



INTERIOR BOARD OF INDIAN APPEALS

Glen Hitchcock v. Northwest Regional Director, Bureau of Indian Affairs

44 IBIA 172 (03/14/2007)



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

GLEN HITCHCOCK,
Appellant,

v.

NORTHWEST REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee.

: Order Affirming Decision
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:
:
: Docket No. IBIA 06-119-A
:
:
: March 14, 2007

Appellant Glen Hitchcock seeks review of an August 3, 2006 decision of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), affirming a December 22, 2005 Notice of Trespass and Demand Letter issued by the Puget Sound Agency Superintendent, BIA (Agency; Superintendent). The Superintendent determined that Appellant was liable for timber trespass on parcels numbered 51-F, 51-P, 51-T, and 51-V of Allotment No. 51 (John Frank Allotment) on the Lummi Reservation in the State of Washington, and assessed \$159,017 in damages. Because we conclude that Appellant has not met his burden of proof to show that the Regional Director's decision was in error or not supported by substantial evidence, we affirm the Regional Director's decision.

Background

The Superintendent determined that Appellant was liable for timber trespass on Allotments No. 51-F, 51-P, 51-T, and 51-V because he had cut and removed timber from those parcels without a BIA-approved timber sale contract or permit. The Superintendent also found that Appellant had willfully falsified a Lummi Forestry timber cutting permit (for Allotment No. 51-V) in order to cut timber, had cut timber without the consent of the Indian landowners, and had crossed trust lands without landowner consent.

Appellant appealed the Superintendent's decision to the Regional Director. In his statement of reasons, dated April 25, 2006, Appellant admitted cutting timber on Allotments No. 51-F and 51-V, but denied cutting timber on Nos. 51-P and 51-T. Appellant disputed the Superintendent's finding that he had cut and removed timber without a BIA-approved timber sale contract or permit. He argued that the Lummi Nation's forester, Allen Tweedie, had told Appellant and the owner of Allotment No. 51-V

to log that parcel and that Tweedie would provide a permit later. 1/ Appellant claims that Tweedie then changed his mind and did not issue the permit. With respect to Allotment No. 51-F, Appellant argued that the landowner had told him that he (the landowner) had a permit. Appellant also denied having willfully falsified a timber cutting permit.

In his August 3, 2006 decision, the Regional Director addressed each of Appellant's arguments. With respect to Allotments No. 51-P and 51-T, on which Appellant denied cutting timber, the Regional Director found that both parcels adjoined the parcels on which Appellant had admitted cutting timber. The Regional Director also found that the type of merchantable wood and amount of logging slash left behind identified it as Appellant's logging operation, and that the timber trespass report had identified Appellant's cutting on Allotment No. 51 as one logging operation. 2/ In response to Appellant's denial that he lacked a BIA timber sale contract or permit, and his allegation that he received oral permission from Tweedie, the Regional Director found that verbal permission does not constitute valid authorization to cut timber on Indian lands. The Regional Director further found that neither the Nation nor BIA had signed any permits giving Appellant permission to conduct the timber cutting operation, and that Appellant had produced no such permits. With respect to the allegedly falsified "permit" for Allotment No. 51-V, the Regional Director concluded that it was clear that Appellant had altered the permit, but also that Appellant's explanation was not relevant because the altered permit (showing only Tweedie's signature) was never signed by BIA and therefore could not serve as authorization to cut timber on trust property.

Appellant's notice of appeal to the Board of Indian Appeals (Board) states that "[Appellant] contests the [August 3, 2006] determination of the Northwest Regional Director and reasserts the response contained in his letter of April 25, 200[6] to Stanley

1/ The forester's name is variously spelled in the record as Allen Tweedie (trespass report), Alan Tweedie (Regional Director's decision), and Alan Tweedy (Apr. 25, 2006 Letter from Appellant to Regional Director).

2/ The timber trespass report, dated December 16, 2005, documents the results of BIA's investigation of the timber cutting on Allotments No. 51-F, 51-P, 51-T and 51-V. It was prepared by the Agency Forester, concurred in by the Regional Forester, and approved by the Superintendent and the Regional Director.

Speaks, [Northwest Regional Director].” 3/ No other argument or statement of reasons is contained in the notice of appeal.

The Board’s notice of docketing and order setting briefing schedule advised Appellant that filing an opening brief is not required under the Board’s regulations, and that Appellant could choose to rely on his notice of appeal and the materials in the record. The Board also advised Appellant, however, that he bore the burden of proving error in the Regional Director’s decision. See Oct. 2, 2006 Notice of Docketing and Order Setting Briefing Schedule at 2.

Appellant did not file an opening brief. The Regional Director filed an answer brief in response to Appellant’s notice of appeal, arguing among other things that this appeal should be dismissed because Appellant had failed to allege error in the Regional Director’s decision, as required by Board precedent. Appellant did not file a reply brief.

Discussion

We agree with the Regional Director that Appellant has failed to satisfy his burden of proof to show error in the Regional Director’s decision, and therefore we affirm his decision.

Appellant bears the burden of showing that the Regional Director’s decision was in error or not supported by substantial evidence. Van Gorden v. Acting Midwest Regional Director, 41 IBIA 195, 198 (2005). An appellant who simply refiles the same statement of reasons he filed with the Regional Director and fails to allege error in the Regional Director’s responses to his contentions has failed to carry his burden of proof. Mandan v. Acting Great Plains Regional Director, 40 IBIA 206, 207 (2005) (citing Concho Cattle Company v. Acting Anadarko Area Director, 31 IBIA 97, 98 (1997)). See also Johnson v. Rocky Mountain Regional Director, 38 IBIA 64, 67 (2002) (an appellant who makes no allegation of error, let alone any arguments in support of such an allegation, has not carried his burden of proof); OK Tank Trunks, Inc. v. Muskogee Area Director, 33 IBIA 119 (1999) (same).

In the present case, Appellant’s entire argument consists of the statements in his notice of appeal that he “contests” the Regional Director’s decision and that he “reasserts”

3/ Appellant’s notice of appeal refers to his letter of April 25, “2005,” but this appears to be a typographical error. Appellant’s statement of reasons to the Regional Director is dated April 25, 2006.

the arguments made in his April 25, 2006 statement of reasons. In his October 3, 2006 decision, the Regional Director responded to the arguments Appellant made in his April 25, 2006 statement of reasons. On appeal to the Board, Appellant fails to allege, let alone show, how the Regional Director erred in addressing those arguments. In his answer brief, the Regional Director noted that Appellant's notice of appeal failed to argue how the Regional Director's decision was in error. Citing Board precedent, the Regional Director contended that Appellant's failure to allege error in the challenged decision constituted grounds for summary disposition against Appellant. Appellant did not file a reply brief.

We conclude, based on his failure to allege any error in the Regional Director's decision, that Appellant has failed to carry his burden of proof .

Were we to consider Appellant's notice of appeal as sufficient to allege error in the Regional Director's decision, we would still conclude that he has failed to satisfy his burden of proof. The Regional Director correctly noted that federal regulations require that BIA approve any timber harvests prior to the removal of any timber. See 25 C.F.R. § 163.26. See also *Lummi Nation v. Northwest Regional Director*, 44 IBIA 47, 48 (2007). The record does not contain, and Appellant has not produced, a BIA-approved timber cutting permit for his operations on Allotments No. 51-F, 51-P, 51-T, and 51-V. Although Appellant denied cutting timber on Allotments No. 51-P and 51-T, the record indicates that the boundary lines of the trespass area were determined by a licensed surveyor, see Timber Trespass Report at 3 and 5, and Appellant has not disputed the evidence and findings by which the Regional Director concluded that the trespass on all the parcels occurred as part of a single operation conducted by Appellant. 4/

4/ The record indicates that the majority of timber cut was on the two parcels on which Appellant admits cutting timber — Nos. 51-F (69.23 MBF) and 51-V (39.44 MBF) — and for which he claimed to have permission. Timber Trespass Report at 7. The trespass on the other two parcels — Nos. 51-P (1.24 MBF) and 51-T (3.89 MBF) — was the result of the operations going over the boundary line. Id. The record indicates that Appellant also trespassed on an adjoining fee parcel, but that trespass was not within the scope of the Regional Director's decision.

We do note that the Superintendent's notice of trespass and her demand letter contained several typographical errors. The trespass notice states the total damages as \$159,107, but the actual total (as reflected in the record and the Superintendent's accompanying demand letter) is \$159,017. The table included in the demand letter lists the volume of Western red cedar cut as 22.50 MBF, but the record indicates the volume as 22.59 MBF. Similarly, the demand letter lists the value of Birch cut as \$919.19, but the record indicates the value as \$991.19. The Superintendent's demand of \$159,017, however, reflects an accurate sum based on the figures in the record.

Appellant has failed to carry his burden of proof to show error in the Regional Director's decision.

Conclusion

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 decision is affirmed.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge