



INTERIOR BOARD OF INDIAN APPEALS

Sandra Buffington v. Acting Great Plains Regional Director, Bureau of Indian Affairs

37 IBIA 12 (10/16/2001)



# United States Department of the Interior

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

SANDRA BUFFINGTON,  
Appellant

v.

ACTING GREAT PLAINS REGIONAL  
DIRECTOR, BUREAU OF INDIAN  
AFFAIRS,  
Appellee

: Order Reversing Decision  
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:  
: Docket No. IBIA 01-40-A  
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:  
: October 16, 2001

This is an appeal from a November 20, 2000, decision of the Acting Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning an assessment for overstocking on range unit 515 on the Pine Ridge Reservation. For the reasons discussed below, the Board reverses the Regional Director's decision.

On January 8, 1996, Appellant was issued a grazing permit for range unit 515 for a five-year term beginning November 1, 1995, and ending October 31, 2000. The permit authorized yearlong grazing for 207 head of cattle.

Sometime prior to July 10, 2000, Appellant applied to the Oglala Sioux Allocation Committee for a grazing allocation for range units 169 and 515 for the five-year period beginning November 1, 2000. On July 10, 2000, the Allocation Committee voted to table Appellant's application until a livestock count was done by BIA. The following day, a BIA Range Conservationist conducted a count on range unit 515.

On July 26, 2000, the Superintendent, Pine Ridge Agency, BIA, wrote to Appellant, stating:

On July 11, 2000, personnel from the Branch of Land Operations inspected Range Unit 515, permitted to you. A livestock count was made and revealed 280 head of cattle [with Appellant's brand] and 40 head of horses [with Appellant's brand]. Your grazing permit on Range Unit 515 allows for grazing 207 head. Forty (40) horses figured at 1.5 animal units converts to 60 head plus 280 head of cattle is a total of 340 head, which makes you overstocked by 133 head and is a violation of your permit. Your bill is figured at  $\$109.68 \times 1.5 = \$164.52$  per head  $\times 133 = \$21,881.16$ .

The Range Control Stipulations attached and made a part of your grazing permit provided "If the number of livestock authorized is exceeded, the permittee shall be liable to pay as liquidated damages, in addition to the regular fees for the full grazing season as provided in the permit, a sum equal to 50% thereof for such excess livestock and such livestock shall be promptly removed from the range unit." This overstocking is considered intentional and excess livestock must be removed immediately within five (5) days from the receipt of this letter. Please notify this office promptly as to the number of livestock and the date of removal.

You are advised that failure to abide by the specified number of livestock in the permit is cause for cancellation of your permit in 30 days from receipt of this letter.

Superintendent's July 26, 2000, Decision.

On August 31, 2000, the Superintendent again wrote to Appellant, stating: "You have been in the office and we have agreed to adjust your billing to reflect 50 head of yearlings. Your bill is adjusted as follows: 50 head of yearlings x \$41.13 (1/4 of the \$164.52) = \$2,056.50. Your new bill is \$21,881.16 - \$2,056.50 = \$19,824.66."

In the meantime, Appellant appealed the Superintendent's July 26, 2000, decision to the Regional Director. She contended:

- 1) I was never properly notified before this inspection took place as stated in the Range Control Stipulation No. 6 "Counting of Livestock."
- 2) [BIA] did not ask for a round up so count could be conducted as stated in the Range Control Stipulation No. 6 "Counting of Livestock."
- 3) If the livestock had been rounded up at [BIA]'s request, the count would have been accurate and orderly.
- 4) I believe the count to be inaccurate. It was not done in the correct procedure required by [BIA]. With no witnesses to prove [the BIA Range Conservationist's] count or my count, therefore I ask that you reject this inspection and count.

Appellant's Aug. 21, 2000, Notice of Appeal to the Regional Director.

The Regional Director rejected all of Appellant's contentions. As to the first two, he held that there was no requirement that BIA give a permittee advance notice of a count or that it conduct a round up in order to count livestock. He continued:

Claims number three and four discuss the validity of the count and counting method. You have not provided any evidence backing up this claim. You have not shown the number of livestock that you own or any evidence that the count was inaccurate or how the procedures used were improper or in error. Therefore lacking any evidence to show otherwise, I find the inspections conducted by the Superintendent's representatives were done within accepted guidelines.

I am upholding the Superintendent's decision to charge you with overstocking on range unit 515. The assessment of \$21,881.16 for overstocking penalties on Range Unit 515 issued to you on July 26, 2000, stands.

Regional Director's Nov. 20, 2000, Decision at 2.

On appeal to the Board, Appellant contends: (1) BIA lacks authority to assess liquidated damages and/or penalties; (2) the Range Control Stipulations were not a part of Appellant's permit; (3) BIA's livestock count violated Appellant's permit; (4) the procedures followed by BIA violated 25 C.F.R. § 166.24 (2000) and basic due process principles; (5) BIA lacks authority to assess the amount of damages it assessed against Appellant; (6) the amount of damages assessed are greater than allowed under United States ex rel. Chase v. Wald, 557 F.2d 157 (8th Cir. 1977); (7) the amount assessed is a penalty, and BIA can collect only actual damages; and (8) the Range Control Stipulations do not authorize the assessment made in this case.

Many of these arguments overlap. In several, Appellant equates liquidated damages under the Range Control Stipulations with trespass penalties and damages under 25 C.F.R. § 166.24 (2000). Under this theory, Appellant contends that BIA was required to follow the procedures set out in section 166.24 (2000) and was limited to the penalties and damages stated therein.

In United States v. Fraser, 156 F. Supp. 144, 150-154 (D. Mont. 1957), the United States District Court for the District of Montana held that the overstocking provision in the then-current Range Control Stipulations was enforceable as a provision for liquidated damages, even though the Stipulations used the term "penalty" rather than the term "liquidated damages." <sup>1/</sup> The court stated that BIA "had an election to treat the overstocking as a trespass

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<sup>1/</sup> Paragraph 3 of the Range Control Stipulations, as they existed at the time of Fraser, provided in relevant part:

"[I]f the number authorized is exceeded without previous authority, the permittee will be required to pay in addition to the regular charges as provided in the permit, a penalty equal to 50 percent thereof for such excess stock and the stock will be held until full settlement has been made." 156 F. Supp. at 151.

and exact the penalty prescribed by [25 C.F.R. §] 71.21 [(1956 Supp.)] for each act of trespass or recover the penalty provided by Par. 3 of the Range Control Stipulations for the excess number of cattle.” 156 F. Supp. at 152. Affirming, the United States Court of Appeals for the Ninth Circuit stated: “We hold that the District Court properly construed the Range Regulation to provide for liquidated damages. The additional charge of 50 per cent does not appear to be incommensurate with the estimated harm done by overgrazing. Certainly such harm is difficult of accurate estimation, but it is oftentimes substantial.” Fraser v. United States, 261 F.2d 282, 287 (9th Cir. 1958).

Appellant does not cite any authority which contradicts Fraser. Chase v. Wald, upon which Appellant relies, concerned trespass penalties and damages under 25 C.F.R. § 151.24 (1976), not liquidated damages under the Range Control Stipulations. Nothing in Chase v. Wald indicates that the Eighth Circuit intended to address liquidated damages.

Appellant has not shown that BIA was required to follow the trespass procedures set out in 25 C.F.R. § 166.24 (2000) in order to assess liquidated damage under the Range Control Stipulations. Neither has she shown that BIA was limited to the penalties and damages stated in 25 C.F.R. § 166.24 (2000).

Appellant also contends that the Range Control Stipulations were not part of her grazing permit. It is not clear whether she is contending that the stipulations were not attached to her permit or that, regardless of whether they were attached, they were not binding on her.

Appellant signed her grazing permit below the statement, “I accept this permit and the attached stipulations.” The page containing the Range Control Stipulations is a printed document. It is identified as BIA Form No. 5-5518 and indicates that it has been in effect since May 1970. The first paragraph states: “The following range control stipulations are hereby prescribed for use in all grazing permits except as special provisions shall be made by the Commissioner of Indian Affairs.” There is little doubt that this is the page that was referred to in Appellant’s permit and which she accepted by signing the statement on her permit. If, in fact, the stipulations were not attached to her permit, it was her responsibility to inquire about them. More generally, it was her responsibility, as a person engaged in the business of grazing on Indian land, to familiarize herself with the terms of her grazing permit and the Range Control Stipulations referenced in the permit. See Federal Crop Insurance v. Merrill, 332 U.S. 380 (1947); Billco Energy v. Acting Albuquerque Area Director, 35 IBIA 1, 7 (2000), and cases cited therein.

The Board finds that the Range Control Stipulations were part of Appellant’s grazing permit.

Next, Appellant contends that BIA did not have authority to count livestock except under paragraph 6 of the permit, "Counting of Livestock" and only after giving notice to Appellant. 2/

It is true that, as Appellant contends, neither her permit nor the regulations in 25 C.F.R. Part 166 (2000) explicitly authorized BIA to enter the range unit for the purpose of counting livestock. 3/ However, under its authority and responsibility to protect Indian trust resources, BIA necessarily has authority to enforce provisions of a grazing permit relating to conservation of those trust resources. E.g. 25 U.S.C. §§ 466, 3711. The Board finds that BIA had authority to enter range unit 515 without prior notice to Appellant for the purpose of counting livestock.

Finally, the Board reaches Appellant's contention that her due process rights were violated. In this part of her brief, she argues that she was deprived of procedural safeguards such as those which were included in 25 C.F.R. § 166.24 (2000), concerning trespass. Further, she contends that the evidence of overstocking upon which BIA relied was insufficient to support its finding.

25 C.F.R. Part 166 (2000) did not require that any particular procedures be followed in the event grazing permits were found to have been violated. 4/ However, it appears that,

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2/ Paragraph 6 provides:

"All livestock authorized to graze upon or trail over restricted Indian land must be counted by the Superintendent or his representative. Arrangements should be made for counting all livestock before it enters the reservation. Permittees are required to notify the Superintendent a sufficient length of time in advance to permit him to have a representative present when stock are counted on or off the reservation. The right is reserved by [BIA] to have a representative present at each roundup to check the number of stock, and in the event the permittee shall fail or refuse to round up his stock at proper times and in a satisfactory manner for the purpose of allowing a count of the stock, the Superintendent shall have the right to round up and count such stock at the expense of the permittee."

3/ This authority is now explicitly set out in 25 C.F.R. Part 166. 25 C.F.R. § 166.701 (2001) provides: "Unless the permit provides otherwise, we may enter the range unit at any reasonable time, without prior notice, to protect the interests of the Indian landowners and ensure that the permittee is in compliance with the operating requirements of the permit."

25 C.F.R. Part 166 (2001) was published on Jan. 22, 2001, 66 Fed. Reg. 7068, 7126, and went into effect on Mar. 23, 2001.

4/ The 2001 revision of Part 166 includes specific procedures in Subpart H, "Permit Violations." That subpart states that it addresses "violations of permit provisions other than

in the past, BIA (and specifically the Great Plains Region) has attempted to provide some basic procedural safeguards. This was evident in Lopez v. Acting Aberdeen Area Director, 5/ 29 IBIA 5 (1995), a case in which the Board affirmed an assessment of liquidated damages under a grazing permit. In that case, BIA initiated proceedings by giving the permittees notice of overstocking and an opportunity to remove excess livestock. BIA conducted several livestock counts over a period of time and gave the permittees several opportunities to correct the problem. The final livestock count, which gave rise to the appeal in Lopez, was made by four individuals, each of whom signed the report and certified its accuracy.

In this case, only one count was made, and only one BIA Range Conservationist participated. His report does not describe the manner in which the count was made and is not certified. The Regional Director has submitted an affidavit from the Range Conservationist as an attachment to his answer brief. In his affidavit, the Range Conservationist states that he made his count from an all-terrain vehicle in about four hours and further states that he has 40 years experience counting cattle and reading brands.

Appellant contends that the Range Conservationist's affidavit should not be considered because it was not part of the record before the Regional Director. Further, she contends that it would be impossible to make an accurate count from a vehicle or on horseback because the range unit covers 11,000 acres, much of which is rough terrain. She raises several further objections to the count and to BIA's handling of the matter.

The Board agrees that the Range Conservationist's affidavit cannot be used to support the Regional Director's decision. There is simply no evidence that the Regional Director had the information in that affidavit before him when he issued his decision. Further, even if the Board were to consider the affidavit, it would still find the record insufficient to support the Regional Director's decision. While the Board does not attempt to describe specific requirements for a valid livestock count, it concludes that an assessment of \$21,881.16 (or

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fn. 4 (continued)

trespass.” 25 C.F.R. § 166.700 (2001). Trespass is addressed in Subpart I of the new regulations, which also includes procedural provisions.

The language of § 166.700 (2001) suggests that overstocking under permits will be considered under the trespass provisions of the new regulations rather than the provisions concerning permit violations. It is not entirely clear what effect will be given to liquidated damages provisions in permits.

For present purposes, it is enough to note that, whether overstocking is considered a permit violation or a trespass, the new regulations include procedural protections for alleged violators in either case.

5/ The Great Plains Region of BIA was formerly known as the Aberdeen Area.

