



## INTERIOR BOARD OF INDIAN APPEALS

Lynwood Ewing v. Rocky Mountain Regional Director, Bureau of Indian Affairs

40 IBIA 176 (01/03/2005)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

LYNWOOD EWING,  
Appellant,  
  
v.  
  
ROCKY MOUNTAIN REGIONAL  
DIRECTOR, BUREAU OF INDIAN  
AFFAIRS,  
Appellee.

: Order Dismissing Appeal  
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: Docket No. IBIA 03-8-A  
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: January 3, 2005

This is an appeal from an August 26, 2002, decision of the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA), which affirmed the disapproval of Northern Cheyenne Tribal Council Resolution DOI-63 (2001), concerning the allocation of grazing privileges to Lynwood Ewing (Appellant), a member of the Northern Cheyenne Tribe. For the reasons discussed below, the Board dismisses this appeal.

On December 22, 1999, the Superintendent, Northern Cheyenne Agency, BIA (Superintendent; Agency), issued a notice titled "**RANGE UNIT (RU) APPLICATIONS.**" The notice stated that all grazing permits on the Northern Cheyenne Reservation would expire on February 28, 2000, and that all range units on the reservation would become available for the permit period beginning March 1, 2000. The notice continued:

If you are a current range operator, you must submit an application for the RU you hold a permit in, along with a copy of your current brand certificate(s). Applications received without current brand certificate(s) will be considered incomplete.

**APPLICATIONS ARE DUE IN MY OFFICE BY 6:00 PM,  
JANUARY 5, 2000.**

**I STRONGLY RECOMMEND THESE APPLICATIONS  
BE HAND CARRIED TO THE BIA-NORTHERN CHEYENNE  
AGENCY, IN ORDER TO ENSURE THE APPLICATION  
DEADLINE IS MET.**

BIA posted this notice at several locations on the reservation and mailed copies to current range operators. Appellant was then a current range operator with permits in range units 18A, 18B, and 18C. He received a copy of the Superintendent's notice 1/ but did not submit an application by the January 5, 2000, deadline.

On February 7, 2000, the Tribal Council enacted Ordinance DOI-005 (2000), governing grazing on the reservation under permits to be "in effect from the date of issue to February 14, 2005." Subsec. I.A.

Section III of the ordinance concerns allocation of grazing privileges to tribal members. It provides in subsection III.B.1.a. that "[c]urrent permittees have first privilege for renewing their current allocation."

Section VI contains provisions concerning the Northern Cheyenne Grazing Board (Grazing Board). Subsection VI.B.1 authorizes the Grazing Board to administer "the allocation of grazing privileges to Tribal members." Subsection VI.B.2 provides:

[T]he settlement of disputes over interpretation of this ordinance in relation to the allocation process and decisions shall be heard by the Northern Cheyenne Grazing Board. All disputes, grievances, or requests to the Board must be in writing and signed by the complaining individual. The Board's ruling on disputes pertaining to this ordinance shall be final and may only be appealed to the Northern Cheyenne Tribal Court.

The preamble to Ordinance DOI-005 provides in part that "[t]he Tribal Council \* \* \* retains the right to ultimately review any action taken by the Grazing Board."

On February 28, 2000, all grazing permits on the reservation expired. On March 2, 2000, the Grazing Board awarded allocations for the new permit period. As no application had been received from Appellant, the Grazing Board did not renew his previous allocations. Instead, it awarded those allocations to other tribal members. 2/

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1/ Appellant acknowledged receipt of the notice in a letter to the Northern Cheyenne Tribal Council (Tribal Council) dated Mar. 5, 2000. See further discussion below.

2/ The Regional Director's decision states that the Grazing Board awarded allocations in range units 18A, 18B, and 18C to two tribal members on Mar. 2, 2000, and a third tribal member on Apr. 28, 2000.

On March 28, 2000, Appellant wrote to the Superintendent, stating that he was appealing the reallocation decision and asking to meet with BIA and the Tribal Council about the matter. <sup>3/</sup> The Superintendent responded on March 30, 2000, stating in part:

I believe a meeting at this point with the Tribal Council and myself would be futile as the [Grazing Board's] decision is final. If you disagree with the [Grazing Board's] decision, the Grazing Ordinance Section VI, B2 states, "***The Board's ruling on disputes pertaining to this ordinance shall be final and may only be appealed to the Northern Cheyenne Tribal Court.***"

If you do not file an appeal with the Tribal Court by **April 7, 2000**, appealing the [Grazing Board's] decision, I will assume you are not going to and the [Grazing Board's] decision will be final. In which case, this agency will issue RU permits to the cattle operators awarded the AUMs <sup>4/</sup> in RU 18A, 18B, and 18C.

Superintendent's Mar. 30, 2000, Letter at 1-2.

On April 5, 2000, Appellant filed a petition for a temporary restraining order in the Northern Cheyenne Tribal Court, attaching a copy of a letter he had written to the Tribal Council. In that letter, Appellant acknowledged that he had received the Superintendent's December 22, 1999, notice but contended that he had not been treated fairly. <sup>5/</sup>

On April 25, 2000, the Grazing Board wrote to the Superintendent, asking that he "take immediate action to bill and permit" range units 18A, 18B, and 18C. On April 26, 2000, the Tribal Court held a hearing in Appellant's case but declined to grant a temporary restraining order. On April 27, 2000, Appellant submitted to the Agency an allocation application for

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<sup>3/</sup> It appears from Appellant's letter that he believed the reallocation decision had been made by BIA rather than by the Grazing Board.

<sup>4/</sup> "AUM" (animal unit month) is defined in BIA's present grazing regulations as "the amount of forage required to sustain one cow or one cow with one calf for one month." 25 C.F.R. § 166.4.

Ordinance DOI-005 defines "AUM" as "the amount of forage required by one AU for one month." The definition of "AU" (animal unit) in the ordinance states: "[O]ne cow and calf = 1 AU; one yearling steer or heifer = .75 AUs; one bull = 1.25 AUs; one horse = 1.5 AUs; one sheep = 2 AUs; one buffalo (bison) = 1 AU." Ordinance DOI-005 at 1.

<sup>5/</sup> Appellant's letter to the Tribal Council is dated Mar. 5, 2000. However, it refers to the Superintendent's Mar. 30, 2000, letter and therefore must have been written on or after Mar. 30, 2000.

range units 18A, 18B, and 18C. At some point, BIA issued permits to the three tribal members who had been awarded allocations by the Grazing Board. 6/

The record includes no evidence of further Tribal Court or Tribal Council action prior to February 5, 2001. On that date, the Tribal Council enacted Resolution DOI-63 (2001). The resolution states in part:

**WHEREAS;** *the Tribal Council has the right to review any action taken by the Grazing Board; and*

**WHEREAS;** *the Grazing Board allocated AUM's in Range Units 18A, 18B and 18C formerly permitted by [Appellant] to [other Tribal members] due to the fact that [Appellant] failed to submit a timely application to [BIA]; and*

**WHEREAS;** *[Appellant] appeals the Grazing Board's decision to the Tribal Council and requests the Council to reverse the Grazing Board's decision and re-allocate said AUM's to him on the grounds that he was not provided proper notice of the permit application deadline; and*

**WHEREAS;** *the Tribal Council finds merit in [Appellant's] argument and desires to overturn the Grazing Board's decision.*

**NOW, THEREFORE, BE IT RESOLVED,** *that the Tribal Council hereby overturns the Grazing Board's allocation and re-allocates the AUM's in Range Unit[s] 18A, 18B and 18C previously permitted by [Appellant] in 1999. The allocation shall be effective in the 2001 permit period.*

Eight days later, on February 13, 2001, the Tribal Court issued an order in Appellant's case. The order describes testimony given by Appellant and by representatives of the Grazing Board at the April 26, 2000, hearing. The concluding paragraph states:

**BASED ON THE TESTIMONY PROVIDED, THE COURT ORDERS THE FOLLOWING: WHEN A PETITIONER IS REQUESTING INJUNCTIVE**

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6/ There is a discrepancy in the record concerning the date(s) on which the Superintendent issued the permits for range units 18A, 18B, and 18C. The Superintendent's Mar. 2, 2001, decision (discussed further below) and the Regional Director's Aug. 26, 2002, decision state that the Superintendent issued two permits on Apr. 14, 2000, and one permit on June 5, 2000. However, the Grazing Board's Apr. 25, 2000, letter suggests that no permits had been issued by that date, and a June 16, 2000, letter from the Superintendent to Appellant's attorney indicates that no permits were issued until after the Apr. 26, 2000, hearing in Tribal Court. There are no copies of the permits in the record for this appeal.

*RELIEF, IN THIS CASE A TEMPORARY RESTRAINING ORDER, THAT PETITIONER MUST PROVE THAT THEY ARE GOING TO BE IRRETRIEVABLY HARMED IF THE TEMPORARY RESTRAINING ORDER IS NOT ISSUED. EVEN THOUGH [APPELLANT] HAS PROVEN BEYOND ANY DOUBT THAT HE IS GOING TO BE SEVERELY HARMED BY HAVING NO RANGE UNITS, THE COURT FINDS THAT THE FAULT FOR THE HARM LIES EXCLUSIVELY WITH [APPELLANT] HIMSELF. THE TESTIMONY HERE FROM BOTH [APPELLANT] AND THE GRAZING BOARD WAS THAT [APPELLANT] DID RECEIVE NOTICE OF RE-APPLICATION OF RANGE UNITS. [APPELLANT] DID TESTIFY THAT HE DID NOT GET HIS APPLICATION IN BY THE JANUARY 5 DEADLINE. WHEN THE GRAZING BOARD MET ON MARCH 2, THEY HAD NO ALTERNATIVE BUT TO ALLOCATE THE RANGE UNITS. THE COURT FEELS THAT THE GRAZING ORDINANCE WAS FOLLOWED BY BOTH THE BIA AND GRAZING BOARD. THEREFORE THE REQUEST FOR INJUNCTIVE RELIEF IS DENIED.*

Feb. 13, 2001, Order in Ewing v. N.C. Grazing Board, No. C2000-119 (Northern Cheyenne Tribal Court), at 2.

In a March 2, 2001, decision letter addressed to the Tribal Council, the Superintendent disapproved Resolution DOI-63. He stated in part:

[S]ince the grazing permits [issued to the three tribal members] were issued based solely upon award allocations made by the [Grazing Board], the appeal process as stated in Ordinance DOI-005 (2000) was completed, my authority to unilaterally revoke or modify the permits [is] limited to [25 C.F.R. § 166.15 (2000) 7/], and the approved grazing permits for RUs 18A, 18B, and 18C are in compliance, I will not attempt to revoke or modify the current grazing permits without the consent of the permittee of record.

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7/ 25 C.F.R. § 166.15 (2000) provided in relevant part:

“(b) The Superintendent may revoke or withdraw all or any part of a grazing permit by cancellation or modification on 30 days’ written notice for violation of the permit or because of termination of trust status of permitted land. \* \* \*

“(c) The Superintendent may revoke or withdraw all or any part of a grazing permit by cancellation or modification on 180 days’ written notice for allocated Indian use or for grazing exempt from permit pursuant to § 166.8.”

25 C.F.R. Part 166 (2000) was superseded by the present Part 166 on Mar. 23, 2001.

Because it is my position I do not have adequate grounds to unilaterally revoke/cancel grazing permits currently held by [the three tribal members], and for the other reasons cited above, I am Disapproving [Resolution] DOI-63 (2001).

Superintendent's Mar. 2, 2001, Decision at 3.

After disapproving the resolution, the Superintendent suggested that the Tribal Council offer Appellant other AUMs. He enclosed a list of available AUMs and stated: "There are currently 100 AUMs available in RU 18B and 56 AUMs available in RU 18C. The [Tribal Council] could award these AUMs to [Appellant] and then offer him the balance of AUMs in other RUs where there is a surplus." Id.

In the final section of his decision, the Superintendent advised the Tribe of its right to appeal to the Regional Director. The Tribe did not appeal. Appellant, however, did appeal. On August 26, 2002, the Regional Director affirmed the Superintendent's disapproval decision.

Appellant then appealed to the Board. <sup>8/</sup> Upon receipt of his notice of appeal, the Board ordered him to show why his appeal should not be dismissed for lack of standing under Hunt v. Aberdeen Area Director, 27 IBIA 173 (1995). In his response, Appellant argued that Hunt is not controlling here. After review of Appellant's response, the Board concluded that the appeal should be permitted to proceed but reserved its ruling as to Appellant's standing, stating that the question could be addressed further in the parties' briefs. Only Appellant filed a brief.

Appellant relies on the general principles of standing discussed in Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, Florida, 508 U.S. 656 (1993), to contend that he has standing here. In Hunt, however, the Board discussed standing with respect to a narrow category of appeals to the Board—appeals in which a tribal member attempts to appeal to the Board from BIA's approval or disapproval of a tribal enactment. The Board there reaffirmed its earlier holdings that a tribal member ordinarily lacks standing before the Board to challenge the approval or disapproval of a tribal ordinance.

It is arguable that Resolution DOI-63 may be distinguished from the ordinances of general application which have been the subject of Board decisions in this area, in that Resolution DOI-63 is of limited application, ostensibly affecting only Appellant and the three tribal members who were awarded the grazing allocations he seeks. Appellant appears to make this distinction when he casts Resolution DOI-63 as a judicial, rather than a legislative, act and contends that

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<sup>8/</sup> Again, the Tribe did not appeal. Although the Tribe has been sent copies of all notices and filings, it has not participated in this appeal.

“[t]he Tribal Council should be viewed as the highest appellate body on the Northern Cheyenne Indian Reservation.” Appellant’s Response to Order to Show Cause at 4.

Upon full review of the record, the Board finds that it need not determine Appellant’s standing here because there are other considerations which require that this appeal be dismissed.

As noted, Appellant characterizes the Tribal Council as “the highest appellate body on the Northern Cheyenne Indian Reservation.” Similarly, he argues that “the Tribal Council not the Tribal Court has the final say as to the allocation of grazing units.” Appellant’s Statement of Reasons before the Regional Director (filed with the Board as part of his Opening Brief) at 5. He bases his argument on the provision in the preamble to Ordinance DOI-005 which states that “[t]he Tribal Council \* \* \* retains the right to ultimately review any action taken by the Grazing Board.” Appellant contends that, as the final decision of the Tribe, the Tribal Council’s action is binding on BIA and the Board.

Ordinance DOI-005 has two provisions which seem to pertain to the review of allocation decisions made by the Grazing Board—the preamble provision just quoted and the provision in subsection VI.B.2, quoted above, which appears to vest exclusive jurisdiction to review such Grazing Board decisions in the Tribal Court. The ordinance does not give the Tribal Council the right to review Tribal Court decisions. Nor does it give the Tribal Court the right to review Tribal Council decisions. Thus, it is not clear from the face of the ordinance which of the two bodies is intended to have the final say in the review of this allocation decision. While there may well be a provision elsewhere in tribal law which would clarify the relative authorities of the two bodies in this area, Appellant has not cited any such provision.

The Tribe’s interpretation of its law is not apparent from the record, because the Tribal Council and Tribal Court each appear to have acted independently, without reference to the action of the other body, and possibly under contradictory interpretations of Ordinance DOI-005. The Tribe has not participated in this appeal, and thus the Board lacks any statement from the Tribe as to how its law should be interpreted.

Nothing in the record shows that Appellant made any attempt to seek a final tribal resolution of his case after receiving apparently conflicting decisions from the Tribal Council and the Tribal Court. He does not allege that he attempted to appeal the Tribal Court decision to an appellate court. Nor does he allege that he returned to the Tribal Council after the Tribal Court issued its decision, in order to seek a resolution of the conflict. In short, he does not allege that he made any attempt to exhaust his tribal remedies. As far as the record shows, he simply picked the decision he preferred and sought to compel BIA and the Board to accept his interpretation of tribal law.

As explained in Hunt, supra, 27 IBIA at 178-79, appeals to the Board are subject to dismissal where the appellant has failed to exhaust tribal remedies, including resort to whatever

tribal appellate forums are available. See also, e.g., Yeahquo v. Southern Plains Regional Director, 36 IBIA 11, 12 (2001) (“Where a BIA decision concerns an intra-tribal matter, the BIA decision is secondary to a decision by a tribal forum in that matter. Therefore, the Board customarily requires that tribal remedies be exhausted before a tribal member may seek relief from the Board. E.g. Wanatee v. Acting Minneapolis Area Director, 31 IBIA 93 (1997).”).

Further, in cases of this nature, where the pivotal issues are issues of tribal law, the Board often refrains from exercising jurisdiction, even though it has jurisdiction to review actions taken by BIA. See, e.g., Hunter v. Acting Navajo Area Director, 34 IBIA 13 (1999), and cases cited therein. <sup>9/</sup> This clearly appears to be a case where such restraint is warranted. Grazing allocations are made under tribal law. The Superintendent issues permits in accordance with decisions made by the Tribe. His role is essentially a ministerial one. Both the substantive issue of whether Appellant should be awarded grazing allocations in range units 18A, 18B, and 18C, and the procedural issue of which tribal body has the final say in the matter, are matters of tribal law which should be resolved within the Tribe, rather than by this Board.

For these reasons, this appeal must be dismissed for failure to exhaust tribal remedies. It is also subject to dismissal under the Board’s practice of abstention in favor of resolution of an intra-tribal issue in a tribal forum.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is dismissed.

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// original signed  
Anita Vogt  
Senior Administrative Judge

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// original signed  
Colette J. Winston  
Administrative Judge

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<sup>9/</sup> Hunter concerned a dispute over an agricultural land use permit for Navajo tribal land. The Board stated in that case:

“[T]he use of the lands at issue here is primarily a matter of tribal concern. In similar situations, the Board has cited the Federal policy of respect for tribal courts and other tribal decisionmaking forums in abstaining from exercising whatever authority it might have in favor of allowing resolution of intra-tribal disputes within a tribal forum. Risse v. Acting Aberdeen Area Director, 27 IBIA 304 (1995); Simpson v. Acting Billings Area Director, 27 IBIA 300 (1995); Zinke & Trumbo, Ltd. v. Phoenix Area Director, 27 IBIA 105 (1995); Burlington Northern Railroad v. Acting Billings Area Director, 25 IBIA 79 (1993). See also Iowa Mutual Insurance Co. v. LaPlante, 480 U.S. 9 (1987); National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. 845 (1985); United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992).”  
34 IBIA at 14.