



INTERIOR BOARD OF INDIAN APPEALS

Maurice and Brian Schwan v. Aberdeen Area Director, Bureau of Indian Affairs

23 IBIA 10 (10/29/1992)



United States Department of the Interior

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

MAURICE AND BRIAN SCHWAN

v.

ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-109-A

Decided October 29, 1992

Appeal from assessment of penalties for alleged violations of agricultural leases on the Devils Lake Sioux Reservation.

Affirmed as modified.

1. Administrative Procedure: Burden of Proof--Indians: Leases and Permits: Violation/Breach: Generally

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

APPEARANCES: J. Thomas Traynor, Jr., Esq., Devils Lake, North Dakota, for appellants; Jean W. Sutton, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Maurice and Brian Schwan ^{1/} seek review of a November 29, 1991, decision of the Aberdeen Area Director, Bureau of Indian Affairs (BIA; Area Director), assessing penalties for alleged violations of several agricultural leases on the Devils Lake Sioux Reservation in North Dakota. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision as modified in this opinion.

Background

In order to facilitate an understanding of the facts of this case, the alleged violations and related assessments will be discussed separately.

The first alleged violation related to Lease 119-87, covering 55.2 acres of cropland in Allotment DLS-1055, described as the W^{1/2} SE^{1/4},

^{1/} It appears that Maurice and Brian Schwan operate their individual leases together. Even though one or the other individual appellant was the lessee under a particular lease or the recipient of a document, the Board will refer to appellants collectively in this decision.

SW $\frac{1}{4}$ NE $\frac{1}{4}$, sec. 7, T. 151 N., R. 62 W., fifth principal Meridian. 2/ The lease ran from January 1, 1987, through December 31, 1991.

A lease compliance inspection was conducted on July 28, 1991. The inspection revealed that appellants had used the entire W $\frac{1}{2}$ of the SE $\frac{1}{4}$, which resulted in their use of approximately 60 acres in addition to the 55.2 acres mentioned in the lease. By letter dated August 30, 1991, the Superintendent, Fort Totten Agency (Agency), BIA (Superintendent), informed appellants that their use of this additional 60 acres was unauthorized. The Superintendent also stated that further investigation had revealed that in 1987 through 1991, appellants had registered the additional 60 acres with the Benson County Agricultural Soil Conservation Service office as 48.9 acres of grass, and 11.1 acres of varying crops. The Superintendent informed appellants that they were being assessed \$2,955 for their unauthorized use of the additional 60 acres, broken down into 48.9 acres of hay at \$8 per acre (\$391) plus 11.1 acres of crop at \$18 per acre (\$199.80) times 5 years usage. Appellants were informed that payment was due within 3 days from receipt of the letter.

When payment was not received, by letter dated September 17, 1991, the Superintendent informed appellants that failure to make the payment constituted a violation of the lease, for which the lease could be cancelled in accordance with 25 CFR 162.14. 3/ The Superintendent gave appellants 10 days from receipt of his letter in which to make payment or show cause why the lease should not be cancelled. When payment was still not received, by letter dated October 7, 1991, the Superintendent informed appellants that the lease was cancelled.

The second alleged violation related to Lease 120-87, covering 30.2 acres of cropland in Allotment DLS-131, described as the SE $\frac{1}{4}$ SW $\frac{1}{4}$,

2/ In the Area Director's decision and some of the filings, this lease is identified as lease 119-89. Also, the legal description is sometimes given as R. 64 W. It appears that both of these differences originated as typographical errors that were copied into other documents.

3/ Section 162.14 provides in pertinent part:

“Upon a showing satisfactory to the Secretary that there has been a violation of the lease * * *, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. * * * If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach. If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease and demands shall be made for payment of all obligations and for possession of the premises.”

sec. 21, T. 151 N., R. 62 W., fifth Principal meridian. 4/ The lease term was from January 1, 1987, through December 31, 1991.

A lease compliance inspection was conducted on September 9, 1991. As a result of this inspection, by letter dated September 18, 1991, the Superintendent informed appellants that they had violated the lease by cutting and removing 9.8 acres of hay. The Superintendent assessed appellants \$78.40 for this violation by calculating 9.8 acres at \$8 per acre. Appellants were given 3 days from receipt of the letter to make payment. When payment was not made, by letter dated November 1, 1991, appellants were given 10 days to make payment or show cause why the lease should not be cancelled in accordance with 25 CFR 162.14.

The third alleged violation related to Lease 89-87, covering 120 acres of pasture land in Allotment DLST-2026, described as the SE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 28, and E $\frac{1}{2}$ NW $\frac{1}{4}$, sec. 33, T. 151 N., R. 62 W., fifth principal meridian; Lease 101-90, covering 40 acres of pasture land in Allotment DLST-2054, described as the NW $\frac{1}{4}$ NW $\frac{1}{4}$, sec. 33, T. 151 N., R. 62 W., fifth principal meridian; Lease 87-87, covering 80 acres of pasture land in Allotment DLST-2056, described as the SW $\frac{1}{4}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 28, T. 151 N., R. 62 W., fifth principal meridian; Lease 90-87, covering 80 acres of pasture land in Allotment DLS-898-B, described as the W $\frac{1}{2}$ SE $\frac{1}{4}$, sec. 28, T. 151 N., R. 62 W., fifth principal meridian; and Lease 93-87, covering 40 acres of pasture land in Allotment DLS-122, described as the NW $\frac{1}{4}$ NE $\frac{1}{4}$, sec. 33, T. 151 N., R. 62 W., fifth principal meridian. 5/ Except for Lease 101-90, each lease ran from January 1, 1987, through December 31, 1991. Lease 101-90 appears to have had a term running from January 1, 1990, through December 31, 1994.

A lease compliance inspection was conducted for these and other leases on September 20, 1991. The inspection revealed that the leases had been overgrazed and that less than 50 percent grass remained. On September 25, 1991, the Superintendent informed appellants of the overgrazing problem and, in accordance with Provision 17.A of the leases, directed them to remove all livestock from the properties within 1 day of receipt of the letter.

Another lease compliance inspection, conducted on September 30, 1991, revealed that 297 cattle were still on the five properties listed supra. By letter dated October 1, 1991, appellants were again directed to remove the livestock, and were assessed a total of \$534.60 in trespass damages pursuant to 25 CFR 166.24(b). 6/ The damages were assessed at the rate

4/ Lease 120-87 excluded a 3649800/24494400 interest which was no longer in trust status. Appellants state that this interest was held by Maurice Schwan.

5/ Lease 93-87 excluded a 4061070/157697280 interest which was no longer in trust status.

6/ Section 166.24(b) provides in pertinent part:

"The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of \$1 per head for each animal thereof for each day of trespass (except in North Dakota * * * where the penalty shall be \$1 per head of cattle regardless of the number of days of

of \$1 per animal for trespass (\$297) and \$.80 per animal for the value of forage consumed (\$237.60).

When the damages were not paid, by letter dated October 7, 1991, appellants were given 10 days to pay the assessment or to show cause why the leases should not be cancelled in accordance with 25 CFR 162.14. The damages were still not paid, and on November 1, 1991, the Superintendent informed appellants that the leases were cancelled.

The fourth alleged violation related to Lease 211-87, covering approximately 44 acres in Allotment DLST-2069, described as that portion of the S½ NE¼, sec. 30, T. 151 N., R. 62 W., fifth principal meridian, which was suitable for grazing. Part of the leased property included a waterhole. The lease ran from January 1, 1988, through December 31, 1992.

On June 27, 1991, a lease compliance inspection was conducted. As a result of that inspection, by letter dated July 2, 1991, the Superintendent informed appellants that several windrows of hay had been cut in violation of the lease. Appellants were assessed a total of \$50 in damages for the cutting of two rounds of sweet clover at \$25 per round.

When payment was not received, by letter dated July 19, 1991, the Superintendent gave appellants 10 days in which to make payment or to show cause why the lease should not be cancelled in accordance with 25 CFR 162.14. A handwritten note on the record copy of this letter indicates that the assessment was paid "as of" August 5, 1991.

The last alleged violation related again to Lease 211-87, and to Lease 209-88, covering 80 acres of pasture land in Allotment DLST-2081, described as the N½ NE¼, sec. 30, T. 151 N., R. 62 W., fifth principal meridian. Lease 209-88 ran from January 1, 1988, through December 31, 1994.

A lease compliance inspection was conducted on September 20, 1991. As a result of the inspection, by letter dated September 25, 1991, the Superintendent informed appellants that the leases had been overgrazed, and gave them 1 day from their receipt of the letter in which to remove all livestock. Another lease compliance inspection was conducted on October 4, 1991, which revealed that there were 119 head of cattle on the two leases. By letter dated October 4, 1991, the Superintendent informed appellants of the livestock trespass and, under 25 CFR 166.24(b), assessed total damages of \$214.20, broken down into 119 cattle in trespass at \$1 per head (\$119),

fn. 6 (continued)

trespass), together with the reasonable value of the forage consumed by their livestock and damages to property injured or destroyed, and for expenses incurred in impoundment and disposal. The Superintendent shall take action to collect all such penalties and damages, * * * and seek injunctive relief when appropriate."

and \$.80 per head for the value of forage consumed (\$95.20). When payment was not received, by letter dated November 1, 1991, the Superintendent gave appellants 10 days in which to make payment or show cause why the lease should not be cancelled in accordance with 25 CFR 162.14.

Appellants appealed all of these decisions to the Area Director. By letter dated November 29, 1991, the Area Director affirmed the Superintendent in all instances, finding that appellants had failed to provide a statement of reasons in support of their appeal.

The Board received appellants' notice of appeal from this decision on December 30, 1991. Both appellants and the Area Director filed briefs in this appeal.

Discussion and Conclusions

Appellants allege that they set forth reasons for their appeal in a letter dated October 21, 1991. No copy of this letter appears in the administrative record. A copy is attached to appellants' opening brief. The letter is addressed to "Dear Sir:" and there is no inside address for, or other indication of, the person to whom the letter was sent. In fact, there is nothing in or with the copy of the letter submitted to prove that it was ever sent to anyone. The administrative record contains several comments suggesting that no statement of reasons had been received.

Despite questions concerning the October 21, 1991, letter, the Board will assume for the purposes of this case that the letter was actually sent to, and received by, some BIA employee, and should, therefore, have been before the Area Director when he considered this appeal. In accordance with this assumption, the Board further assumes that the reason given by the Area Director for affirming the Superintendent's decisions, *i.e.*, that no statement of reasons was filed, is incorrect. ^{7/} However, for the reasons discussed below, the Board also finds that the Superintendent's

^{7/} 25 CFR 2.10 provides that a statement of reasons shall be filed by an appellant either with a notice of appeal or within 30 days after the filing of a notice of appeal. Section 2.17(b)(1) indicates that an appeal may be subject to summary dismissal "[i]f after the appellant is given an opportunity to amend them, the appeal documents do not state the reasons why the appellant believes the decision being appealed is in error, or the reasons for the appeal are not otherwise evident in the documents" filed.

Although the Area Director states that he was sustaining the Superintendent's decisions, the reason given suggests that he actually dismissed the appeal under section 2.17. The administrative record contains no evidence that the Area Director gave appellants the opportunity required by section 2.17(b)(1) to amend their filings in order to set forth their reasons for appeal. The Board finds that appellants were given this opportunity in the present appeal.

decisions should be affirmed. Therefore, it affirms the Area Director's decision as modified in this opinion. 8/

In regard to the alleged violation of Lease 119-87, unauthorized use of 60 acres, appellants argue that they used the land covered by the legal description in the lease. Appellants state that the southern part of the 60 acres at issue can be used for crops, and the middle section, located between the 55.2 acres mentioned in the lease and the southern part of the 60 acres, was usable only for hay. They contend that they, "and other tenants which have farmed this property, have always farmed the cropland, and taken off the hay on the land in between. This is consistent with the description in the lease" (Opening Brief at 2). Appellants argue that because their use of the property was consistent with the legal description, there was no unauthorized use.

It is arguable that the description of the property covered by the lease is ambiguous. Although the legal description included the entire $W\frac{1}{2}$ of the $SE\frac{1}{4}$, a diagram of the leased property, included as part of the lease indicated that only approximately the $N\frac{1}{2}$ of the $NW\frac{1}{4}$ $SE\frac{1}{4}$ was covered by the lease. The lease clearly stated that only 55.2 acres were being leased. Furthermore, the lease stated that the property leased was to be used only for crops. Provision 18.7 of the lease provided that "[n]o hay is to be cut on grazing or farm pasture leases without prior written permission by the Superintendent." The Board finds that, read in its entirety, the lease could not be construed to cover more than 55.2 acres. Appellants were clearly aware that they were using much more than 55.2 acres, without compensation to the landowners. The Board affirms the Superintendent's decision that appellants' use of the 60 acres was not authorized.

Appellants also contend that BIA should not have waited until the last year of the lease term to inform them that their use of the 60 acres was not authorized. The reason for this delay is not evident from the record. However, the fact that appellants were not immediately informed of their violation of the lease does not exonerate them.

In regard to the alleged violation of Lease 120-87, unauthorized use of 9.8 acres, appellants contend that the 9.8 acres at issue are covered by the lease. They allege that this acreage is very low and wet, and should be considered wasteland. Appellants contend that the only use they made of the acreage during the 5 years of the lease was to get a few bales of hay.

It appears that appellants' argument is again based on the legal description of the leased property, without regard to the diagram included in the lease which showed the property covered by the lease, the recitation of the acreage leased, or the limitation of their use of the leased

8/ The Board could vacate the Area Director's decision and remand this matter to him for further consideration. Under the circumstances of this case, the Board sees no valid reason for further delaying final resolution of this appeal, and therefore reaches the merits.

property. See Provision 18.7 of the lease. This argument has already been addressed and decided against appellants. The Board affirms the Superintendent's decision that appellants' use of the 9.8 acres was not authorized. 9/

In regard to the alleged violation of Leases 89-87, 101-90, 87-87, 90-87, and 93-87, livestock trespass and overgrazing, appellants argue that they were not given an adequate opportunity to remove the cattle. They contend that they received the letter requiring them to remove the cattle on September 28, 1991, a Saturday, and that, despite repeated attempts, they were not able to contact anyone at the Agency until October 1, 1991. Appellants allege that there was no overgrazing of the leased properties, supporting this allegation by the statement that cattle were not put onto these leases until June 8 and July 1, 1991. They contend that if someone from the Agency had inspected the properties, it would have been evident that there was no overgrazing. 10/

The administrative record does not support appellants' contention concerning the date of receipt of the Superintendent's September 25, 1991, letter, which appears, from the certified mail receipt, to have been mailed on September 24, 1991. The return receipt card for the letter was signed by Brian Schwan and shows a September 25, not 28, date of receipt. Although this would appear to be very rapid delivery, the Board notes that other letters sent by the Superintendent in this case were received the day after they were dated. Without additional support for a date of receipt of September 28, the Board finds that the date of receipt indicated on the return receipt card is determinative. The Board finds that all livestock should have been removed from the leased properties by September 26, 1991.

Appellants cite the 10-day cure provision of 25 CFR 162.14 in support of their argument that they were not given adequate time to remove their cattle. Section 162.14 provides procedures to be followed when a lease is cancelled. At the time appellants were issued the notice to remove their livestock, they were not in a lease cancellation proceeding, but were being directed to take certain actions required under their leases. The Superintendent's order was not governed by 25 CFR 162.14, but by Provision 17.A and the Grazing Schedule of each lease. Provision 17.A states that "[g]razing land will not be overgrazed. * * * If grass deterioration occurs,

9/ The exclusion of 9.8 acres from the description of the leased property indicates that the acreage may well have been considered wasteland. Even if this were true, however, appellants would not have the right to use the acreage without a modification of the lease and compensation to the landowners.

10/ Appellants also indicate that the Superintendent's Oct. 1, 1991, letter stated that the cattle were not authorized to be on the leases because the brand was registered to Maurice Schwan and the lease was to Brian Schwan. No violation has been alleged based upon ownership of the cattle on the leases. The brand was given merely to identify the cattle.

[appellant] agrees to remove all livestock.” The Grazing Schedule further provides:

The total AUM capacity for this unit for a normal growth year is ___ AUM’s. Under normal conditions this unit will support ___ Animal Units for the six-month grazing period of May 15 to Nov. 15. If grass deterioration occurs, for whatever reasons, [appellant] agrees to reduce or remove the livestock even if the unit has been stock[ed] at or below the normal stocking rate. The Superintendent or his duly authorized representative will be the judge of grass deterioration.

Although worded differently, Lease 101-90 sets forth the same requirements in Provision 17.G and the Grazing Plan. 11/

There is no indication in the record or in any of appellants’ filings that appellants made any attempt to move the livestock. Instead, appellants disputed the determination that the properties had been overgrazed. The leases clearly provide that the determination of whether land has been over grazed will be made by BIA, and appellants agreed to comply with a directive to remove livestock from leased property following a determination of overgrazing. 12/ Appellants were given a second notice of non-compliance on October 1, 1991. It was not until October 7, 1991, that the Superintendent determined to cancel the leases based upon appellants’ failure to pay the trespass assessment. At that time, he properly informed appellants of the requirements of 25 CFR 162.14, and gave them the opportunity to come into compliance or show cause as to why the leases should not be canceled. Appellants were given an adequate opportunity to remove their cattle from the leased properties.

Appellants continue to dispute the determination that the properties were overgrazed, arguing that they could not have been overgrazed because of the date on which cattle were put onto the properties and the fact that vegetation on the properties was high. Overgrazing is not simply a question of time or height of some vegetation. It is a much more complex question requiring consideration of, inter alia, time; environmental factors during

11/ The blanks in the standard Grazing Schedule in each lease are filled in with the specific stocking rates for that lease. Lease 89-87 indicates a total AUM capacity of 24 AUM’s with 4 Animal Units for the 6-month grazing period; Lease 87-87 indicates a total AUM capacity of 18 AUM’s, with 3 Animal Units for the 6-month grazing period; Lease 90-87 indicates a total AUM capacity of 48 AUM’s, with 8 Animal Units for the 6-month grazing period; and Lease 93-87 indicates a total AUM capacity of 24 AUM’s with 4 Animal Units for the 6-month grazing period. The Grazing Plan for Lease 101-90 indicates a total AUM capacity of 24 AUM’s with 4 Animal Units for the 6-month grazing period. The Sept. 30, 1991, inspection found a total of 297 cattle on these leases.

12/ If appellants disputed BIA’s determination, they should have removed the livestock and then requested another inspection.

the grazing season; number and type of livestock; and quality, quantity, and type of vegetation. The inspection reports indicate that there was less than 50 percent grass left on the leased properties. Nothing appellants have submitted or argued on appeal provides grounds for discrediting that assessment of the condition of the properties.

The Board affirms the Superintendent's decision finding livestock trespass and overgrazing on the five leases.

In regard to the alleged violation of lease 211-87, unauthorized cutting of hay, appellants contend that they cut weeds, not hay, and that the cutting was done because of the requirement in the lease to protect the property from the growth and spread of weeds. Despite contesting this determination, appellants paid the \$50 penalty imposed.

[1] The Superintendent's July 2, 1991, letter concerning this alleged violation states that the vegetation cut was sweet clover. Sweet clover is not a weed. Appellants have the burden of proving the error in the decision under appeal. French v. Aberdeen Area Director, 22 IBIA 211, 214 (1992), and cases cited therein. The mere allegation that the vegetation cut was weeds, without any additional support, is not sufficient to sustain appellants' burden of proof. The Board affirms the Superintendent's decision finding unauthorized haying on this lease.

In regard to the alleged violation of Leases 211-87 and 209-88, livestock trespass and overgrazing, appellants contend that the leases were not overgrazed, submitting several pictures of the properties to show that there is vegetation above what they state is approximately 10 inches of snow. Appellants admit that the area immediately around the waterhole may have been overgrazed, but contend that the remaining areas were not, stating that cattle were kept out of 25 acres until September 10 or 15, 1991, and that some sweet clover in that area was 5 feet high. Appellants repeat their argument that they were not given adequate time to remove their cattle from the properties, and add that the cattle had broken out of their proper pasture the day of the inspection (apparently October 4, 1991), and were moved back to that pasture the same day. 13/

The Board has already addressed appellants' argument concerning the adequacy of the time given to move the livestock and contention that the properties were not overgrazed. The prior discussion applies equally to the present leases.

Although appellants argue that the cattle had broken into these properties on the day of the inspection, they do not dispute that they had been

13/ Provision 17.A and the Grazing Schedule for these leases are the same as those quoted in text supra. Lease 211-87 indicates a total AUM capacity of 26 AUM's, with 4 Animal Units for the 6-month grazing period; Lease 209-88 indicates a total AUM capacity of 47 AUM's, with 8 Animal Units for the 6-month grazing period.

ordered to remove all livestock by letter dated September 25, 1991, or that 119 head of cattle were on the properties on October 4, 1991. Under these circumstances, appellants' cattle were in trespass on the lease on October 4, 1991. Damages for that trespass were properly determined under 25 CFR 166.24(b). The Board affirms the Superintendent's assessment of penalties on the two leases.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 29, 1991, decision of the Aberdeen Area Director is affirmed as modified in this opinion.

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge