment No. 4056. *See supra* at 310.

The Superintendent then stated that on August 13, 2009, “approximately 147 head of cows branded [with a brand] registered to Doug or Donna T[i]hista [were observed].” Superintendent’s Decision at 1 (unnumbered) (AR Tab 18). The Superintendent did not state *where* the cows were when they were observed, but implied that they were grazing on Allotment No. 4056. The Superintendent acknowledged that the cattle did not belong to Appellant but that she had “exchanged grazing rights” on the Britzman Pasture, “including [A]llotment 4056,” thus implying that Appellant was responsible for the Tihistas’ cattle. *Id.*<sup>10</sup> For these reasons, the Superintendent charged Appellant for “the annual rental on [A]llotment 4056, which will be retained for liquidated damages.” *Id.* An invoice was

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<sup>8</sup> It is unclear whether the technicians were BIA employees or tribal employees.

<sup>9</sup> Color copies of photographs were appended to the lease inspection report, but no explanation accompanied any of the photographs to explain, e.g., their significance or where they were taken. *See* AR Tab 14.

<sup>10</sup> The record does not contain any documents purporting to exchange grazing rights, much less documentation that purports to hold Appellant liable for cattle owned by the Tihistas.

enclosed for damages in the amount of \$2,367.56 (116 AUMs x \$20.41/AUM). *Id.* at 3 (unnumbered). Appellant appealed the Superintendent's letter to the Regional Director.

Appellant's statement of reasons to the Regional Director contained several arguments against paying the deposit or damages: She claimed that it was Olson's duty to fence the withdrawn tract, not hers, under the tribal grazing regulations. She averred that although she signed the original permit, she did not read the stipulations on the second page, and she never received a copy of that page. She also claimed that both she and the Tihistas received oral assurances from BIA that they would not be liable for rent on the unfenced withdrawn tract. Finally, Appellant claimed that she did not have funds available for the supplemental payment.

After first requiring Appellant to post a bond equal to the amount of the invoiced damages, which Appellant did, the Regional Director explained in his Decision that Appellant's permit required the supplemental rental deposit to cover potential damage to unfenced lands within the range unit that were not part of the permitted lands. The Regional Director acknowledged that tribal grazing regulations require landowners to fence withdrawn land, but also noted that the regulations provide no recourse against landowners who fail to erect fencing. Because the tribal regulations did not address the situation where the landowner fails to fence the withdrawn land, the Regional Director relied on the more comprehensive BIA procedures. He concluded that Appellant had agreed to the permit's terms and conditions when she signed the permit and was bound by them even if she did not read or receive a copy of them. He therefore affirmed the Superintendent's decision that Appellant was required to make the supplemental deposit and that the deposit would be distributed to Olson because "livestock under [Appellant's] control grazed Allotment 4056." Decision at 5 (AR Tab J). The Regional Director did not explain how he determined that cattle had grazed on Allotment No. 4056 or how he determined that they were under Appellant's control. Appellant then appealed the Regional Director's Decision to the Board.

Appellant filed a statement of reasons, and separately incorporated the statement of reasons that she submitted to the Regional Director. No brief was filed by or on behalf of the Regional Director although BIA's counsel entered his appearance in this matter.

### **Discussion**

We limit our review to BIA's decision to charge Appellant with violating the terms of her permit by failing to keep cattle off of Allotment No. 4056 and requiring her to pay liquidated damages therefor. Because we can find no evidence in the record of cattle on Allotment No. 4056, let alone evidence that shows that Appellant is liable therefor, and

because nothing in the record shows that BIA provided Appellant with notice of the alleged permit violation and an opportunity to cure the violation or otherwise explain why the notice should be withdrawn or set aside, we reverse.

#### A. Standard of Review

The Board reviews *de novo* questions of law and the sufficiency of evidence in support of a BIA decision. *Spang v. Acting Rocky Mountain Regional Director*, 52 IBIA 143, 149 (2010). “Where the administrative record furnished to the Board does not support the decision, the decision must be vacated and the case remanded for development of an adequate record and issuance of a new decision.” *GMG Oil & Gas Corp. v. Muskogee Area Director*, 18 IBIA 187, 191 (1990).

#### B. Permit Violation by Unauthorized Cattle Grazing

Beyond a vague statement made by the owner of Allotment No. 4056, there simply is no evidence in the record to show that any livestock, whether owned by Appellant or by anyone else, grazed impermissibly on Allotment No. 4056. Even if there were evidence of such grazing, the record fails to provide support for additional material facts related to liability for the foraging livestock and notice of the permit violation, including an opportunity to cure the violation. Given this lack of evidence, we reverse the Regional Director’s Decision.

Although Olson notified BIA in July that he wanted his land added back to the range unit “because of numerous cows being on this allotment,” AR Tab 12, Olson provided no date(s) of the alleged grazing, no photographs, no identification of the brand on the livestock, or any other information in support of his bare suggestion that unauthorized cattle were on his land. And when a lease compliance inspection was done, the report specifically stated that there were no livestock on Allotment No. 4056. The fact that they observed cattle in the distance that might have or could have wandered onto Allotment No. 4056 cannot support a conclusion that cattle, in fact, did graze on that allotment.<sup>11</sup>

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<sup>11</sup> The inspectors also commented that the grass on Allotment No. 4056 was “very sparse, and [the land was] barren.” Inspection Report, AR Tab 14 at 3 (unnumbered). We cannot determine whether the lack of forage could have served as a deterrent to cattle that might otherwise have grazed on Allotment No. 4056 or whether the inspectors attributed the sparseness and barrenness to recent foraging by livestock.

And if we assume further that the record did support a finding of livestock grazing on Allotment No. 4056 by the cattle that were seen in the distance, these cattle belonged to the Tihistas, whose right to graze on the Britzman Pasture was approved by BIA. Nothing in the record explains why Appellant, rather than the Tihistas, is liable for any damages caused by the Tihistas' livestock.

Assuming still further that unauthorized cattle were grazing on Allotment No. 4056 and that Appellant is liable therefor, Appellant is correct that BIA failed to give her notice prior to demanding liquidated damages from her. An entire subpart in 25 C.F.R. Part 166 is devoted to permit violations on Indian agricultural lands. *See* Subpart H.<sup>12</sup> As set forth at 25 C.F.R. § 166.703(b), within 5 business days of the alleged permit violation, written notice must be provided to the permittee. Only *after* a notice of permit violation is issued *and* an opportunity to cure the violation or respond to the notice has passed without an adequate response may BIA then cancel the permit or invoke other remedies that may be set out in the permit or grant the permittee additional time to cure. 25 C.F.R. § 166.705(a). Thus, the regulations establish a two-step process, beginning first with the opportunity to explain or cure, followed by some further action, if the response from the permittee is inadequate.<sup>13</sup> As the Regional Director asserted in his decision, quoting *United States v. Heffner*, 420 F.2d 809, 811 (4th Cir. 1969),

“The rule is well established that: An agency of the government must scrupulously observe the rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and the courts will strike it down.”

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<sup>12</sup> Indian agricultural lands include rangeland. *See* 25 C.F.R. § 166.4 (definition of Indian agricultural land).

<sup>13</sup> If the unauthorized grazing is treated as a trespass rather than a permit violation, *see O'Bryan v. Acting Great Plains Regional Director*, 41 IBIA 119 (2005), the same two-step process would apply, i.e., notice of trespass that is then followed, if appropriate, by a decision as to trespass damages. *See* 25 C.F.R. §§ 166.803, 166.806, 166.808, 166.812. In *O'Bryan*, 41 IBIA at 125 & n.7 (2005), we noted that it was not entirely clear from the regulations whether unauthorized grazing should be treated as a trespass under subpart I or as a permit violation under subpart H of 25 C.F.R. Part 166. Because both subparts require notice of the permit violation or trespass to be provided prior to collecting damages, *see* 25 C.F.R. §§ 166.703(b), 166.803(a), we find it unnecessary to determine for purposes of this appeal which subpart should have been followed or whether, in general or under particular circumstances, BIA has discretion to apply either subpart.

Decision at 3 (AR Tab J). Here, BIA ignored the regulations under which it sought to assess liquidated damages against Appellant, for which reason we cannot allow the Regional Director's Decision to stand.

Because the record fails to support the Regional Director's determination that Appellant violated her permit by allowing livestock to graze on Allotment No. 4056 and fails to show that BIA complied with the regulations governing permit violations, 25 C.F.R. Part 166, Subpart H, we reverse. BIA must return Appellant's appeal bond to Appellant in its entirety. If BIA also collected and retained additional funds from Appellant for Allotment No. 4056, *see supra* at 310, these funds must be returned to Appellant as well.<sup>14</sup>

### 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 reverses the Regional Director's February 23, 2010, Decision.

I concur:

          // original signed            
Debora G. Luther  
Administrative Judge

          // original signed            
Steven K. Linscheid  
Chief Administrative Judge

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<sup>14</sup> Given our reversal of the Regional Director's decision to assess damages and the expiration of the subject permit at the end of the 2009 grazing season, we do not address other issues raised by Appellant, including her contention that no deposit was required.