



INTERIOR BOARD OF INDIAN APPEALS

William Hunter v. Acting Navajo Regional Director, Bureau of Indian Affairs

40 IBIA 61 (07/30/2004)

Related Board cases:

34 IBIA 13
37 IBIA 274
38 IBIA 239



United States Department of the Interior

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

WILLIAM HUNTER,	:	Order Affirming Decision
Appellant,	:	
	:	
v.	:	
	:	Docket No. IBIA 03-84-A
ACTING NAVAJO REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	July 30, 2004

Appellant William Hunter, pro se, seeks review of a decision by the Bureau of Indian Affairs (BIA), approving an Agricultural Land Use Permit (ALUP) for Mr. Theodore Nez for a 16.3-acre area of tribal land on the Navajo Reservation. The permit was approved on September 13, 2002, by the Regional Natural Resource Specialist, Navajo Regional Office, BIA; and in a letter to Appellant dated March 24, 2003, the Acting Navajo Regional Director (Regional Director) confirmed BIA's approval of the permit. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Regional Director's decision.

This appeal involves a dispute between Appellant and Mr. Nez, both members of the Navajo Nation, which began over the use of a 17.3-acre parcel of Navajo tribal land. One acre of that parcel is now subject to a homesite lease that BIA approved for Mr. Nez, which is no longer at issue. The present appeal involves the remaining 16.3 acres. The land is located on the Navajo Reservation about one-half mile east of the Thunderbird Lodge in Chinle, Arizona, and the 16.3 acres are identified on the ALUP as Plot No. 10-3-655. As further explained in this decision, the underlying dispute has already resulted in three previous appeals to the Board. 1/

1/ See Hunter v. Acting Navajo Area Director, 34 IBIA 13 (1999) ("Hunter I") (dismissing an appeal to allow Appellant to pursue tribal remedies for his dispute with Mr. Nez); Hunter v. Navajo Regional Director, 37 IBIA 274 (2002) ("Hunter II") (affirming BIA's approval of a 1-acre homesite lease for Mr. Nez within the 17.3-acre parcel, finding that Appellant had failed to show that he had pursued tribal remedies); Hunter v. Navajo Regional Director, 38 IBIA 239 (2002) ("Hunter III") (dismissing without prejudice as premature a prior appeal by Appellant concerning BIA's approval of the ALUP for Mr. Nez for the 16.3 acres).

Appellant and Mr. Nez each claim that the 16.3-acre parcel at issue here is within their ancestral customary and traditional use area, which apparently affords a preference under tribal law or practice for an individual to receive a land use permit. Although these are tribal lands, a land use permit – once approved by the Department of the Interior (Department) – affords its holder exclusive rights of occupancy as long as he or she makes beneficial use of the property. See Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, art. V, 15 Stat. 667, 668; Hunter I, 34 IBIA at 13 (17.3-acre parcel is within the 1868 treaty area).

The dispute first came before the Board in 1999 after an official in the BIA Chinle Agency office initially approved an ALUP for Appellant for the larger 17.3-acre parcel, but the BIA Area Director nullified that approval. When Appellant appealed the Area Director's decision to the Board, the Board took notice of the dispute between Appellant and Mr. Nez. The Board noted that the Agency official had approved an ALUP for Appellant despite pending tribal court proceedings relating to that dispute. In Hunter I, the Board recognized that while the Department has authority to issue ALUPs under the 1868 Treaty with the Navajo Nation, "the use of the lands at issue here is primarily a matter of tribal concern." 34 IBIA at 14. The Board then held that once BIA became aware of a dispute over this land, it should have refrained from taking any action on Appellant's application for an ALUP, and should instead have allowed tribal forums to resolve the dispute between tribal members. Id. The Board dismissed the appeal to allow resolution of the dispute in tribal forums. The Board's decision left intact the Regional Director's nullification of the ALUP that the Agency official had approved for Appellant, thus returning the matter to the status that existed prior to any federal action on the disputed acreage.

On June 10, 1999 – the same day that Hunter I was decided – the Resources Committee of the Navajo Nation Council enacted Resolution RCJN-92-99, titled "Issuing a Decision to Settle a Land Use Permit Dispute Between William Hunter and Theodore Nez of Chinle Chapter, Chinle, Arizona." Earlier, on March 12, 1999, the Resources Committee had held a hearing at which it allowed Appellant and Mr. Nez to present their respective cases, after which the Committee approved a motion to recommend that the land use permit be issued to Mr. Nez. The formal committee resolution that followed on June 10, 1999, recommended that the Department cancel Appellant's land use permit for the 17.3-acre parcel "and reissue a new permit to Mr. Theodore Nez for 17.3 acres for the same area based on aboriginal, ancestral and traditional interest and to approve a homesite lease for Mr. Theodore Nez."

Appellant appealed the Resources Committee's decision to the Navajo Nation District Court. Appellant contended that the only issue which had properly been before the Resources Committee was a conflict between his claim for a land use permit for the 17.3 acres and Mr. Nez's application for a 1-acre homesite lease within that 17.3 acres. According to Appellant, Mr. Nez had not applied for a land use permit for the 17.3 acres. Appellant argued that the

Resources Committee had acted improperly and exceeded its jurisdiction when “it awarded Theodore Nez an interest in land totaling 17.3 acres.” Appeal from Resources Committee Decision (Resolution RCJN-92-99) with Memorandum of Points and Authorities at 5, 9, Hunter v. Nez, No. WR-CV-391-99 (Nav. Nat. Dist. Ct., July 16, 1999).

The tribal district court dismissed Appellant’s appeal for lack of jurisdiction, because appeals from Resources Committee decisions must be filed directly with the Navajo Nation Supreme Court. On further appeal, the Navajo Supreme Court affirmed the dismissal. Hunter v. Nez, No. SC-CV-08-2000 (Nav. Nat. S. Ct., July 5, 2000). In its decision, however, the Court suggested that Appellant’s remedy was to return to the Resources Committee, demonstrate that a grave injustice would result from the denial of his right to take an appeal, and ask the Committee to reissue its decision with a new date, thereby providing a new opportunity for Appellant to appeal the decision to the Supreme Court in a timely manner.

A year later, in Hunter II, this matter returned to the Board when Appellant sought review of a June 13, 2001, decision by the Regional Director, approving a 1-acre homesite lease for Mr. Nez within the 17.3-acre parcel. As recounted in Hunter II, shortly after the Navajo Supreme Court’s decision in July 2000, Appellant had written to BIA, stating that he was pursuing the matter before the Resources Committee and asking BIA to hold the ALUP and homesite lease in abeyance while he exhausted tribal remedies. 37 IBIA at 275. BIA complied, but nearly a year later, when Mr. Nez requested action on his homesite lease application, BIA investigated and discovered that Appellant had never requested a new decision date from the Resources Committee, and there did not appear to be any current tribal activity to address the dispute. The Regional Director then approved Mr. Nez’s homesite lease.

In Hunter II, Appellant invoked Hunter I, arguing that BIA was required to refrain from acting on the 1-acre homesite lease, to allow his dispute with Mr. Nez to be resolved in tribal forums. The Board rejected that argument, finding that Appellant could not invoke the exhaustion-of-tribal-remedies doctrine when he had failed to show that he had pursued the matter in any tribal forum:

From all appearances, Appellant has, by his own inaction, essentially foreclosed any formal tribal action in this dispute. Under these circumstances, it is disingenuous for him to contend that BIA must await formal action by the Nation before approving the homesite lease.

* * * [W]hen BIA learned * * * that Appellant had not pursued his tribal remedies, it reasonably concluded * * * that a further decision by the Nation was unlikely. [Under the circumstances], the Regional Director acted reasonably in approving the lease in accordance with the Nation’s original recommendation.

Hunter II, 37 IBIA at 277.

Three months after the Board's decision in Hunter II – on September 13, 2002 – BIA's Regional Natural Resource Specialist approved the ALUP for Mr. Nez for the remaining 16.3 acres within the 17.3 acre parcel. BIA did not formally notify Appellant of the decision. Appellant learned about it, however, and in December 2002, he sought to appeal the decision to the Board. In the absence of any written confirmation of a decision, the Board dismissed the appeal without prejudice as premature. Hunter III, 38 IBIA 239. Thereafter, Appellant obtained written confirmation from the Acting Regional Director, dated March 24, 2003, of BIA's approval and issuance of the ALUP to Mr. Nez for the 16.3 acres. On April 8, 2003, Appellant filed the present appeal. Because Appellant was not formally notified of BIA's permit approval until he received the March 24, 2003, letter, the Board accepted the appeal as timely.

On appeal, Appellant contends that under Hunter I, the Board must set aside BIA's approval of the ALUP for Mr. Nez and order BIA to refrain from taking any action on the matter until Appellant has exhausted his tribal remedies. Appellant argues that BIA knew or should have known that rights to the 16.3 acres were disputed and that once Appellant became aware of any action on the ALUP, he would pursue available tribal remedies. Appellant asserts that even if he failed to exhaust tribal remedies with respect to the homesite lease involved in Hunter II, that did not mean he would fail to do so for Mr. Nez's ALUP, which he characterizes as involving "completely different" issues from those involved in Hunter I and Hunter II. Thus, according to Appellant, BIA was required to notify him when it received the Grazing Committee's recommendation to approve the ALUP for Mr. Nez – involving a separate and distinct decision from the 1-acre homesite lease – and give him an opportunity to pursue tribal remedies. In his appeal, Appellant submitted a variety of documents to show that he promptly wrote to various tribal officials concerning the dispute, after he received the Regional Director's March 24, 2003, letter confirming the fact that BIA had approved the ALUP for Mr. Nez on September 13, 2002. 2/

The Regional Director responds that Hunter II controls, and that Appellant's belated attempt to show that he is pursuing tribal remedies should be discounted and the Regional Director's decision upheld. Similarly, interested party Theodore Nez contends that the underlying issues involved in this appeal have already been fully resolved by the tribal court and

2/ The documents include an April 25, 2003, "affidavit," in which Appellant asserts he is pursuing a response from the Navajo Nation Resources Committee; an April 10, 2003, letter from Appellant to the BIA Chinle Agency office, requesting tribal and BIA documents related to BIA's decision to issue the ALUP; an April 25, 2003, letter from Appellant to the Chairman of the District 10 Grazing Committee of the Navajo Nation; and a July 25, 2003, letter from the Office of Legislative Council of the Navajo Nation, acknowledging receipt on July 24, 2003, of a document packet from Appellant, which includes – among other things – a July 21, 2003, letter from Appellant to the Chairperson of the Resources Committee, requesting reconsideration of the Committee's June 10, 1999, resolution RCJN-92-99.

Board decisions, that the land in question is a single 17.3-acre parcel, and that Appellant cannot re-litigate the same issues in the context of the 16.3-acre area that he already lost in the context of the 1-acre homesite lease.

We agree with Appellant that Hunter II does not control this appeal as a matter of res judicata, because BIA's decision at issue in Hunter II was limited to approving the 1-acre homesite lease for Mr. Nez. Nevertheless, we conclude that following the Board's finding in Hunter II that Appellant had failed to pursue tribal remedies with respect to the Resources Committee's recommendation – involving, as it did, the entire 17.3-acre parcel – it was reasonable for BIA to approve the ALUP for Mr. Nez for the remaining 16.3 acres, in the absence of any evidence that following Hunter II, Appellant had promptly re-initiated his pursuit of tribal remedies for that remaining acreage.

Although BIA's decisions concerning the 17.3-acre parcel involved two separate decisions – one for the homesite and one for the ALUP – it is clear that the underlying tribal action that was the subject of Appellant's tribal remedies applied to the entire 17.3-acre parcel, and that the dispute was considered ripe for review within tribal forums. Therefore, we reject Appellant's argument that the dispute over the 16.3 acres was not ripe for pursuing tribal remedies until he had learned that Mr. Nez had applied for an ALUP and had learned that the Nation's District 10 Grazing Committee had recommended that BIA approve the ALUP for Mr. Nez. ^{3/}

The Resources Committee's 1999 decision "to Settle a Land Use Permit Dispute" between Appellant and Mr. Nez encompassed the entire 17.3 acres. When Appellant challenged that decision in tribal district court in 1999, he clearly understood that to be the case. Appellant argued to the district court that the Resources Committee had exceeded its jurisdiction because it had "awarded an interest in land totaling 17.3 acres" to Mr. Nez, even though, Appellant contended, Mr. Nez had not applied for a land use permit. Nowhere in Appellant's tribal court litigation in 1999 and 2000 did either Appellant or the tribal courts suggest that the only part of the Committee's action that was ripe for review was its recommendation on the 1-acre homesite lease.

^{3/} The record indicates that the District 10 Grazing Committee approved Mr. Nez's ALUP application for the 16.3 acres on September 7, 1999, three months after the Resources Committee's resolution to settle the dispute. In his Opening Brief, at 2 n.1, Appellant contends that the Grazing Committee's approval of Mr. Nez's application for the ALUP was not "formally made known to" him until he received the Regional Director's March 24, 2003, letter concerning BIA's approval of the permit. Appellant's choice of language suggests that he may have had actual, albeit not "formal," notice earlier, but in any event, the fact of the Grazing Committee's 1999 action would appear to have been discoverable, had Appellant pursued his tribal remedies following the Board's decision in Hunter I.

Similarly, in Hunter II, the Board referred to the one-acre homesite lease as “within the 17.3-acre ALUP to be issued to Nez,” 37 IBIA at 274-75. It was understood in that decision that Appellant contended that he was pursuing tribal remedies for the entire 17.3-acre parcel, and not just the homesite lease portion of the Resource Committee’s recommendation. See id. at 275 (Appellant requested BIA to hold the ALUP and homesite lease in abeyance). Thus, even though the matter came to BIA in the context of two distinct decisions, the *tribal remedies* available to Appellant applied to the 17.3-acre parcel as a whole because that was the scope of the Committee’s action he was challenging.

In this context, we conclude that BIA acted reasonably when it approved the ALUP for the remaining 16.3 acres for Mr. Nez three months after the Board had held in Hunter II that Appellant, by his own inaction, had foreclosed resolution of the dispute between himself and Mr. Nez in a tribal forum. Because the internal tribal dispute was not broken down into separate disputes over the 1-acre homesite lease and the 16.3-acre agricultural area, BIA was not required to refrain from acting on the ALUP for the 16.3 acres, at least in the absence of any evidence following the Board’s decision in Hunter II that Appellant had promptly re-initiated his pursuit of tribal remedies for the 16.3 acres. And, under the circumstances, we conclude that BIA was not required to give Appellant prior notice and yet another opportunity to pursue tribal remedies in which he had just been found not to have demonstrated a serious interest. 4/

Nor is the Board convinced that Appellant’s purported efforts, taken after he filed this appeal, to once again initiate activity in tribal forums, require the Board to set aside BIA’s decision and allow him another opportunity to pursue remedies in tribal forums. Although Appellant now contends that he has been “trying ever since” the Navajo Supreme Court decision in 2000 to get the Resources Committee to change the date of its decision to trigger a new time period to bring a judicial challenge in the proper tribal forum, he does not provide evidence which supports that contention. Although Appellant submitted various documents post-dating the Regional Director’s March 24, 2003, letter to demonstrate that he acted promptly once he received formal notice of BIA’s decision, those documents fail to show that Appellant promptly re-initiated his pursuit of tribal remedies following the Hunter II decision.

4/ We agree with Appellant, however, that BIA should have provided him notice of the September 13, 2002, decision pursuant to 25 C.F.R. § 2.7. The fact that the Board had held against Appellant in Hunter II with respect to BIA’s decision on the 1-acre homesite, and even the fact that Hunter II found that Appellant had not pursued tribal remedies (understood to be for the entire 17.3-acre parcel), does not mean that Appellant was not entitled, as a matter of due process, to be treated as an interested party, given the fact that BIA’s decision on the ALUP did adversely affect his claimed interests. Ultimately, however, Appellant was not prejudiced by this lack of notice because he has been afforded appeal rights to the Board, and the Board has fully considered his arguments and the relevant evidence.

Under these circumstances, and considering the history of this case, the Board concludes that BIA's decision should not be set aside based on Appellant's contacts with tribal officials that occurred after he filed this appeal.

The Board's decision here does not violate the strong doctrine of allowing Indian tribes and tribal members to resolve their disputes internally, without federal interference. Following the Board's decision in Hunter I, Appellant was given the opportunity to pursue his efforts to reverse or otherwise challenge the Resources Committee's recommendation, and failed to do so. Following Hunter II, Appellant clearly was on notice of the consequences of failing to pursue tribal remedies for the Resources Committee's 1999 recommendation, which encompassed the entire 17.3 acres. While the exhaustion-of-tribal-remedies doctrine is a strong one, and even mandatory in many circumstances, it did not require – as Appellant argues here – that BIA refrain from acting on the ALUP when there was no evidence that Appellant was pursuing or intended to pursue such remedies.

In addition to his exhaustion-of-tribal-remedies argument, Appellant contends that before BIA approved the ALUP for Mr. Nez, it should have independently evaluated the evidence of ancestral customary use of the affected property, and should not have simply relied on the tribal recommendation. According to Appellant, the evidence shows that ancestral customary use “rights” to the area belong to the Hunter family – and not to the Nez family. Because BIA relied on the tribal recommendation, without independently investigating and reviewing the underlying evidence, Appellant argues that its decision must be set aside and remanded. We disagree.

As the Board noted in Hunter I, “the use of the lands at issue here is primarily a matter of tribal concern.” 34 IBIA at 14. The 1868 Treaty with the Navajo Nation provides a role for the Federal Government in certifying and recording selections of tribal land for agricultural use by tribal members, but there are no criteria in federal law or regulations for choosing between competing tribal member claimants for the same tract of land. And because these are tribal lands, it is appropriate for BIA, at the initial permit approval stage, to defer to the Nation's recommendation. It would hardly comport with notions of deference to tribal resolution of internal disputes for BIA to first refrain from taking action on an ALUP for tribal land, while competing claimants exhaust their tribal remedies, only to independently evaluate the evidence and independently decide between tribal members, notwithstanding the Nation's resolution of the issue.

Appellant cites a June 16, 1986, Field Solicitor's memorandum concerning a land use permit dispute, in which the Field Solicitor advised BIA that it must make an independent, informed and reasonable federal decision when asked to cancel a land use permit that had already been issued by BIA. The decision whether to cancel a federally-approved permit, however, is distinguishable from BIA's decision whether to initially approve a permit. Once a

federal permit has been validly issued, some protected property rights may attach. Before a permit has been issued, however, no property rights associated with that permit have yet been granted through federal action. Indeed, the Field Solicitor's memorandum made that very distinction, stating that tribal procedures and recommendations merit greater weight when BIA is deciding whether to issue a permit, than when a federally-approved permit is being cancelled.

Appellant also contends that he never received a due process hearing on the merits of his claim, and that the Resources Committee's 1999 hearing and recommendation were fundamentally flawed. Due process allegations concerning tribal action, however, are also subject to the tribal exhaustion doctrine, see Risse v. Acting Aberdeen Area Director, 27 IBIA 304, 305 (1995), and we are not convinced – particularly on the facts shown here – that either BIA or the Board is required to review those allegations when Appellant failed to pursue them in a tribal forum.

The Board concludes that BIA was not required, under the circumstances, to refrain from approving the ALUP for Mr. Nez in order to provide Appellant another opportunity to pursue tribal remedies. The Board also concludes that BIA was entitled to rely on the Nation's recommendation in deciding to approve the ALUP for Mr. Nez, pursuant to the Treaty of 1868, and was not required to independently evaluate the evidence of customary and traditional use to determine the relative rights of Appellant and Mr. Nez, under tribal law or custom, to receive the land use permit for the 16.3 acres. ^{5/}

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 Board affirms the Regional Director's decision.

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Colette J. Winston
Administrative Judge

^{5/} For the first time in his Reply Brief, Appellant contends that the Regional Director's decision was tainted by misconduct and a conflict of interest. Normally, the Board will not consider arguments raised for the first time in a reply brief, see Tendoy v. Portland Area Director, 33 IBIA 303, 308 n.5 (1999), and given the absence of evidence in the record or proffered by Appellant suggesting any actual conflict of interest or misconduct, we have no reason to depart from that practice here.