



## INTERIOR BOARD OF INDIAN APPEALS

Nelson R. Roanhorse v. Acting Navajo Regional Director, Bureau of Indian Affairs

58 IBIA 110 (11/15/2013)

Related Board case:  
53 IBIA 126



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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NELSON R. ROANHORSE,	)	Order Vacating Decision and
Appellant,	)	Remanding
	)	
v.	)	
	)	
ACTING NAVAJO REGIONAL	)	Docket No. IBIA 11-142
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS	)	
Appellee.	)	November 15, 2013

Nelson R. Roanhorse (Appellant) appealed to the Board of Indian Appeals (Board) from a June 10, 2011, decision of the Acting Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirming a decision by the Navajo Region Supervisory Natural Resource Specialist (Natural Resource Specialist) that denied Appellant’s request to consolidate Appellant’s Seasonal Grazing Permit 18-35-84 and his Yearlong Grazing Permit 17-18-91, as a means to cure a regulatory prohibition against holding grazing permits in two different districts on the Navajo Reservation. We vacate the Decision because nothing in the applicable Federal regulations prohibits BIA, as a matter of Federal law, from combining the two permits, and BIA’s decision was premised upon the belief that denial of Appellant’s request was required by Federal law. On the other hand, Appellant has not shown that BIA is required, either by Federal or tribal law, to combine the two permits, and he concedes that he may not hold both permits at the same time. Thus, we have no basis to order BIA to combine the two permits. But we do grant Appellant’s request to have his seasonal permit “returned” to him until the matter is resolved. Until the two permits are combined (if authorized by tribal law) or one permit is either surrendered or properly terminated by BIA—after affording Appellant due process by taking action through a formal decision with appeal rights—BIA may not interfere with Appellant’s use of both permits. We remand the matter to BIA for further proceedings consistent with this decision.

## Background

### I. Grazing Management on the Navajo Reservation

The grazing of livestock on the Navajo Reservation (Reservation) is governed by both Federal and tribal law, and is the joint responsibility of BIA and the Navajo Nation

(Nation). *Dahozy v. Acting Navajo Regional Director*, 42 IBIA 16, 23 (2005). Federal law specifically applicable to Navajo grazing is found in the Navajo Grazing Regulations, codified at 25 C.F.R. Part 167 (formerly Part 152). The regulations are also incorporated in the Navajo Reservation Grazing Handbook and Livestock Laws (1967) (“Redbook”), which contains the Nation’s interpretation of the regulations as well as additional tribal guidance and rules. *See* Administrative Record (AR) Tab OO, Ex. 4.<sup>1</sup>

The Reservation is divided into various grazing districts, and at the local level, the District Grazing Committees are the Nation’s administrative bodies with the primary responsibility to manage rangeland and enforce the grazing regulations and additional tribal laws or policies. *See* Resolution DGCM#18-01-05-09 (Resolution of the District 18 Grazing Committee), AR Tab TT, Ex. 15. “All livestock grazed on the Navajo Reservation must be covered by an authorized grazing permit issued by the [BIA] Superintendent based upon the recommendations of the District Grazing Committee.” 25 C.F.R. § 167.9(a). “All such grazing permits will be automatically renewed annually until terminated.” *Id.*

Grazing permits may be transferred from one permittee to another upon the recommendation of the District Grazing Committee and with the Superintendent’s approval, in accordance with instructions included in the Redbook. *Id.* § 167.9(d); *see* Redbook at 33-35. Grazing permits that are obtained either through conveyance or inheritance “must remain within the District originally issued and must remain in the customary use area of the original permittee unless changed in writing by District Grazing Committee action.” Redbook at 35. “No person can hold a grazing permit in more than one district” on the Reservation. 25 C.F.R. § 167.8(c). BIA and Appellant agree that this means that a person may not hold one grazing permit issued in one grazing district, and another grazing permit issued in another grazing district.

However, seasonal grazing permits, which provide for part time (e.g., summer) grazing in one district, and part time (e.g., winter) grazing elsewhere, are not considered two separate grazing permits, nor treated in the Redbook as violating § 167.8(c). *See* Redbook at 23, 33-34. The secondary seasonal grazing area (the “elsewhere” portion of the permit) may be non-tribal lands, but the Redbook recognizes that at least some seasonal permits were issued for grazing from one tribal grazing district to another, including from District 18 to 17. *Id.* at 23.

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<sup>1</sup> The references in the Redbook are to the regulations as formerly codified at 25 C.F.R. Part 152 (1966). For example, § 152.1 in the Redbook is presently codified as § 167.1 in the Code of Federal Regulations.

## II. Appellant's Grazing Permits and BIA's Decisions

In 1984, with the recommendation and approval of the District 18 Grazing Committee, and the approval of BIA, Appellant acquired Seasonal Grazing Permit 18-35-84.<sup>2</sup> Districts 18 and 17 border one another, and Seasonal Permit 18-35-84 authorized grazing in District 18 from April 1 to September 30, and in District 17 from October 1 to March 31. *See* AR Tab SS, Ex. 2. Appellant maintains a summer residence in District 18.<sup>3</sup> Seasonal Grazing Permit 18-35-84 is for 51 Sheep Units (SU).

In 1991, Appellant and his wife purchased 20 SUs from Appellant's sister, Lena Roanhorse, who held a District 17 yearlong grazing permit for 41 SUs. *See* AR Tab S. Following the necessary approvals of the transaction, *see id.*, the Superintendent issued Yearlong Grazing Permit No. 17-18-91 to Appellant and his wife for 20 SUs in District 17. AR Tab SS, Ex. 3.

According to BIA, it was not until 18 years later, in 2009, that BIA first realized that Appellant held grazing permits in more than one district. Regional Director's Answer Brief (Br.) at 5. In March 2009, BIA's Fort Defiance Agency (Agency) Natural Resource Manager (Natural Resource Manager) notified Appellant that having the two grazing permits in different districts violated the regulations; that the "validity" of Appellant's seasonal permit was being researched; and that the Agency had put an "administrative hold" on both permits. AR Tab CC.

Thereafter, Appellant attempted to cure the violation by seeking to have the two permits combined into one by adding the 20 SUs in his District 17 yearlong permit to his seasonal District 18 permit (for 51 SUs), which would result in a seasonal District 18 (to District 17) permit for 71 SUs. *See* Resolution DGCM#18-01-05-09, AR Tab TT, Ex. 15.<sup>4</sup> In May 2009, the District 18 Grazing Committee considered Appellant's request, but declined to take action on the merits of Appellant's request, concluding instead that "the

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<sup>2</sup> The acquisition was accomplished by an exchange between Appellant, who held a yearlong permit in District 17, and Mary Hale, who held the seasonal permit. AR Tab Q.

The first two digits on a permit number indicate the district in which it was issued, e.g., Seasonal Grazing Permit 18-35-84 denotes a permit issued in District 18.

<sup>3</sup> Appellant also owns an allotment that straddles the border between the two districts.

<sup>4</sup> As early as 2006, Appellant apparently sought to combine the two permits. *See* AR Tab RR, Ex. 8 (Grazing Use Area Plan of Operation), at 2 ("My proposal to combine District 17 yearlong permit with seasonal District 18 grazing permit was rejected by District 17 Grazing Committee."). It is not clear what prompted Appellant's request at that time.

request to combine District #17 grazing permit into District #18 seasonal permit remain open for further discussion between District #17 and District #18 Committees.” *Id.* at 2 (unnumbered).<sup>5</sup>

In August 2009, the Natural Resource Manager gave Appellant “official notice” that his Seasonal Permit 18-35-84 “has been nullified and put on Administrative hold.” AR Tab GG. The reasons for the action did not expressly include the fact that Appellant holds two permits in two different districts, and the only concern identified by BIA for Seasonal Permit 18-35-84 was an issue regarding the proposed change for the permit from Unit 6 to Unit 4 within District 18, which the District 18 Grazing Committee had recommended be made. *See supra* note 5. The Natural Resource Manager did not advise Appellant of appeal rights for his action purporting to “nullify” Appellant’s seasonal permit. *See* 25 C.F.R. § 2.7(b) and (c) (BIA decisions must include appeal rights, or the appeal period is tolled).

Notwithstanding the Agency’s failure to advise Appellant of his appeal rights, Appellant appealed the Natural Resource Manager’s action to the Navajo Regional Office of BIA, becoming increasingly frustrated when BIA did not respond in a timely manner, while apparently denying Appellant use of his seasonal permit. Eventually, Appellant filed an appeal from inaction with the Board pursuant to 25 C.F.R. § 2.8. On March 7, 2011, the Natural Resource Specialist issued a decision, and the Board dismissed Appellant’s § 2.8 appeal from inaction as moot. *See Roanhorse v. Navajo Regional Director*, 53 IBIA 126 (2011).

The Natural Resource Specialist denied Appellant’s request to combine the two grazing permits. The reasons given for denying the request consist of a variety of allegations or concerns that Appellant was not in compliance with the terms of his seasonal permit, and a summary of various provisions in the Navajo grazing regulations, including the prohibition in 25 C.F.R. § 167.8(c), quoted *supra* at 111, against having permits in more than one district. The Natural Resource Specialist rejected Appellant’s argument that the Nation interprets § 167.8(c) as allowing his two permits to be combined. In the Redbook, the Nation’s commentary on § 152.8(c) (now § 167.8(c)) reads: “When persons of two different districts marry and each has a grazing permit in these different districts, transfers and sales should be encouraged to get the new family’s operation concentrated into one district.” Redbook at 23, AR Tab OO, Ex. 4. The Natural Resource Specialist concluded that the Redbook language only applies when each spouse held a permit in

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<sup>5</sup> The Grazing Committee accepted two other requests from Appellant, recommending that his seasonal grazing permit be amended and reissued to change the grazing unit from Unit 6 to Unit 4, and to revise the starting date to May 1. *Id.*

different districts prior to marriage, which was not the case for Appellant's permits. Natural Resource Specialist's Decision at 2 (unnumbered) (AR Tab OO).

Appellant appealed the Natural Resource Specialist's decision to the Regional Director, again asking that his seasonal permit be "returned" to him and that the two grazing permits be combined into one seasonal permit. AR Tab RR at 6. Appellant argued that the two-permit problem was the result of BIA's own negligence decades ago when the permits were issued, and that the solution was to combine the two permits. Appellant again relied in part on the Redbook's commentary on § 167.8(c) with respect to marriages between persons of different districts.

On June 10, 2011, the Regional Director issued the Decision, in which he affirmed the Superintendent's refusal to combine Appellant's two permits. Addressing Appellant's request to combine the two permits "pursuant to" § 167.8(c), as interpreted by the Redbook, the Regional Director stated that § 167.8(c) "basically makes allowances for parties to transfer or sell property owned separately prior to marriage . . . such that one grazing permit will then be operated and utilized within one district." Decision at 1. The Regional Director found that Appellant's wife was a party to both transactions through which Appellant obtained his two permits, and because neither was owned by Appellant's wife prior to their marriage, § 167.8(c) did not allow consolidation of the two permits. After rejecting Appellant's request to combine the two permits, and finding that having the two permits violated § 167.8(c), the Regional Director referred the matter back to the Natural Resource Specialist "to take the appropriate necessary administrative action." Decision at 2 (unnumbered). The Regional Director did not directly address Appellant's request to have Seasonal Permit 18-35-84 "returned to" him while the matter is being resolved. AR Tab RR at 6.

### III. Arguments on Appeal

Appellant appealed the Decision to the Board. On appeal, Appellant distinguishes between the two issues addressed by the Regional Director: (1) Appellant's request to combine the two permits, and (2) the prohibition against having two grazing permits in two different districts. Appellant states that he is only appealing the portion of the Decision refusing to combine his two permits. As relief, Appellant reasserts that Seasonal Permit 18-35-84 should be returned to him and his use of the permit restored until the two permits are combined. On the merits, Appellant disputes BIA's conclusion that the regulation does not allow combining two grazing permits after marriage. Appellant argues that when BIA issued the yearlong permit to him in 1991, it never advised him that the permit could not be combined with his existing seasonal permit. Appellant also argues that the Decision does not have the support of the tribal government, and that the Nation has not been given a reasonable opportunity to consider the matter, noting that the District 18 Grazing

Committee had stated that his request should “remain open for further discussion.” Notice of Appeal at 4. In his opening brief, Appellant argues that BIA’s conduct in this matter denied him his right to due process by failing to resolve the dispute in a timely manner. Opening Br. at 1.

The Regional Director responds that the Decision should be affirmed because denial of Appellant’s request to combine the two permits “was required by applicable Federal regulations” and supported by the record. Regional Director’s Answer Br. at 6. The Regional Director agrees that the transaction through which Appellant originally obtained Seasonal Grazing Permit 18-35-84 was approved by the District 18 Grazing Committee, and that the permit allows Appellant to graze in District 18, Unit 6 from April 1 to September 30, and in District 17 from October 1 to March 31.<sup>6</sup> The Regional Director also acknowledges that BIA issued Yearlong Grazing Permit 17-18-91 to Appellant, but notes that the permit was issued to both Appellant and his wife, i.e., during their marriage.

The Regional Director argues that the prohibition against two permits in two different districts controls, and that combining the two permits would not remedy the situation because Appellant “would still have grazing rights in multiple districts . . . in express violation of the regulations.” Regional Director’s Answer Br. at 8-9. The Regional Director disputes Appellant’s interpretation of the Redbook language accompanying § 152.8(c) (now § 167.8(c)), arguing that the policy favoring transfers of permits to address § 167.8(c)’s prohibition against multiple permits in multiple districts only applies when persons coming into a marriage already hold permits in different districts. In that case, tribal policy encourages them “to get the *new* family’s operation concentrated in one district.” Regional Director’s Answer Br. at 9 (quoting Redbook and adding emphasis). The Regional Director contends that the Redbook explanation does not authorize the consolidation of permits for different districts, but instead encourages sales or transfers to concentrate grazing rights in one district, in conformity with § 167.8(c). *Id.* at 9-10. In any event, the Regional Director notes that both permits were obtained after Appellant and his wife were already married, so that the policy, whatever its effect, would not assist Appellant.

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<sup>6</sup> The Regional Director asserts that Appellant’s right to graze in District 17 is limited to “‘off-reservation’ property held by BLM.” Regional Director’s Answer Br. at 8. The Regional Director does not identify any evidence in the record to support that assertion and Appellant contends that there is no BLM land anywhere in the area for his seasonal use of the permit in District 17. Nothing on Seasonal Permit 18-35-84 suggests that the seasonal use allowed in District 17 pertains to BLM lands.

In reply, Appellant contends that he is being singled out unfairly, and that BIA has allowed other individuals to combine yearlong SUs from a District 17 permit into a District 18 seasonal permit. Reply Br. at 3-5.

The Board also received a letter from Navajo Council Delegate Jonathan Hale, 22nd Navajo Nation Council, in support of Appellant. Delegate Hale suggests that the District Grazing Committees are the appropriate bodies to handle this dispute, and that BIA should not have unilaterally declared Appellant's seasonal permit invalid or refused to combine the two permits. The Board allowed responses to Delegate Hale's letter, but no responses were received.

### Standard of Review

The Board reviews questions of law *de novo*. *Brown v. Acting Northwest Regional Director*, 58 IBIA 49, 54 (2013); *One Hundred and Ninety-One Navajo Landowners v. Navajo Regional Director*, 57 IBIA 271, 285 (2013), and cases cited therein. The same *de novo* standard of review applies to evaluating the sufficiency of evidence. *One Hundred and Ninety-One Navajo Landowners*, 57 IBIA at 285. When a BIA decision involves an exercise of discretion, we do not substitute our judgment for that of BIA, but we do review the decision for consistency with applicable law and to determine whether the discretion exercised by BIA is supported by the record and adequately explained. *Id.* at 285-86. An appellant has the burden to demonstrate error in the decision being appealed.

### Discussion

There is no dispute in this case that in holding one permit issued in District 18 and another one issued in District 17, Appellant is in violation of the prohibition against having grazing permits in more than one district. What the parties disagree on is whether BIA is authorized or required to combine Appellant's District 17 yearlong permit (for 20 SUs) with his District 18 seasonal permit (for 51 SUs), the result of which apparently would be to permit him to graze 71 SUs in District 18 in the summer and in District 17 in the winter, while holding a single seasonal permit that would not be deemed to violate § 167.8(c).

We conclude that nothing in the Federal regulations prohibits BIA from adding the 20 SUs from Appellant's yearlong District 17 permit to his District 18 seasonal permit. The regulations are silent on whether or under what circumstances additional SUs acquired in a secondary grazing district of a seasonal permit may be added to the seasonal permit. Whether it is prohibited by tribal law is an issue that is not before the Board.

Initially, we note that the parties' focus on the Redbook's language about consolidating grazing rights held by spouses is misplaced. We agree with the Regional Director that the tribal policy is directed to *new* families, and to permits from different districts brought *into* a marriage, and thus it does not apply to the facts of this case. But it does not follow, as BIA appears to believe, that if the policy does not apply, then § 167.8(c) prohibits BIA from combining a yearlong permit from District 17 into a seasonal permit from District 18. Section 167.8(c) is silent on that issue, and no other provisions in the regulations expressly address the issue raised in this case.

The Regional Director argues that the two permits cannot be combined because Appellant “would still have grazing rights in multiple districts . . . in express violation of the regulations.” Regional Director’s Answer Br. at 8-9. But that is not how the regulations are worded or how they have been interpreted, as least in the Redbook. As the Regional Director notes, the regulations prohibit grazing permits in two different districts, but a seasonal permit is not considered to be two permits, and—significantly—the Redbook notes that some seasonal permits allow seasonal use in the district in which they are issued and seasonal use in another district, including District 18-to-District 17 seasonal permits. Thus, to the extent that a seasonal permit results in a permittee having “grazing rights in multiple districts,” the Redbook does not construe § 167.8(c) to prohibit that result, nor is it plainly prohibited by the regulatory language, which is at best ambiguous. It might have been possible to construe the language in § 167.8(c)—“[n]o person can hold a grazing permit in more than one district”—as prohibiting seasonal permits involving multiple districts, but the Redbook’s commentary specifically acknowledges the existence of District 18-to-District 17 seasonal permits, without suggesting that they violate the prohibition in § 167.8(c).

The issue in this case is not whether Appellant’s possession of two permits, each of which apparently was approved by the necessary tribal authorities and by BIA, violates § 167.8(c). The issue is whether there is a lawful cure that would allow the SUs from Appellant’s yearlong District 17 permit to be added to his seasonal District 18 permit, thereby resulting in only a single seasonal permit that does not violate § 167.8(c). That is an issue we cannot decide in this appeal because it would appear to implicate tribal law or policy, or both, and BIA failed to consider either one in rejecting Appellant’s request.<sup>7</sup>

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<sup>7</sup> One provision in the regulations addresses “special grazing permits,” and provides that “[t]he problem of special grazing permits shall be settled by [BIA] working in cooperation with the Tribal Council, or any Committee designated by it, with a view to terminating these permits at a suitable date and with the least hardship to the Indians concerned.” 25 C.F.R. § 167.10. Annotating this provision, the Redbook states, “Special or Supplemental Grazing Permits are terminated upon the death of the original permittee.”

(continued...)

What is notably missing in this case, as argued by both Appellant and Delegate Hale, is any consultation by BIA with the District Grazing Committees concerning applicable tribal law and policy, or recommendations from those Committees or from other appropriate tribal bodies.

It does not follow, however—as Appellant argues—that BIA is required to combine the two permits, even assuming that BIA was negligent in issuing the yearlong permit in 1991, resulting in the violation. The record shows that the last action taken by the District 18 Grazing Committee was to leave Appellant’s request open for discussion. Appellant faults BIA for failing to pursue the matter further with the District Grazing Committees, but we have no reason to conclude that BIA had a greater obligation to do so than Appellant. Thus, although BIA did not rely on this ground in denying Appellant’s request, the absence of a recommendation from the appropriate tribal bodies could well be a reason not to grant Appellant’s request.

In this case, BIA abused its discretion by relying on an unsupported interpretation of Federal law, and thus we vacate the Decision, while also declining to grant Appellant’s request that we require BIA to grant his request.

Lastly, we address Appellant’s request that his seasonal permit be “returned” to him. There is no provision in the regulations authorizing BIA to place an “administrative hold” on a grazing permit and purport to “nullify” it without issuing a formal decision with appeal rights. The regulations provide that a grazing permit “will be” automatically renewed annually until terminated, 25 C.F.R. § 167.9(a), and BIA has never properly terminated either of Appellant’s permits. Before BIA may deny Appellant the use of his permits, it must make a proper written decision, with appeal rights, *see id.* § 2.7, which will

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(...continued)

Redbook at 25. But the Redbook does not indicate that seasonal permits, which are not mentioned in connection with § 167.10, but instead are discussed elsewhere, *see id.* at 23, 33-34, are considered to be “special permits” within the meaning of § 167.10. Neither the Natural Resource Specialist’s decision, nor the Regional Director’s decision, found that that seasonal permits terminate upon the death of the original permittee, although one document in the record reflects the opinion of an individual in the Nation’s Department of Agriculture that Seasonal Permit 18-35-84 “should have terminated upon Mr. Hale’s death.” AR Tab MM. We cannot determine from this record whether or to what extent that statement reflects an authoritative tribal interpretation of tribal law. We also note that the record indicates that as recently as 2003, BIA was issuing seasonal permits, thus suggesting that the Nation has not treated them as “special” permits that must be phased out. *See* Reply Br., Ex. D and E.

be subject to the automatic stay provisions of 25 C.F.R. § 2.6. Unless and until a proper termination decision is issued and becomes effective, BIA must immediately restore Appellant's rights under his permits.<sup>8</sup> And if BIA decides to take action to terminate either permit, it must consult with the appropriate Tribal Grazing Committees and seek their recommendations.

### 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 Board vacates the Decision and remands the matter to the Regional Director for further proceedings consistent with this decision.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge

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<sup>8</sup> We recognize that Appellant limited this appeal to the portion of the Decision rejecting his request to combine the two permits, but as part of the relief sought from the Board, he asked that his seasonal permit be "returned" to him, thus implicating BIA's apparent action denying him the use of the seasonal permit even before the two-permits two-districts problem is resolved. In any event, even if this issue were considered to be outside the scope of Appellant's appeal, we would exercise our authority to correct manifest error. *See* 43 C.F.R. § 4.318.