



INTERIOR BOARD OF INDIAN APPEALS

Tim Kimmet v. Billings Area Director, Bureau of Indian Affairs

22 IBIA 148 (06/25/1992)

Related Board cases:

17 IBIA 231

Reconsideration denied, 17 IBIA 285

19 IBIA 72

28 IBIA 87



United States Department of the Interior

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

TIM KIMMET

v.

BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-11-A

Decided June 25, 1992

Appeal from a decision declining to assess trespass damages for the benefit of a lessee of Indian trust land.

Affirmed.

1. Indians: Lands: Trespass: Damages--Indians: Leases and Permits: Farming and Grazing

Under 25 CFR 166.24(b), a Bureau of Indian Affairs Superintendent is required to take action to collect penalties and damages from the owner of cattle grazing in trespass upon trust or restricted Indian lands. However, it is within the Superintendent's discretion to determine whether or not a lessee should receive any of the damages.

APPEARANCES: Rae V. Kalbfleisch, Esq., Shelby, Montana, for appellant; Keith L. Beartusk, Acting Area Director, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Tim Kimmet seeks review of a September 13, 1991, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to assess trespass damages against Claire P. Smith for damages alleged to have been suffered by appellant. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

This is the third time this matter has been before the Board. In Smith v. Acting Billings Area Director, 17 IBIA 231, reconsideration denied, 17 IBIA 285 (1989), the Board affirmed the Acting Area Director's determination that lessor Claire Smith's cattle were in trespass on two leases held by Kimmet. ^{1/} In Kimmet v. Billings Area Director (Kimmet I), 19 IBIA 72

^{1/} These were lease Nos. L-2643 and L-2734 on the Blackfeet Reservation. Both leases were due to expire at the end of December 1990, but were cancelled by mutual consent on Oct. 15, 1990.

(1990), the Board reviewed the Area Director's decision denying appellant's claim for damages against Smith. The Board affirmed the Area Director's decision insofar as it rejected appellant's claim for damages for crop destruction, upon finding that appellant had failed to submit any evidence in support of that claim. However, the Board remanded the matter to the Area Director for consideration of, inter alia, whether and to what extent damages should be assessed against Smith and paid to appellant for the value of forage consumed by the trespassing cattle. The Board stated:

[A]ppellant has the right under the leases, with the approval of the Superintendent, to use the [grazing] rights himself or to authorize someone else to use them. Even so, if BIA reasonably determines that appellant would not have made use of the grazing rights, either personally or by authorization of another, it is entitled to take this factor into consideration in determining the compensation, if any, payable to appellant.

19 IBIA at 79. See Smith and Kimmet I for further background of this matter.

Upon remand, the Superintendent, Blackfeet Agency, BIA, requested appellant to provide information in support of his claim for damages. He stated:

The matter of compensation to you requires that you provide the documentation that losses did occur. Therefore, please provide this agency with federal tax returns, federal crop damage reports, copies of damage reports of the county agent, and other documents relating to your losses. The remand requires the Superintendent to take into consideration if you would have made use of the grazing rights, either personally or by authorization of another, this factor must be taken into consideration in determining the compensation, if any, payable to appellant. Copies of agreements for grazing that you were unable to fulfill because of the trespass and any agreements that you had previously to graze the stubble and the amounts of compensation you received would be helpful in this matter.

(Superintendent's Jan. 23, 1991, Letter).

On February 5, 1991, the Superintendent apparently made a further, verbal request to appellant for information. On March 1, 1991, he issued a decision on the matters remanded. He found that the value of the forage consumed was \$355.32, but further stated:

The Superintendent has reasonably determined that the appellant would not have made use of the grazing rights, and would not be entitled to any compensation. The main factors being: 1) a copy of a previous lease [showing] that [appellant] had allowed Smith to graze the aftermath without compensation 2) the annual

usage by Smith on the BIA leases, with [appellant's] consent, prior to the trespass action by the BIA 3) requests from [appellant] to the Superintendent that negotiations be conducted to keep livestock off until he was done harvesting, and then upon notice through the Superintendent, that the cattle could graze the aftermath without compensation 4) the appellant did not present any evidence of grazing agreements that he was unable to fulfill.

(Superintendent's Mar. 1, 1991, Decision at 2).

Appellant appealed to the Area Director who, on September 13, 1991, affirmed the Superintendent's decision.

Appellant's notice of appeal from the Area Director's decision was received by the Board on October 15, 1991. Appellant and the Area Director filed briefs.

Discussion and Conclusions

25 CFR 166.24(b) requires the Superintendent to collect penalties and damages for grazing trespass and provides: "All payments for such penalties and damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid."

The Superintendent made a number of findings, as required by the Board's remand, concerning the length of the trespasses, the value of forage consumed, and other matters. However, the crux of his decision as it concerns appellant is his determination that appellant should not receive any damages because he would not have made use of the grass and crop aftermath which were consumed during the trespasses. The Superintendent's determination in this regard was based on appellant's prior willingness to allow Smith to run her cattle on the leases after crops had been harvested, as evidenced by an unapproved agreement between Smith and appellant 2/ and by statements made by appellant to BIA. The Superintendent also took into consideration the fact that appellant was unable to produce any grazing agreements which he was unable to fulfill.

Appellant argues that the Superintendent erroneously concluded that appellant had given implied consent to Smith's trespasses. He also argues

2/ Section 4(g) of the unapproved agreement provided:

"(LESSOR'S RIGHT TO USE LAND FOR PURPOSE OF GRAZING LIVESTOCK) Notwithstanding anything contrary in this lease, it is hereby mutually agreed and understood that LESSOR shall have the specific right to use all of the above farms lands for herself or others for the purpose of grazing livestock for the period of time commencing the earlier of either the end of harvest or October 15th of any given year, whichever comes first, and until April 1st of the following year."

that the Superintendent erroneously relied on a void lease. Further, he challenges the Superintendent's findings concerning the length of the trespasses and the value of forage consumed.

The unapproved agreement between Smith and appellant, a purported lease dated April 15, 1986, was found by the Board in Smith, supra, to be void ab initio because it was not approved by BIA. As the Board stated in that decision, the document granted no rights to anyone. However, even though the document granted no enforceable rights, it is evidence indicating that appellant, who signed the agreement, did not intend to use the aftermath grazing himself or to sublease it to a third party. The Superintendent was entitled to consider the document in determining appellant's intent. Further, the Superintendent was entitled to consider oral statements made by appellant indicating that he did not object to Smith turning her cattle onto the leases after harvest, although he wanted BIA assistance in preventing her from doing so before harvest.

After remand of this matter to the Superintendent, appellant submitted an affidavit stating that, when he acquired the leases, several ranchers contacted him about subleasing the grass and aftermath grazing. The affidavit also stated that, had Smith's cattle not consumed all available forage, appellant would have subleased the grass and aftermath grazing at prevailing rates (Appellant's Feb. 6, 1991, Affidavit at 2). Appellant did not state, however, that he had entered into negotiations with any of the inquiring ranchers. Nor did he submit any evidence whatsoever to support his bald statement that he would have subleased the grass and aftermath grazing but for the trespasses. ^{3/}

Under these circumstances, it was reasonable for the Superintendent to conclude that appellant would not have made use of the aftermath grazing had the trespasses not occurred.

[1] As noted in Kimmet I, while the Superintendent's duty to collect penalties and damages was mandatory, it was within his discretion to determine whether appellant should receive any of the damages. On a number of occasions, the Board has discussed its role in reviewing discretionary decisions of BIA officials. When a decision is based on the exercise of discretionary authority, the Board does not substitute its judgment for that of BIA. Rather, the Board undertakes to ensure that BIA gave proper consideration to all legal prerequisites to the exercise of discretion. See, e.g., Lower Elwha Tribe v. Portland Area Director, 18 IBIA 50 (1989); Romo v. Acting Phoenix Area Director, 18 IBIA 16 (1989); City of Eagle Butte v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989). The Board also reviews a discretionary decision for reasonableness. Kimmet I, 19 IBIA at 79.

^{3/} Such evidence might consist of, for instance, evidence of preliminary sublease negotiations, even if not the executed grazing agreements contemplated by the Superintendent.

In this case, the Board finds that BIA properly exercised its discretion and further finds that its decision as to appellant was reasonable.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 13, 1991, decision of the Billings Area Director is affirmed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge