



INTERIOR BOARD OF INDIAN APPEALS

Abel Wolfe v. Acting Eastern Regional Director, Bureau of Indian Affairs

45 IBIA 95 (06/29/2007)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SUITE 300
ARLINGTON, VA 22203

ABEL WOLFE,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 07-57-A
ACTING EASTERN REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	June 29, 2007

Appellant Abel Wolfe has appealed from a November 8, 2006, decision of the Acting Eastern Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director affirmed the August 9, 2006, decision of the Cherokee Agency Superintendent, BIA (Agency; Superintendent), finding Appellant liable for timber trespass on the Jenkins Creek Tribal Reserve (Tribal Reserve), in Wolfetown Community of the Cherokee Indian Reservation, Cherokee, North Carolina, and assessing Appellant \$3,608.52 in damages and costs. We conclude that Appellant has not met his burden of showing that the Regional Director’s decision was in error or otherwise unsupported by substantial evidence, and therefore affirm the Regional Director’s decision.

Background

On July 22, 2006, BIA Forestry Technician Gary Sneed discovered that Appellant had cut some trees on the Tribal Reserve, on which the Eastern Band of Cherokee Indians of North Carolina (Tribe) prohibited commercial timber harvesting. Sneed commenced an investigation and learned that the logs were sent to the W.N.C. Pallet Log Yard. On July 27, 2006, BIA recovered \$463.60 from the log yard for 6 or 8 trees (1,421 MBF)¹ that had been illegally cut on and removed from the Tribal Reserve.

¹ BIA’s Timber Trespass Report identifies six trees cut from the Tribal Reserve while a narrative statement by Sneed, attached to the trespass report, identifies eight trees illegally harvested. What is consistent throughout the administrative record is the total amount of board feet illegally harvested, which was 1,421 MBF.

On August 1, 2006, the Superintendent sent Appellant a notice to cease and desist his timber harvesting activity on the Tribal Reserve. The Superintendent stated that “[a]ccording to the Eastern Band of Cherokee Indians Reservation[] Forest Management Plan signed September 26, 2004, by Michell Hicks, Principal Chief[,] there is to be no commercial harvesting on [the] Tribal Reserve.” Letter from Superintendent to Appellant, Aug. 1, 2006.² On or about August 4, 2006, Sneed completed a trespass report in which he detailed the results of his investigation into the trespass. The report detailed the location of the trespass; the type, amount, and value of timber that was harvested on the Tribal Reserve; and information obtained from the log yard. On August 8, 2006, the Superintendent issued a Notice of Trespass to Appellant that described the evidence on which he relied to find Appellant liable for trespass. The Superintendent found that nineteen hardwood logs had been illegally harvested from the Tribal Reserve. The Superintendent concluded that damages, penalties, and costs were estimated at \$4,072.12, less the \$463.60 payment received from the log yard.

On August 9, 2006, the Superintendent sent a Demand Letter to Appellant, for damages in the amount of \$3,608.52. The Superintendent attached a Trespass Damage Worksheet, in which he (1) determined the value of the timber removed to be \$637.09, and assessed treble stumpage damages at \$1,911.27; (2) calculated the “reasonable cost” of restoring the land through “slash treatment” to be \$622.90; and (3) calculated enforcement costs as \$1,537.95.³ The Superintendent subtracted the payment of \$463.60 that was received from the log yard from the total amount of damages, \$4,072.12, to arrive at his demand of \$3,608.52. The demand letter provided appeal rights.

On August 22, 2006, Appellant appealed the Superintendent’s demand letter to the Regional Director. In his subsequent statement of reasons, dated September 18, 2006, Appellant admitted cutting timber on the Tribal Reserve, but stated that he “fe[lt] [he] did nothing wrong in cutting these trees.” Notice of Appeal. He stated that he needed to cut

² The record does not contain a copy of the forest management plan. However, Appellant does not dispute the Superintendent’s interpretation of the forest management plan.

³ For the sawtimber, the Superintendent relied on the high stumpage price per thousand board feet (MBF) published by the Timber Mart-South for the second quarter of 2006 in western North Carolina, where the trespass occurred. He then multiplied the appropriate stumpage prices by the appropriate MBF of timber cut to arrive at a total value for the timber taken from the Tribal Reserve. For the firewood, the Superintendent relied on local market rates per load, and held that there were four loads of firewood. The Superintendent also detailed the costs involved in calculating both restoration and enforcement costs.

six trees down from the Tribal Reserve “to make a full load to take to W.N.C. Pallet & Forest Products Co., Inc.” *Id.* He asserted that the Tribal Reserve was owned by the Tribe and that, as a tribal member, the timber on the Tribal Reserve “is [his] also.” *Id.* He pointed out that an area of the Tribal Reserve had been set aside from which tribal members could cut firewood, but that the timber at issue could not be used for firewood because “it would be too difficult to get to the site.” *Id.* He stated that he intended to pay stumpage for the logs he cut. Appellant also disputed the rehabilitation costs assessed by the Superintendent, arguing that he “ha[d] been back to the site and ha[d] not seen any evidence of rehabilitation (slash treatment) in the area [where he] cut the trees.” *Id.*

On November 8, 2006, the Regional Director affirmed the Superintendent’s decision. The Regional Director determined that Appellant had not been issued a permit to harvest timber on the Tribal Reserve, as required by Federal regulations prior to any timber harvest on Indian forest land. Because Appellant was harvesting timber, the Regional Director concluded that it was irrelevant that firewood harvest was allowed on the Tribal Reserve. He also concluded that it was irrelevant that Appellant intended to pay stumpage for the trees he cut when he had no permit to cut the trees. The Regional Director determined that BIA was required by Federal law to seek treble damages and was also authorized to pursue restitution of other damages associated with a timber trespass. Therefore, the Regional Director affirmed the Superintendent’s decision.

On December 12, 2006, the Board of Indian Appeals (Board) received a copy from Appellant of his September 18, 2006, statement of reasons for his appeal from the Superintendent’s decision. Appellant did not attach a copy of either the Superintendent’s demand letter or the Regional Director’s decision to his letter. Upon inquiry to the Eastern Regional Office, BIA, the Board learned of the Regional Director’s decision and construed Appellant’s letter as a timely-filed appeal from that decision.

The Board’s notice of docketing and order setting briefing schedule advised Appellant that he bears the burden of proving error in the decision being appealed, i.e., the Regional Director’s decision. *See* Notice of Docketing and Order Setting Briefing Schedule, Mar. 16, 2007, at 2. The Board did not receive any briefs.

Discussion

We conclude that Appellant has not carried his burden of proof to show error in the Regional Director’s decision, and therefore we affirm.

Appellant bears the burden of showing that the Regional Director's decision was in error or not supported by substantial evidence. *Strom v. Northwest Regional Director*, 44 IBIA 153, 162 (2007); *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. *Hitchcock v. Northwest Regional Director*, 44 IBIA 172, 174 (2007); *Mandan v. Acting Great Plains Regional Director*, 40 IBIA 206, 207 (2005); *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).

Appellant did not provide a notice of appeal that specifically challenged the Regional Director's decision. Instead, following his receipt of the Regional Director's decision, Appellant sent the Board a copy of the September 18 statement of reasons that he submitted in response to the Superintendent's decision. Although the Board construed its receipt of Appellant's September 18 statement of reasons as a notice of appeal from the Regional Director's decision, that did not relieve Appellant of his burden of showing error in the decision being appealed. The Board provided Appellant the opportunity to file a brief, but he did not do so.⁴ Thus, Appellant has not addressed the Regional Director's responses to the arguments raised by Appellant in his September 18 statement of reasons challenging the Superintendent's decision, much less has he assigned error to the Regional Director's conclusions.

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

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
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

⁴ Appellant's brief was due on May 2, 2007. *See* Notice of Docketing and Order Setting Briefing Schedule, Mar. 16, 2007, at 2.