



INTERIOR BOARD OF INDIAN APPEALS

Jay T. Martin v. Rocky Mountain Regional Director, Bureau of Indian Affairs

57 IBIA 313 (08/30/2013)



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

JAY T. MARTIN,)	Order Vacating Decision and
Appellant,)	Remanding
)	
v.)	
)	
ROCKY MOUNTAIN REGIONAL)	Docket No. IBIA 11-153
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	August 30, 2013

Jay T. Martin (Appellant) seeks review from the Board of Indian Appeals (Board) of a July 1, 2011, decision (Decision) of the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director upheld the March 11, 2011, decision of BIA's Northern Cheyenne Agency Superintendent (Superintendent) to deny Appellant's request for reimbursement of \$3,571.65 in grazing rental and administrative fees resulting from BIA's removal of lands (removed lands) from his grazing permit for Range Unit 3K (RU 3K). We vacate the Regional Director's decision and remand this matter for further consideration consistent with our decision.

The facts are not entirely clear, but Appellant contends that the removed lands had been fenced off and under lease to another lessee for several years including 2010, when Appellant obtained the permit for RU 3K. What is clear is that BIA concedes that it erred in assigning certain lands to RU 3K, leading BIA to modify Appellant's permit to remove these lands, which suggests to us that these lands were never available for Appellant's use. If so and if the two uses could not both be accommodated, Appellant is entitled to reimbursement of that portion of his 2010 rental fee that is attributable to the removed lands.

History

On or about January 5, 2010, Appellant submitted an application for an allocation of grazing privileges for two range units, 3K and 3M, for the upcoming 2010 grazing

season. On the application, Appellant stated that he intended to graze 125 cow/calf pairs.¹ Two weeks later, the Northern Cheyenne Tribe (Tribe) awarded Appellant the allocation for both requested range units. The Tribe specified that RU 3K was authorized 946 AUMs. On January 26, 2010, Appellant and the Superintendent signed a 3-year grazing permit for RU 3K, commencing February 15, 2010, *see* Contract No. 2070A003K1013 (AR Tab 20), and Appellant paid the full amount of the rental plus the administrative fee for 2010. AR Tab 18. The permit authorizes 946 AUMs for an annual rental of \$12,850.63 plus an administrative fee of \$385.52. No grazing season is identified on the permit² and no provisions are included that require Appellant to coordinate his use with anyone who might hold a farm or other lease for some or all of the lands in the RU.

Attached to Appellant's permit were "Range Control Stipulations." One provision, under the heading "Termination and Modification" provides,

It is understood and agreed that . . . any part of the area covered by this permit may be excluded from this range unit by the Superintendent . . . ; and thereupon this permit shall cease and determine [sic] as to the parts of the range unit thus eliminated, the number of stock stipulated shall be reduced in conformity thereto, and the payments due hereunder shall be adjusted accordingly, provided that the termination of this permit has not been due to the fault of the permittee

AR Tab 20. Another provision provides, "Unless the number of livestock specified in the permit is reduced by [BIA], the permittee will not be allowed credit or rebate in case the full number is not grazed on the range unit." *Id.* ("Excess or Deficit of the Number of Stock Specified").

Appellant maintains that RU 3K originally was less than 946 AUMs but that BIA told him, before issuing the permit, that there were additional lands and AUMs available to add to his permit. He agreed to accept the additional lands and AUMs, and his grazing permit subsequently was executed for 946 AUMs. Sometime during 2010, Appellant

¹ The parties agree that 125 cow/calf pairs require 687.5 Animal Unit Months (AUMs). Letter from Appellant to Superintendent, Mar. 1, 2011 (Administrative Record (AR) Tab 13); Decision at 4. An AUM is "the amount of forage required to sustain one cow or one cow with one calf for one month." 25 C.F.R. § 166.4.

² The Regional Director states that Appellant's grazing permit was for the grazing season of June 1 – November 15. Decision at 4. Nothing in the grazing permit, the modification, or elsewhere in the record supports this statement, although Appellant did propose in his application to utilize RU 3K for this time period.

“realized that there were no additional acres [available] to increase the AUM[]s in [RU 3K]” because some of the lands included in RU 3K were hay fields that “were fenced into another pasture” and had been subject to a farm/haying lease belonging to Allen Fisher (Fisher) for several years. *See* Notice of Appeal to Board (Statement of Reasons) at 1-2, 5 (unnumbered); letter from Appellant to Superintendent, Mar. 1, 2011 (AR Tab 13). Thus, according to Appellant, these lands were not available for him to graze. He states that he spoke with Tiffany White Clay, a range manager with BIA or with the Tribe, about his concerns, but she did not get back to him except to say, “it was being checked into.” Notice of Appeal to Board (Statement of Reasons) at 1 (unnumbered).

In December 2010, Appellant asserts that Ron Burns (Burns), who apparently is another range management employee with the Tribe or with BIA, then told Appellant that BIA made a mistake and Appellant’s grazing permit needed to be modified to remove lands. Statement of Reasons to Regional Director at 1. According to Appellant, Burns told him “the fence line that was used to increase the [AUMs] was [on] an old map [that] included allot[tee]’s hay fields.” Notice of Appeal to Board (Statement of Reasons) at 2 (unnumbered). Therefore, on or about December 3, 2010,³ Appellant and the Superintendent executed a modification to Appellant’s grazing permit. The modification reduced the acreage in RU 3K from 4,581.90 to 3,688.44, reduced the AUMs from 946 to 708, and reduced the total annual rental fee (including the administrative fee) from \$13,225.43 to \$9,653.78 for the remaining 2 years of his permit. The space for entering the “effective date” of the modification was left blank. *See* AR Tab 16. The modification apparently was preceded by an email communication on December 1, 2010, concerning the need to modify the acreage in RU 3K. Attached to the email was a list of 6 allotments,⁴ totaling 693.54 acres, to be removed from Appellant’s permit. The December 1st email is the earliest document in the administrative record that mentions the modification. The record does not reflect any reimbursement to Appellant for any portion of his grazing permit fee for 2010.

On January 26, 2011, Appellant wrote to the Acting Superintendent seeking a credit towards his 2011 grazing fees as a result of the modification. He explained that he agreed to 946 AUMs when he obtained the permit “so [he] would not have any surplus in [RU 3K].”⁵ Letter from Appellant to Superintendent, Jan. 26, 2011 (AR Tab 14). He asserted

³ BIA asserts that the modification was executed on December 3, 2010. Decision at 3. The date is not clear on the modification that appears in the record. *See* AR Tab 16.

⁴ Allotments 322, 324-A, 324-B, 326, 328 (two noncontiguous parcels), and 329.

⁵ Appellant does not explain what he means by “surplus” or why it was important to him to avoid a surplus.

that, in December 2010, Burns told him that the wrong fence line was used to increase the AUMs to 946. *Id.* Appellant requested reimbursement, claiming he was overcharged for the 2010 grazing season. On March 1, 2011, Appellant wrote the Acting Superintendent again, stating he had not received a response to his January 26 letter. He explained that he did not use the land that was removed from RU 3K and he did not use all of the AUMs that he was awarded. He also told the Superintendent that the removed lands had been under lease to Fisher for several years. Letter from Appellant to Superintendent, Mar. 1, 2011 (AR Tab 13).

The Superintendent responded to Appellant on March 11, 2011, and denied his request for reimbursement. She explained that the “administrative adjustment” made to Appellant’s permit in December 2010 “resulted in a change in the annual rental for 2011.” Superintendent’s Decision at 1 (AR Tab 12). She explained that Appellant’s decision not to utilize all 946 AUMs “was a business decision on [his] part.” *Id.* at 2. The Superintendent did not state why the modification was made. She did not respond to Appellant’s assertions that the removed lands were concurrently leased to Fisher and were fenced off.

Appellant appealed the Superintendent’s decision to the Regional Director and reiterated that the lands were already leased to “other individuals.” Statement of Reasons for Regional Director at 1 (unnumbered) (AR Tab 10). He maintained that he is entitled to reimbursement because BIA “sold AUM’s that [it] did not have.” *Id.* at 1-2 (unnumbered). He stated that the lessee of the hay fields cut, baled, and removed hay from the land in 2010 and that the landowners received double payment from the hay fields lessee and Appellant.

On July 1, 2011, the Regional Director upheld the Superintendent’s decision to deny Appellant’s request for reimbursement. He began by stating that he was upholding the Superintendent’s decision “[b]ecause the Superintendent did not restrict [Appellant’s] livestock or season of use and [Appellant] had an approved grazing permit to utilize 946 AUMs during 2010.” Decision at 2. The Regional Director explained that “[d]uring the range unit boundary digitization for the 2010 rangeland inventory, [BIA] determined that several allotments included in [RU] 3K’s land schedule were not within the pasture boundary and were in an adjacent pasture.” Decision at 1.⁶ The Regional Director asserted

⁶ We cannot determine from the record how the Regional Director knew that the range unit boundary digitization was responsible for uncovering BIA’s error. The only place where we find any reference to “range unit boundary digitization” is in the Decision. Thus, nothing in the record supports this assertion. The Regional Director is reminded that if he obtains information concerning an appeal through person-to-person discussions, he must make a written record of these conversations, identifying who he spoke with, when he

(continued...)

that there is no evidence that Appellant disagreed with the RU's land schedule⁷ or the grazing capacity for the RU or sought a modification of his permit based on his concerns. The Regional Director further asserted that during the 2010 grazing season, Appellant was not restricted in any way from utilizing all 946 AUMs. Quoting Part 2 of the Range Control Stipulations, the Regional Director stated that Appellant had agreed that he would not be entitled to reimbursement if "the full number [of AUMs] is not grazed on the [RU]." *Id.* at 2 (quoting a selective portion of the "Excess or Deficit of the Number of Stock Specified" provision in the Range Stipulations, AR Tab 20). The Regional Director concluded by saying, "because you had a binding contract for [RU] 3K and were authorized to graze 946 AUMs and the Superintendent did not interfere with your grazing during 2010, I am upholding the Superintendent's. . . decision to deny your request for a 2011 credit for your grazing rental invoice or a partial refund." Decision at 6.

This appeal followed. Appellant submitted his opening brief ("statement of reasons") with his notice of appeal. No brief was submitted by the Regional Director.

Discussion

We vacate and remand the Regional Director's decision. We cannot understand the position taken by the Superintendent or by the Regional Director. BIA appears to us to have confessed error in adding certain acreage to RU 3K that seemingly should not have been put in the RU in the first place. The Regional Director held that Appellant is not entitled to reimbursement because, according to the Regional Director, BIA did not bar Appellant from using the removed lands during the 2010 grazing season nor did Appellant complain that he was unable to use all of his 946 AUMs. This position would be correct *only if* the removed lands were, in fact, available to Appellant to utilize in 2010 had he chosen to do so. Otherwise, the permit fees collected Appellant for the removed lands constitute an impermissible windfall to the landowners.

We review the Regional Director's decision to ensure that it comports with the law, is supported by the record, and is not arbitrary or capricious. *Frank v. Acting Great Plains*

(...continued)

spoke with them, and the details of each conversation. These notes must be added to the administrative record.

In addition, the Regional Director does not explain what a "range unit boundary digitization" is or how it enabled BIA to determine that there was an error in the boundary for RU 3K.

⁷ It is not clear to us what land schedule was provided to Appellant. Nothing in the administrative record purports to be the land schedule that was provided to him.

Regional Director, 46 IBIA 133, 140 (2007). We also determine whether the Regional Director has responded to relevant arguments raised by the appellant. See *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 39 (2008). Ultimately, it is the appellant's burden to show error in the Regional Director's decision. *Frank, supra*.

We begin with the legal premise that in executing a lease of real property, the landowner warrants that he can deliver the premises at the time the lease is to commence. See, e.g., *Barkhorn v. Adlib Associates, Inc.*, 222 F. Supp. 339, 341 (D. Haw. 1963), *aff'd*, 409 F.2d 843 (9th Cir. 1969) (*per curiam*); see also *La France v. Kashishian*, 269 P. 655, 656 (Cal. 1928) ("The law . . . seems to be well established that a lease which is silent as to guaranty of ownership of the leased premises by the lessor, nevertheless carries an implied warranty of the title in him, and consequent quiet possession in the lessee during the term specified in the lease."). And, with respect to the failure to deliver a portion of the premises, the Restatement (Second) of Property, Landlord & Tenant, § 4.2 (1977), provides in relevant part:

Except to the extent the parties to a lease validly agree otherwise, there is a breach of the landlord's obligations if, *on the date the tenant is entitled to possession*, there is a paramount title the assertion of which would deprive the tenant of the use contemplated by the parties.

Emphasis added. Thus, in the absence of a provision in the lease or permit to the contrary, the landowner impliedly warrants good title or power to demise the property, and covenants to deliver the premises at the time the lease or permit is to commence. If the landowner does *not* have sufficient title or possession and the tenant's use of the land will be frustrated, the landowner is in default.

It is not required that the lessee attempt to use the premises, enter on the premises, or even *need* the premises. *Id.* The point is that there is a contract pursuant to which one party (the permittee) agreed to pay a sum certain for the privilege of using—or, as the case may be, not using—certain lands or premises that are available for lease by the owner. If a portion of the lands is not available to the permittee *and* the permittee is willing to continue with the lease as to any remaining lands, the permittee is entitled to a reformation of the permit and reimbursement of the fees he paid for the lands that were not available.

Like the Superintendent before him, the Regional Director did not address Appellant's argument that the removed lands were committed to a lease to Fisher, were fenced off, and unavailable to be included in RU 3K in 2010. Instead, the Regional Director simply asserted that no one prohibited Appellant from using the removed lands in 2010. What BIA overlooks is that *if* the removed lands were under lease to a third party, they may have been physically inaccessible, e.g., fenced off. Or, if Appellant permitted his

cattle to graze on the removed lands that were subject to a haying or other farm lease, he could have been subject to damages to a lessee with paramount title if the grazing interfered with the lessee's rights. And the Regional Director's suggestion in the Decision that Appellant was not restricted from utilizing 946 AUMs is shortsighted and hardly convincing because the remaining lands may then have been overgrazed if the full AUMs were used (as well as the removed lands, if they were grazed after haying).⁸

With respect to Appellant's request for reimbursement, the Regional Director quotes a section of the Range Control Stipulations—"the permittee will not be allowed credit or rebate in case the full number is not grazed on the range unit"—to deny Appellant's request. The Regional Director omits critical language preceding the quoted language, which alters its significance: "*Unless the number of livestock specified in the permit is reduced by [BIA], the permittee will not be allowed credit or rebate in case the full number is not grazed on the range unit.*" Range Control Stipulations, "Excess or Deficit of the Number of Stock Specified" (AR Tab 20) (emphasis added).⁹ Here, it appears that BIA determined that the modification was required and, thus, prospectively, BIA adjusted Appellant's grazing permit fees. But, quoting the range control stipulations does not address Appellant's contention that he is entitled to reimbursement for 2010 because BIA mistakenly included unavailable land in RU 3K. It is this contention that BIA must address on remand.

Although it certainly appears from BIA's action of removing the lands from RU 3K that these lands were *not* available to be included in RU 3K in 2010, the Regional Director also asserts that no one told Appellant he could not use the removed lands and therefore he is not entitled to reimbursement for the fee paid by Appellant in 2010 for the removed lands. This latter position suggests that, notwithstanding the existence of a concurrent lease, the lands may have been available for Appellant's use and that Appellant's use of the lands for grazing may have not been inconsistent with any other use authorized for the removed lands, if any. Thus, on remand, the Regional Director must address Appellant's contention that the removed lands were fenced off and already leased to a third party at the time Appellant's grazing permit was executed and, thus, these lands were not available to be included in RU 3K. If they were not, Appellant must be reimbursed for the fee paid in 2010 for the right to graze on the removed lands unless BIA is able to show that Appellant did, in fact, use some or all of these lands.

⁸ Appellant apparently considered increasing his herd in order to utilize the additional AUMs, but did not. Notice of Appeal at 5 (unnumbered).

⁹ Another range control stipulation provides BIA with unilateral authority to modify a permit to exclude any part of the range unit and requires "payments due . . . [to] be adjusted accordingly" so long as the modification is not due to the fault of the permittee or any violation of the permit terms by him.

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 vacates and remands the Regional Director's July 1, 2011, decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge