



INTERIOR BOARD OF INDIAN APPEALS

Estate of Mary Dodge Peshlakai v. Navajo Area Director, Bureau of Indian Affairs

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United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF MARY DODGE PESHAKAI

v.

AREA DIRECTOR, NAVAJO AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 86-21-A

Decided October 28, 1986

Appeal from a decision of the Area Director, Navajo Area Office, Bureau of Indian Affairs, disapproving a temporary lease of Navajo Grazing Permit No. 18-984.

Affirmed.

1. Administrative Procedure: Administrative Review--Board of Indian Appeals: Generally

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

2. Indians: Tribal Powers: Self-Determination--Indians: Tribal Powers: Tribal Sovereignty

In furthering the doctrines of Indian sovereignty and self-determination, the Department of the Interior has recognized the right of Indian tribes initially to interpret their own governing documents and to resolve their own internal disputes and has given deference to a tribe's reasonable interpretation of its own laws.

3. Bureau of Indian Affairs: Generally--Regulations: Interpretation

It is axiomatic that the Bureau of Indian Affairs has a responsibility to interpret Federal regulations in carrying out its duties under those regulations.

4. Bureau of Indian Affairs: Generally--Regulations: Generally

When the Bureau of Indian Affairs receives information suggesting that Federal regulations have been violated, it has an affirmative duty to inquire into the matter and take appropriate action to correct or end any violation found to exist.

5. Indians: Tribal Government: Judicial System

The extent of a tribal court's jurisdiction should be raised first to the court, rather than being addressed through collateral attack before the Bureau of Indian Affairs.

6. Indians: Tribal Government: Generally--Indians: Tribal Powers: Generally

When the Bureau of Indian Affairs becomes aware of an action it believes exceeds tribal authority and impacts upon an area of legitimate BIA concern, it should bring the matter to the attention of appropriate tribal officials.

APPEARANCES: Lawrence A. Ruzow, Esq., Window Rock, Arizona, for appellant; Ross O. Swimmer, Assistant Secretary--Indian Affairs, U.S. Department of the Interior, Washington, D.C., for appellee; Robert C. Ericson, Esq., St. Michaels, Arizona, for Margaret Jose and Beulah Allen.

OPINION BY ADMINISTRATIVE JUDGE LYNN

On January 6, 1986, the Board of Indian Appeals (Board) received a request from the Estate of Mary Dodge Peshlakai (appellant) to assume jurisdiction over an appeal filed with the Washington office of the Bureau

of Indian Affairs (BIA) pursuant to 25 CFR Part 2. The appeal was taken from a September 18, 1985, decision of the Navajo Area Director, BIA (appellee), disapproving the temporary leasing of a Navajo grazing permit. For the reasons discussed below the Board affirms the September 18, 1985, decision.

Background

In 1981, the estate of Mary Dodge Peshlakai, Navajo C#54007 (decedent), was submitted for probate in the Window Rock District Court (court) of the Navajo Nation. One asset of decedent's estate was grazing permit No. 18-984, which permitted the use of the Sonsela Butte Management Unit, an area of tribally owned land. Apparently because of the protracted nature of the probate proceedings, the court approved the temporary leasing of the permit by the administratrix of decedent's estate, pending completion of probate. The purpose of this lease was to raise funds for estate administration.

Under the terms and conditions approved by the court, the permit was leased to Dennis Lee for the 1985 and 1986 grazing seasons; i.e., March 1 through October 31, 1985 and 1986. Lee was permitted to graze 50 head of cattle for a lease rate of \$225 per month during each grazing season.

The court furnished a copy of its order and the lease to the Branch of Land Operations, Fort Defiance Agency, BIA. Because Federal regulations in 25 CFR Part 167 provide for the leasing of tribal land by the District Grazing Committee, the Fort Defiance Agency Superintendent (Superintendent) questioned the court's authority to enter this order, and requested an opinion from the Department's Field Solicitor in Window Rock on whether or not

the lease should be approved. The Field Solicitor recommended BIA approve the lease, reasoning:

1. Under 25 CFR §167.8(d), Tribal Courts have authority to determine the rights to grazing permits of deceased permittees. I see no basis in the Tribal Code for any involvement by District Grazing Committees in the transfer of grazing permits by * * * inheritance.

2. It seems appropriate for a Tribal Court to make the assets of an estate productive during the pendency of probate. I understand that lease payments ultimately will be transferred to the persons the Court determines to be heirs.

3. It is only the temporary use of the decedent's permit rights that will be acquired by a non-heir, not the permit itself.

4. I see no legal objection to the form of the lease approved by the court.

5. It is in the interests of tribal sovereignty and self-determination for the Bureau to respect orders of Tribal Courts unless those orders are in clear violation of federal law. [1/]

The Field Solicitor concluded: "I see no guise or ploy involved in this transaction. The sole purpose of the lease is to pay the cost of probate, not to bypass the authority of any tribal legislative/administrative body." 2/

Subsequent to receipt of the Field Solicitor's recommendation, the Superintendent learned that the Sonsela Butte Management Unit was also permitted to Margaret Jose, C#1037, and that Jose and her daughter, Beulah Allen, C#1039, had the right to use the management unit in common with decedent, and were, in fact, using it. On page 2 of a letter to appellant dated July 9,

1/ Letter to Executive Director, Navajo Division of Resources, from Field Solicitor, Window Rock (June 3, 1985) at 2.

2/ Memorandum to Superintendent, Fort Defiance Agency, from Field Solicitor, Window Rock (June 20, 1985) at 1.

1985, the Superintendent stated he could not approve the lease for the following reasons:

1. Margaret Jose, C#1037, and Beulah M. Allen, C#1039, have an undivided joint grazing right in the Sonsela Butte Management Unit with the estate of Mary Dodge Peshlakai.

2. Beulah M. Allen, on her own behalf and that of her mother, Margaret Jose, opposes the leasing of the area covered by Grazing Permit No. 18-984, and further, she states that the proposed lease of the grazing area approved by the Tribal Court did not consider their grazing rights.

3. The leasing will only prolong the probate action and will subject the parties concerned to further disputes.

Appellant appealed this decision to appellee, who affirmed the Superintendent's decision in a letter dated September 18, 1985, stating at pages 1-4:

1. The grazing rights of the proposed lessee are not in question. The leasing action itself cannot be allowed since neither the Tribal Code nor the Navajo grazing regulations provide for the leasing of a grazing permit by probable heirs. Indeed, the only subleasing of a grazing permit that is allowed is by a grazing permit holder to probable heirs of immediate family pursuant to 25 CFR [167.9(e)].

2. Since the permitted grazing area is a common use area and has not been divided into specific described units that could be fenced, any permit action impacts all permit holders whose needs must be considered. While Ms. Margaret Jose and Ms. Beulah Allen do not seek any direct benefits resulting from the Peshlakais' death, they certainly have a right to express their desires regarding any action regarding their common grazing permit, which they have done * * *.

* * * * *

7. The subject correspondence [June 14, 1985, Memorandum from Executive Director, Navajo Division of Resources, to Deputy Attorney General, Navajo Department of Justice] can hardly be interpreted as lack of opposition to the proposed lease by the

Navajo Nation. [The Executive Director] merely states that in the absence of tribal laws specifically addressing leasing of grazing permits, he is unable to approve or disapprove [the District Court's action]. The District 18 Grazing Committee having been delegated the Tribe's authority to act on all grazing matters within their district, provided a more definite picture of the Tribe's position on leasing of grazing permits. I enclose their September 1, 1981 letter regarding a proposed grazing lease on this same unit where the purported Lessee was directed to remove his livestock or face immediate trespass action resulting from a violation of the Navajo Grazing Regulations with regard to subleasing.

8. Part 167.8 of the Code of Federal Regulations Title 25 gives the Tribal Courts the responsibility for determining rights to grazing permits involved in cases of divorce, separation, threatened family disruption, and permits of deceased permittees. All other grazing permit actions are authorized by the Superintendent considering the recommendation of the Grazing Committee. The Superintendent and the Grazing Committee have had no involvement in this proposed grazing lease and as such the heirs and the courts appear to have taken such authorities and responsibilities to lease upon themselves.

9. The Superintendent's decision was made in accordance with the Navajo Grazing Regulations as well as with the knowledge of longstanding Navajo Tribal practices regarding grazing permits. The Solicitor fails to mention the proper regulations of 25 CFR if such lands were to be leased with approval of the B.I.A.

10. The decision to disapprove the proposed lease does not fail to protect the estate or favor one group of land users against another, instead we must insure that the rights of all common users are considered and protected.

For this lease to be executed legally and properly the following requirements would have to be met:

1. The Navajo Grazing Regulations would have to be revised or waived.
2. The B.I.A. would have to determine grazing and carrying capacities and establish fair market appraisals.
3. The subject lands would have to be advertised for competitive bidding.
4. The lands under the permit would have to be subdivided, legally described, fenced, and proper arrangements made for adequate livestock watering.
5. A lease bond to insure compliance with the terms would have to be considered.

Appellant filed an appeal from this decision with the Assistant Secretary--Indian Affairs. On January 8, 1986, appellant requested the Board to assume jurisdiction over the matter, stating its appeal had been pending before the Assistant Secretary for more than 30 days without decision, in violation of 25 CFR 2.19. ^{3/} By order dated January 15, 1986, the Board made a preliminary determination that it had jurisdiction over the matter, and requested the administrative record. The record was received on February 4, 1986. Briefs on appeal were filed by appellant, appellee, and Margaret Jose and Beulah Allen.

Contentions of the Parties

On appeal appellant argues that appellee's disapproval of the court-ordered lease constitutes an impermissible intrusion into the internal affairs of the Navajo Nation and a derogation of the nation's right of self-government. Appellant contends that BIA has no authority to disapprove an order entered by a Navajo court in a matter over which that court undisputably had jurisdiction. Alternatively, appellant argues that the court had

^{3/} Section 2.19 states in pertinent part:

“(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or BIA official exercising the administrative review functions of the Commissioner] shall:

“(1) Render a written decision on the appeal, or

“(2) Refer the appeal to the Board of Indian Appeals for decision.

“(b) If no action is taken by the Commissioner within the 30-day time limit, the Board of Indian Appeals shall review and render the written decision.”

The 30-day time limit applies to the Assistant Secretary when he is exercising the administrative review functions of 25 CFR Part 2. Interim Ad Hoc Committee of the Karok Tribe v. Sacramento Area Director, 13 IBIA 76, 92 I.D. 46 (1985).

full authority to make an asset of the estate productive during the pendency of probate, that the person receiving the lease was qualified to receive a grazing permit, and that the temporary leasing of a grazing permit by the court does not in any way contravene the authority of the Navajo District Grazing Committee.

Appellee disapproved the lease on the grounds that the court's action violated regulations set forth in 25 CFR Part 167. In his brief to the Board, appellee takes a different approach and argues that the decision to disapprove the lease should be affirmed because the Navajo Nation agrees the court did not have authority to order the lease:

The real issue in this appeal is the scope of the authority of the Navajo Tribal Court. In deference to the Navajo Tribe's sovereignty and its interest in defining the scope of authority of its Courts, we requested the tribe to advise us of its opinion on this matter. By letter dated May 14, 1986, the tribe advised the Board of Indian Appeals and all concerned parties that the Area Director's September 18, 1985, decision was correct, and that under the Navajo Tribal Code and 25 CFR § 167.9(e), the Court had exceeded its authority in directing that the sublease be issued * * *. We believe that the tribe's position on this matter is dispositive of the issues raised in this appeal and should be accepted by the Board.

Conclusion: In view of the Navajo Attorney General's opinion, we urge the Board of Indian Appeals to affirm the Area Director's September 18, 1985, decision.

Appellee's Brief at 1-2.

The May 14, 1986, letter from the Navajo Attorney General states at pages 1-2:

After careful review, it is my opinion that the Area Director's decision dated September 18, 1985 is correct. Clearly, the Tribal Courts have full authority to determine heirs of a Grazing Permit holder. 25 C.F.R. Section 167.8(d). However, the authority to review and approve grazing permit subleasing rests solely with the District Grazing Committee and Agency Superintendent. 25 C.F.R. Section 167.9(e), 3 N.T.C. Section 786. These same provisions specifically limit grazing permit subleasing to family members or probable heirs.

Presumably, the Navajo Tribal Council delegated that authority to the District Grazing Committee because it determined that a Committee composed of community members who are familiar with local customs, family ties, and grazing patterns could do the best job of allocating grazing rights. In determining the heirs of the Mary Dodge Peshlakai estate and approving a grazing permit sublease, the Tribal Court failed to adequately consider the conflicting grazing rights of Margaret S. Jose and Beulah M. Allen. This conflict could have been avoided had the Court consulted with or deferred subleasing matters to the District Grazing Committee.

Mootness

Although not raised by the parties, the present case is potentially subject to dismissal on the grounds of mootness because the court-ordered lease at issue was for only the 1985 and 1986 grazing seasons. Accordingly, the lease would expire by its own terms on October 31, 1986.

The doctrine of mootness in Federal courts is based on the case-or-controversy limitations set forth in Article III, § 2, of the United States Constitution. As interpreted by the courts,

The fundamental policies underlying the doctrine appear to be two and awareness of them is essential to dealing with this complex area of the law. The first is that the courts, for reasons of judicial economy, ought not to decide cases in which the controversy is hypothetical, a judgment cannot grant effective relief,

or the parties do not have truly adverse interests. Second, it is a premise of the Anglo-American judicial system that the genuinely conflicting self-interests of parties are best suited to developing all relevant material before the court. * * * Hence, when the circumstances out of which a controversy arise change so as to raise doubt concerning the adversity of the parties' interests, courts ordinarily dismiss cases as moot, regardless of the stage to which the litigation has progressed.

Marchand v. Director, U.S. Probation Office, 421 F.2d 331, 332 (1st Cir. 1970).

[1] The Board has previously discussed the similarity between Article III restrictions and its own authorizing regulations in the context of standing. Hawley Lake Homeowners' Ass'n v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 276 (1985). As an executive/administrative forum, the Board is not bound by the Constitutional restrictions on judicial branch review. As a quasi-judicial body, however, it has consistently applied the doctrine of mootness in the interest of economy of judicial resources. See, e.g., LeBeau v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 14 IBIA 84 (1986); Estate of Milton Roy Osage, Sr., 13 IBIA 146 (1985); Burns v. Anadarko Area Director, 11 IBIA 40 (1983).

A major exception to the mootness doctrine recognized both by the courts and the Board concerns potentially recurring questions raised "by short term orders, capable of repetition, yet evading review." Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 515 (1911). See also Boise City Irrigation & Land Co. v. Clark, 131 F. 415, 419 (9th Cir. 1904) (The court considered a question allegedly moot "partly because of the necessity or propriety of deciding some question of law presented which might serve

to guide the municipal body when again called upon to act in the matter.") The Board has also considered the merits of cases falling into this category. See, e.g., Aleutian/Pribiloff Islands Ass'n, Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 9 IBIA 254, 89 I.D. 196 (1982); Rosenberg v. Portland Area Director, 6 IBIA 124, 84 I.D. 439 (1977).

Because the present case raises the same type of question, the Board will address the merits of the case even though the matter is arguably moot.

Applicable Regulations

Regulations concerning grazing on Navajo tribal land are found in 25 CFR Part 167. A major objective of these regulations, as set forth in 25 CFR 167.3 (a) is "[t]he preservation of the forage, the land, and the water resources on the Navajo Reservation, and the building up of those resources where they have deteriorated." Grazing permits evidence a valuable right to use tribal land because under section 167.9(a), "[a]ll livestock grazed on the Navajo Reservation must be covered by an authorized grazing permit issued by the Superintendent based upon the recommendations of the District Grazing Committee. * * * All such grazing permits will be automatically renewed annually until terminated." Section 167.8 sets forth those persons who are eligible to hold grazing permits.

Part 167 also regulates the transfer of grazing permits. Section 167.9(d) provides that "[u]pon recommendation of the District Grazing Committee and with the approval of the Superintendent, grazing permits may be

transferred from one permittee to another in accordance with instructions provided by the Advisory Committee of the Navajo Tribal Council, or may be inherited.” Under section 167.8(d), the “determination of rights to grazing permits involved in cases of divorce, separation, threatened family disruption, and permits of deceased permittees shall be the responsibility of the Navajo Court of Indian Offenses under existing laws, rules, and regulations.”

The sublease of a grazing permit is addressed in section 167.9(e): “By request of a permittee to sublet all or a part of his or her regular grazing permit to a member of his family or to any person who would receive such permit by inheritance, such subletting of permits may be authorized by the District Grazing Committee and the Superintendent or his authorized representative.”

Section 167.7 provides that “[t]he District Grazing Committee, the Superintendent, and his authorized representatives shall keep accurate records of all grazing permits and ownership of all livestock. Master files shall be maintained by the Superintendent or his authorized representatives.”

Discussion and Conclusions

This case raises two distinct questions: (1) did appellee commit error by disapproving the temporary leasing of Navajo Grazing Permit No. 18-984, and (2) does a determination of that issue impermissibly intrude on the Navajo Nation's right of self-government.

[2] The Board is fully cognizant of the Department's policy to further the doctrines of Indian sovereignty and self-determination by recognizing the right of Indian tribes initially to interpret their own governing documents and resolve their own internal disputes. This policy extends to giving deference to the tribe's reasonable interpretation of its own laws when BIA must interpret tribal laws to ensure that tribal action in which the Department has an interest is consistent with that law. Rogers v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 13 (1986), and cases cited therein. The present matter does not, however, fall neatly into this class.

[3] Under 25 CFR Part 167, the grazing of livestock on the Navajo Reservation is clearly the joint responsibility of the Navajo Nation and BIA. The duties of BIA and various components of the government of the Navajo Nation are set forth in detail in those regulations. The governing law in this case is not Navajo tribal law, but is Federal law embodied in Federal regulations. It is axiomatic that BIA has a primary responsibility to interpret Federal regulations in carrying out its duties under those regulations.

Here, appellee interpreted the Navajo grazing regulations as not authorizing the action taken by the court. This position is reasonable and supportable. Section 167.9(e) provides for subleasing of grazing permits by the District Grazing Committee and the Superintendent only to a limited class of individuals. There is no dispute that the lessee under the court's order is not a person to whom the permit could be subleased. Furthermore, section 167.8(d) gives the court in this case authority only to determine who should

receive the grazing permit of the deceased permittee. Nothing in the regulations authorizes the court to sublease the permit.

[4] Appellant notes no one asked BIA to approve or disapprove the court-ordered lease. This fact is irrelevant. Regardless of the source or context, when BIA receives information suggesting Federal regulations have been violated, it has an affirmative duty to inquire into the matter and take appropriate action to correct or end any violation found to exist.

Accordingly, the Board holds that appellee did not commit error by disapproving the court-ordered lease of Navajo Grazing Permit No. 18-894.

The Board also holds that this determination does not impermissibly intrude on the Navajo Nation's right of self-government. Initially, it is interesting that appellant and appellee each argue that their diametrically opposed positions must be sustained on the grounds of tribal sovereignty. Appellant contends BIA must respect the court's order as an exercise of self-government; while appellee argues the Navajo Attorney General's statement during the course of this appeal represents the position of the Navajo Nation and must be followed.

[5] In fact, what this case reveals is the failure of the Navajo Nation to have a unified position in this matter. Initially, the record does not show that lack of jurisdiction to enter this order was argued to or considered by the court. The extent of a court's jurisdiction is clearly the kind of question that should be raised first to the court, rather than being addressed through collateral attack in a separate forum.

[6] When BIA became aware of the court's order, which it reasonably believed was an action exceeding the court's authority and impacting upon an area of legitimate Federal concern, it properly brought the matter to the attention of tribal officials. ^{4/} When BIA also disapproved the lease, attention was diverted from the fact that tribal remedies may not have been exhausted and the matter might still be ultimately unresolved within the Navajo Nation, and was instead focused on the role of BIA. Under the circumstances, however, BIA had no alternative except to take the dual course of action of disapproving what it considered an ultra vires action by the court, while informing appropriate tribal officials of the reason for its action.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Navajo Area Director's September 18, 1985, decision is affirmed.

//original signed
Kathryn A. Lynn
Administrative Judge

I concur:

//original signed
Anita Vogt
Acting Chief Administrative Judge

^{4/} In Potter v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 10 IBIA 33 (1982), the Board noted with approval BIA's actions in bringing conflicting official reports of a tribal council's action to the council's attention.

^{5/} This decision in no way reflects upon the intent of the court's order under the circumstances before it, or restricts these or future parties in seeking alternative legal means for dealing with the type of situation underlying this dispute.