



INTERIOR BOARD OF INDIAN APPEALS

Frank Papse, Sr., et al. v. Acting Portland Area Director, Bureau of Indian Affairs

33 IBIA 175 (03/03/1999)

Judicial review of this case:

Dismissed, *Papse v. Bureau of Indian Affairs*, CIV 99-589-E-BLW (D. Idaho Aug. 8, 2001)



United States Department of the Interior

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

FRANK PAPSE, SR., ET AL.

v.

ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-17-A

Decided March 3, 1999

Appeal from a decision concerning a lease of trust land on the Fort Hall Reservation and trespass to two Fort Hall allotments.

Affirmed.

1. Indians: Lands: Trespass: Damages

In the absence of the regulations required by section 103 of the American Indian Agricultural Resource Management Act, 25 U.S.C. § 3713, a Bureau of Indian Affairs Area Director is not authorized to assess civil penalties for trespass under the Act.

APPEARANCES: Howard A. Belodoff, Esq., Boise, Idaho, for Appellants; Colleen Kelley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Frank Papse, Sr., Alethea Wetchie, Cleo Hasuse, Cynthia Bitt, Emmy Bitt, Jameson Bitt, and Myron Bitt appeal from a September 9, 1997, decision of the Acting Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning Fort Hall Lease 96-23 and trespass to Fort Hall Allotments 329 and 1217. 1/ For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Lease 96-23 is a dry farm/pasture lease. It was approved by the Superintendent, Fort Hall Agency, BIA, on August 3, 1995, with John McNabb d.b.a. McNabb Farms Partnership (McNabb Farms) as lessee. The lease term is five years, beginning January 1, 1996. As originally approved, the lease covered 45 tracts of trust land, including Allotments 329 and 1217.

1/ Appellant Frank Papse, Sr., is the sole owner of Allotment 329. The remaining Appellants are owners of all but a 1/15th interest in Allotment 1217.

By letter of April 17, 1997, Appellant Papse, through his attorney, asked the Superintendent to determine whether the lease was valid as to Allotment 329. Papse also asked the Superintendent to assess trespass damages in the event he found the lease invalid as to Allotment 329. On May 2, 1997, the Superintendent reconfirmed his approval of the lease, thus in essence holding that the lease was valid as to Allotment 329. Papse, joined by the other Appellants, appealed to the Area Director. They challenged the validity of the lease with respect to both Allotments 329 and 1217 and sought trespass damages with respect to both allotments.

In a decision issued on September 9, 1997, the Area Director held that both allotments had been improperly included in the lease and would therefore be removed from the lease at the end of the crop year. He continued:

With respect to collection of damages for the alleged trespass, appellants request that we collect damages pursuant to the American Indian Agricultural Resource Management Act (AIARMA), P.L. 103-177, 25 U.S.C. §§ 3701-3746. Although section 3713(a) requires the Secretary to issue regulations providing for damages, those regulations are not yet in place. Therefore, we cannot assess damages based on AIARMA.

In the absence of AIARMA regulations, we will calculate damages based on the fair market value of the property. Prior to the approval of the lease, BIA made an appraisal. Based on this appraisal, the fair market rental for 1996 and 1997, during which McNabb Farms was allegedly in trespass on allotments 329 and 1217, the damages were \$16 per farmable acre. McNabb Farms in fact paid that amount, albeit under the assumption it was a rental payment. Further, there is no evidence to suggest that McNabb Farms harmed the property in any way. Therefore we conclude there is no necessity to assess any additional damages.

Area Director's Decision at 4-5.

Appellants appealed the Area Director's decision to the Board.

Discussion and Conclusions

On appeal to the Board, Appellants challenge the Area Director's decision only with respect to the determination of trespass damages. The Board first considers their argument that the Area Director should have assessed civil penalties under the AIARMA.

[1] Civil penalties are addressed in 25 U.S.C. § 3713 (section 103 of the AIARMA). Subsection 3713(a) is most relevant to this appeal. It provides:

(a) Civil penalties; regulations

Not later than one year after December 3, 1993, the Secretary shall issue regulations that))

(1) establish civil penalties for the commission of trespass on Indian agricultural lands, which provide for))

(A) collection of the value of the products illegally used or removed plus a penalty of double their values;

(B) collection of the costs associated with damage to the Indian agricultural lands caused by the act of trespass; and

(C) collection of the costs associated with enforcement of the regulations, including field examination and survey, damage appraisal, investigation assistance and reports, witness expenses, demand letters, court costs, and attorney fees;

(2) designate responsibility within the Department of the Interior for the detection and investigation of Indian agricultural lands trespass; and

(3) set forth responsibilities and procedures for the assessment and collection of civil penalties. [2/]

BIA published proposed regulations to implement this provision on June 3, 1996, 61 Fed. Reg. 27824, but has never finalized them.

2/ The remainder of § 3713 provides:

"(b) Treatment of proceeds

"The proceeds of civil penalties collected under this section shall be treated as proceeds from the sale of agricultural products from the Indian agricultural lands upon which such trespass occurred.

"(c) Concurrent jurisdiction

"Indian tribes which adopt the regulations promulgated by the Secretary pursuant to subsection (a) of this section shall have concurrent jurisdiction with the United States to enforce the provisions of this section and the regulations promulgated thereunder. The Bureau and other agencies of the Federal Government shall, at the request of the tribal government, defer to tribal prosecutions of Indian agricultural land trespass cases. Tribal court judgments regarding agricultural trespass shall be entitled to full faith and credit in Federal and State courts to the same extent as a Federal court judgment obtained under this section. Nothing in this chapter shall be construed to diminish the sovereign authority of Indian tribes with respect to trespass."

Appellants contend that "[t]he civil penalties of the AIARMA are self-executing and not dependent on the issuance of regulations." Appellants' Reply Brief at 17. Further, they contend that "[t]he [proposed] regulations do not substantively 'establish' the trespass penalties, damages, or costs but merely provide a procedural framework for the Secretary to comply with the Act." Id. at 18.

Appellants' interpretation of the AIARMA is belied by the language of the statute. Subsection 3713(a)(1) states explicitly that it is the regulations which are to establish the civil penalties. While the statute also directs that the regulations establish procedures, it does so in a separate subsection, i.e., subsection 3713(a)(3).

Appellants contend that the legislative history supports their interpretation. In support of this contention, they quote from H.R. Rep. No. 367, 103d Cong., 1st Sess. (1993). Nothing in the passage they quote, however, suggests that the penalty provision was intended to be self-executing. Rather, the quoted language actually contradicts Appellants' interpretation in that it states, as does the statute, that the regulations are to establish the penalties. See H.R. Rep. No. 367 at 19: "This section requires the Secretary to issue regulations that establish civil penalties for trespass on Indian agricultural lands. This section will allow the Secretary to collect fines, penalties, and other costs associated with trespass on Indian agricultural lands."

Appellants have not shown that either the statutory language or the legislative history demonstrates an intent on the part of Congress to make the civil penalty provision self-executing.

In his answer brief, the Area Director compares the language of 25 U.S.C. § 3713(a) to that of 16 U.S.C. § 668(b), the civil penalty provision in the Bald Eagle Protection Act. ^{3/} The distinction between the two is obvious. 16 U.S.C. § 668(b) clearly and unambiguously establishes a civil penalty and specifies no other step which must be taken prior to assessment of

^{3/} 16 U.S.C. § 668(b) provides:

"Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner, any bald eagle, commonly known as the American eagle, or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, may be assessed a civil penalty by the Secretary [of the Interior] of not more than \$5,000 for each such violation. Each violation shall be a separate offense. No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. In determining the amount of the penalty, the gravity of the violation, and the demonstrated good faith of the person charged shall be considered by the Secretary."

penalties by the Secretary. ^{4/} By contrast, 25 U.S.C. § 3713(a) provides for an intermediate step)) the promulgation of regulations)) in order to put civil penalties into effect. Had Congress intended the AIARMA civil penalty provision to be self-executing, it could have, and presumably would have, chosen language more akin to that in 16 U.S.C. § 668(b).

While it is perhaps arguable that the language of 25 U.S.C. § 3713(a) is specific enough to enable it to be enforced without the aid of implementing regulations, ^{5/} the fact remains that the statute is unambiguous in its requirement that regulations be promulgated in order to establish civil penalties. Were the Area Director to attempt to enforce penalties which, by the terms of the statute, were not yet established, serious due process problems would arise.

Appellants contend that the civil penalty provision must be construed liberally in favor of the Indian landowners, in accordance with the well-established rule concerning construction of statutes enacted for the benefit of Indians. ^{6/} The civil penalty provision is, however, also subject to an equally well-established rule requiring strict construction of statutes imposing penalties. ^{7/} These two rules of construction essentially cancel each other out. The Board applies neither in this case.

Appellants' final contention concerning the AIARMA is that the Area Director should be required to assess penalties under the AIARMA in accordance with the proposed regulations published on June 3, 1996. The proposed regulations, however, have no legal effect and therefore do not constitute the regulations contemplated in 25 U.S.C. § 3713(a)(1).

The Board finds that Appellants have not shown that the Area Director has authority to impose civil penalties under the AIARMA in the absence of the regulations required by 25 U.S.C. § 3713(a).

^{4/} The civil penalty provision was added to the Bald Eagle Protection Act in 1972. Act of Oct. 23, 1972, sec. 1, 86 Stat. 1064. Nothing in the 1972 act requires that the Secretary publish regulations prior to assessing civil penalties. Even so, the Department has promulgated regulations under which it enforces the civil penalty provisions of the Bald Eagle Protection Act, as well as those in other laws. 50 C.F.R. Part 11.

^{5/} Cf. White Earth Band of Chippewa Indians v. Minneapolis Area Director, 23 IBIA 216 (1993), finding certain provisions of the Indian Gaming Regulatory Act self-executing.

^{6/} "[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." County of Yakima v. Confederated Bands and Tribes of the Yakima Indian Nation, 502 U.S. 251, 269 (1992), quoting from Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985).

^{7/} E.g., 36 Am. 2d Forfeitures and Penalties § 8 (1963); 82 C.J.S. Statutes § 389 (1953).

Appellants also contend that they are entitled to seek damages under common law and under Idaho statutory law. Their argument on this point is confusing. It is possible that they believe the Area Director should have served as a forum for Appellant's arguments under common law and Idaho statutory law. This seems unlikely, however, because Appellants did not make those arguments before the Area Director. Appellants cannot have expected the Area Director to consider arguments they did not make.

It is also possible that Appellants do not actually want the Area Director (or the Board) to consider their common law and Idaho statutory law arguments ^{8/} but are instead contending that the Area Director has somehow prevented them from making those arguments in a different forum. They argue, for instance, that "[t]he Area Director abused his discretion by preventing the landowners from seeking all available remedies against a trespasser," Appellants' Opening Brief at 13, and that "[t]he Area Director may not disregard and usurp the rights of individual allottees to protect their land and enforce their legal rights apart from the United States." Id. at 14. ^{9/}

If this is the thrust of their argument, however, they would seem to be contending that the Area Director erred simply by issuing a decision concerning trespass damages) a curious contention given the fact that it was Appellants who requested that the Area Director issue such a decision.

The Area Director contends that he has not taken any action to prohibit or impede Appellants from enforcing their legal rights, and Appellants do not specify how the Area Director might have done so by issuing a decision in their appeal. ^{10/}

^{8/} If, however, they are asking the Board to consider these arguments now, they face the obstacle of the Board's well-established rule under which it declines to consider arguments raised for the first time on appeal. E.g., Welk Park North v. Acting Sacramento Area Director, 29 IBIA 213, 219 (1996).

^{9/} In support of this contention, they quote at length from Poafpybitty v. Skelly, 390 U.S. 365 (1968), and place particular emphasis on the Supreme Court's statement: "We agree that the federal restrictions preventing the Indian from selling or leasing his allotted land without the consent of a government official do not prevent the Indian landowner, like other property owners, from maintaining suits appropriate to the protection of his rights." Id. at 372.

^{10/} The Board notes that some Fort Hall landowners, in a case with facts similar to this one, have sought additional damages in a judicial forum. Those landowners participated in an appeal before the Board (ultimately withdrawn) and also filed suit in Shoshone-Bannock Tribal Court. Cedar Farms, Inc. v. Portland Area Director, 32 IBIA 235 (1998). Appellants' attorney, who represented the landowners in Cedar Farms, is presumably familiar with the tribal court litigation in that case.

Appellants have failed to show that the Area Director erred either by issuing a decision on trespass damages or by issuing a decision that did not address the common law and Idaho statutory law arguments which Appellants make for the first time in this appeal.

Next, Appellants contend that the Area Director should have assessed damages and penalties for grazing trespass under 25 C.F.R. § 166.24(b) and (d). Further, they contend that they "were never provided an opportunity to present evidence of the grazing trespass." Appellants' Opening Brief at 8.

Appellants did not allege before BIA that there were livestock present on Allotments 329 or 1217 during 1996 and 1997, let alone request that penalties and damages be assessed. Appellants' problem was not a lack of opportunity to make arguments or present evidence but, rather, their own failure to take advantage of their opportunity to do so.

There is nothing in the record to suggest that livestock were in fact present on the allotments during 1996 and 1997.

Appellants have failed to show that the Area Director erred in not assessing damages and penalties for grazing trespass.

Appellants next contend that the trespass assessment should not have been based upon the appraised rental value, because the appraisal was not properly done.

In November 1994, BIA appraisers prepared an appraisal for the property to be included in Lease 96-23, for the purpose of estimating fair annual rent for the lease. The appraisers based their estimate upon an analysis of the rental rates paid for comparable properties in the area. This appraisal methodology is often used by BIA. The Board has held that it is a reasonable methodology. E.g., Loveland v. Acting Portland Area Director, 33 IBIA 172 (1999); Kelly v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 249 (1987).

An appellant who challenges a BIA appraisal bears the burden of proving that BIA's chosen methodology has produced an unreasonable result. E.g., Loveland; Wapato Orchard Partnership v. Portland Area Director, 18 IBIA 254, 256 (1990). Appellants have not made such a showing here.

Appellants do not dispute the Area Director's conclusion that Appellants' property had not suffered harm as a result of McNabb Farms' presence thereon.

In the absence of a showing that BIA's determination of fair annual rental was unreasonable or that Appellant's property had suffered harm, and in view of the fact that McNabb Farms had a BIA-approved lease authorizing it to farm Allotments 329 and 1217 during the period in question, the Board finds that the Area Director reasonably assessed trespass damages based upon the rent called for in the lease.

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 Area Director's September 9, 1997, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge