



INTERIOR BOARD OF INDIAN APPEALS

David A. Miller, d.b.a. Royal Crest Dairy v. Rocky Mountain Regional Director,
Bureau of Indian Affairs

39 IBIA 57 (06/04/2003)



United States Department of the Interior

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

DAVID A. MILLER, d.b.a. ROYAL CREST DAIRY,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 02-117-A
ROCKY MOUNTAIN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	June 4, 2003

Appellant David A. Miller, d.b.a. Royal Crest Dairy, seeks review of an April 26, 2002, decision issued by the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning an alleged trespass on Allotment 1154-A on the Crow Indian Reservation and an assessment of trespass penalties and costs. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Allotment 1154-A is presently leased to one of the allotment's co-owners. Although the materials before the Board do not show any leasing history for the allotment, Appellant makes several statements that suggest he leased the allotment prior to November 2000. Appellant's statements further suggest that he presently owns or leases property adjacent to Allotment 1154-A.

The current lease on Allotment 1154-A began on November 1, 2000, and expires on October 31, 2005. Sometime prior to July 3, 2001, the landowner lessee complained to BIA that Appellant had removed a fence from the allotment. BIA inspected the allotment on July 3, 2001, and confirmed that the fence had been removed. On July 10, 2001, the Superintendent, Crow Agency, BIA (Superintendent), wrote to Appellant, requiring that he reconstruct the fence within 90 days.

Appellant responded through his attorney on July 16, 2001. He stated that he moved the fence from its original location to a position on the boundary of the allotment. He continued: "In effect, the fence was not removed, but was moved to a more useful position as a border fence – all in response to the needs expressed by the fact that this land is no longer in [Appellant's] area of use." Appellant asked that BIA's demand for fence reconstruction be

withdrawn “on the grounds that good land use is served by building the fence as a boundary fence.” ^{1/}

BIA did not respond to Appellant’s July 16, 2001, letter but reinspected the allotment on September 19, 2001. At that time, it found that the fence had not been reconstructed. On December 5, 2001, the Superintendent assessed trespass penalties and costs against Appellant. Appellant appealed to the Regional Director, who affirmed the Superintendent’s decision on April 26, 2002.

Although not raised by the parties, the Board finds that there is an initial question as to the extent of its jurisdiction in this case. 25 C.F.R. § 166.803(c) provides: “Trespass notices under this subpart are not subject to appeal under 25 CFR part 2.” Because the Board’s jurisdiction derives from 25 C.F.R. Part 2, there is a question as to the extent of the restriction this regulation places on the Board’s normal jurisdiction.

The proposed revision to 25 C.F.R. Part 166 was published at 65 Fed. Reg. 43874, 43934 (July 14, 2000). As proposed, Part 166 was divided into subparts. Subpart I, entitled “Trespass,” included sections 166.800 through 166.819. Sections 166.803 through 166.805 were contained within a separate division within Subpart I which was entitled “Notification.” Proposed subsection 166.803(c) was identical to the present regulation.

Proposed section 166.900 was the only section in Subpart J, “Appeals.” The proposed section provided: “Except as otherwise provided in this part, appeals from decisions of the BIA under this part may be taken pursuant to 25 CFR part 2.”

The proposed revisions to 25 C.F.R. Part 166 are discussed at 65 Fed. Reg. 43883-43887 (July 14, 2000). The Board found no mention there of either subsection 166.803(c) or section 166.900.

The final regulations were published at 66 Fed. Reg. 7068, 7126 (Jan. 22, 2001). In the final version of Part 166, proposed subsection 166.803(c) remained unchanged, but proposed section 166.900 was not carried into the final rules, and the section number was used for other matters. In reviewing the regulations as published, however, the Board found a new section 166.3 which is essentially the same as proposed section 166.900.

The cross-reference chart accompanying the final regulations notes that proposed section 166.900 was not carried into the final version. The chart further indicates that a new

^{1/} Prior to its being moved, the fence appears to have divided the allotment. However, it is not clear from the materials before the Board whether the land between the fence before and after it was moved is actually part of Allotment 1154-A.

section 166.2 was added and that proposed section 166.2 was renumbered as section 166.3. In fact, however, proposed section 166.2 was renumbered as section 166.4, and new sections 166.2 and 166.3 were added. As mentioned above, new section 166.3 contains the appeal information that had appeared in proposed section 166.900.

A part-by-part analysis of the regulations in 25 C.F.R. Part 166 appears at 66 Fed. Reg. 7084-7088 (Jan. 22, 2001). As was the case with the discussion accompanying the proposed rulemaking, there is no discussion of subsection 166.803(c). Neither is there any discussion of the removal or moving of proposed section 166.900, or of the addition of new section 166.3.

The Board must therefore interpret the extent of the restriction on administrative review set out in 25 C.F.R. § 166.803(c) in the absence of any statement of intent from the regulation drafters.

25 C.F.R. § 166.803(c) appears under the “Notification” division of the “Trespass” subpart. It states that “trespass notices” are not subject to appeal. Trespass notices are discussed in 25 C.F.R. §§ 166.803 through 166.805. A trespass notice, as described in those sections, is written notice given to a person whom BIA believes to be in trespass on trust or restricted property. Under the regulations, the trespass notice gives the person such information as the fact that BIA believes him to be in trespass, any action that the person must take to end and/or correct the alleged trespass, an opportunity to object to the corrective action required, and what actions BIA may take against the person if the corrective action is not undertaken.

The remainder of the “Trespass” subpart basically describes the actions that can be taken against the alleged trespasser if the required corrective action is not undertaken.

It appears logical that BIA could determine that merely notifying a person that BIA believed that person to be in trespass did not constitute adverse action justifying an appeal. It further appears logical that an appeal would be appropriate once BIA actually took steps to enforce its finding of trespass. During that appeal, the alleged trespasser would be able to contest the finding of trespass as well as any actions taken based on that finding. A restriction on appeals from a trespass notice, but not from adverse actions taken as a consequence of that notice, also appears to be logical. Other constructions of the extent of the restriction on administrative review which the Board examined, such as a restriction on review of the finding of trespass or of actions taken based on that finding, did not appear to be either logical or in accordance with due process.

Furthermore, this interpretation seems consistent with section 166.3, which provides that all BIA actions under 25 C.F.R. Part 166 may be appealed under 25 C.F.R. Part 2, unless provided otherwise.

Therefore, the Board concludes that 25 C.F.R. § 166.803(c) restricts administrative appeals from the actual trespass notice, but not from the finding of trespass or from any action that BIA takes as a result of its finding of trespass. The Board further concludes that it has jurisdiction to review the finding of trespass and actions taken as a result of that finding, but does not have jurisdiction to review the actual trespass notice itself.

The Board addresses Appellant's appeal in accordance with the foregoing discussion.

On appeal to the Board, Appellant asserts for the first time that a BIA employee or employees orally authorized him to move the fence. However, Appellant produces no evidence to support this assertion, failing even to offer his own affidavit or declaration.

The Board ordinarily declines to consider arguments presented for the first time on appeal. E.g., Ross v. Midwest Regional Director, 38 IBIA 100 (2002), and cases cited there. Given Appellant's failure to produce any support whatsoever for his new argument, it is particularly appropriate for the Board to follow its usual practice here.

Appellant concedes that he removed the fence from its original location. To move the fence, he had to go onto the allotment in order to get the fencing materials. He has presented no evidence that he was authorized to do so. Thus, by conceding that he moved the fence, in essence, Appellant concedes that he committed trespass.

Appellant appears to argue that his trespass should be excused because, he contends, BIA employees refused to assist him with the fencing problem and told him that he was "on his own." Notice of Appeal and Statement of Reasons at 2. Appellant continues that "[h]e did solve this problem in a very reasonable and appropriate manner by separating the two areas of use" by moving the fence. Id.

Appellant seems to believe that he should be commended, or at least not penalized, for his initiative in solving his perceived problem. The Board does not agree. If Appellant believed that there was a problem which BIA was failing to address, he should have followed the established regulatory procedures for forcing action by a BIA official. These procedures are set out in 25 C.F.R. § 2.8. 2/ Appellant is presumed to be aware of the regulations governing his use

2/ Subsection 2.8(a) provides in relevant part: "(a) A person or persons whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of an official to act on a request to the official, can make the official's inaction the subject of an appeal * * *."

The remainder of section 2.8 describes the procedures to be followed in making a BIA official's inaction the subject of an appeal.

of Indian land. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); David C. Carruth Family Trust v. Acting Muskogee Area Director, 35 IBIA 9, 10 (2000), and cases cited there.

The Board affirms the Regional Director's conclusion that Appellant was in trespass on Allotment 1154-A.

Appellant's only argument against the amount of the trespass assessment is that no assessment is appropriate because the landowners, including the landowner lessee, were not damaged.

BIA assessed damages for the cost of replacing the fence, as authorized by 25 C.F.R. § 166.812(a). It did not assess the penalty of double that cost, which is also authorized by subsection 166.812(a). In addition, it assessed the cost of its investigation of the trespass, as authorized by subsection 166.812(c). BIA's trespass assessment thus did not include any amount for damages sustained by the landowners or the landowner lessee. Under these circumstances, the Board finds that Appellant has failed to carry his burden of proving error in the Regional Director's trespass assessment.

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 Regional Director's April 26, 2002, decision is affirmed. 3/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Kathleen R. Supernaw
Acting Administrative Judge

3/ As a point of information, if the Board had found that it could review the trespass notice, it would have been inclined to vacate the assessment against Appellant and to remand this matter to the Regional Director for further proceedings. 25 C.F.R. § 166.803(a)(6) requires that a trespass notice include "[p]otential consequences and penalties for failure to take corrective action." The penalties for trespass, described in 25 C.F.R. § 166.812, are substantial. Although, as mentioned above, Appellant is presumed to be aware of regulations pertaining to his activities on Indian lands, 25 C.F.R. § 166.803(a)(6) explicitly requires that BIA's trespass notice include a statement of the potential consequences and penalties for failure to take the corrective action. Because of this explicit requirement, the Board would have been inclined to view the failure to include this information as a violation of Appellant's due process rights.