



INTERIOR BOARD OF INDIAN APPEALS

Peter B. Hall v. Great Plains Regional Director, Bureau of Indian Affairs

59 IBIA 136 (09/16/2014)



United States Department of the Interior

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

PETER B. HALL,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 12-026
GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	September 16, 2014

Peter B. Hall (Appellant) appealed to the Board of Indian Appeals (Board) from a September 12, 2011, decision (Decision) of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), upholding BIA's Cheyenne River Agency Superintendent's (Superintendent) April 5, 2011, decision to cancel Appellant's 2008-2013 grazing permit for Range Unit #313 on the Cheyenne River Reservation. The grazing permit was cancelled because Appellant failed to properly dispose of deceased cattle, in violation of a range control stipulation in the permit, and did not adequately respond to BIA's notice of violation.

We affirm the Decision because Appellant does not meet his burden to demonstrate that the Regional Director abused his discretion or that the Decision is not supported by law or substantial evidence. First, Appellant argues, without explanation, that BIA failed to meet a deadline imposed by BIA's rules. To the extent that Appellant is referring to a purported deadline for a BIA decision, there is no deadline in BIA's grazing regulations by which it must decide whether a permittee has adequately responded to a notice of violation. Next, Appellant argues that the Cheyenne River Agency failed to assist him in removing the carcasses and thereby hindered his compliance with the notice of violation. But Appellant did not raise that issue to the Regional Director, and on appeal Appellant does not argue or provide evidence that he requested and BIA promised assistance before the deadline to cure the violation expired. Moreover, Appellant acknowledges that he did not meet the deadline for removing the carcasses set forth in the notice of violation, and he does not argue or provide evidence that he was granted an extension of the deadline. Further, to the extent that BIA nonetheless considered Appellant's subsequent actions, the record supports the Regional Director's finding that although Appellant removed some of the carcasses after the deadline, he did not remove all of them—and thus Appellant never cured the violation.

Background

I. Regulatory Framework

Grazing permits are issued for “range units,” which are consolidated tracts of rangelands that BIA creates after consultation with the Indian landowners. *See* 25 C.F.R. §§ 166.4 (definition of range unit), 166.302. With limited exceptions, anyone wishing to graze livestock on Indian trust or restricted land must obtain a permit. *Id.* § 166.200.¹

Grazing permits must include, among other things, a prohibition against creating a nuisance and negligent use or waste of resources, the numbers and types of livestock allowed, and a right of entry by BIA for inspection or enforcement purposes. *Id.* § 166.207. Permittees are required to comply with the terms of grazing permits, and BIA is authorized to ensure that permittees are in compliance. *Id.* §§ 166.213, 166.701. If a permit violation occurs, BIA will provide the permittee written notice of the violation and 10 days to either: (1) cure the violation and notify BIA; (2) explain why the grazing permit should not be cancelled; or (3) request in writing additional time to cure the violation. *Id.* § 166.704. If a permit violation is not cured within the required time, BIA may cancel the permit. *Id.* § 166.705.

II. Factual and Procedural Background

Appellant, Melvin Garreau, Steven Garreau, and Francine Hall, as co-permittees, were granted a grazing permit for Range Unit (RU) #313 on the Cheyenne River Reservation for the 5-year period from November 1, 2008, to October 31, 2013. Grazing Permit for RU #313, Dec. 5, 2008 (Administrative Record (AR) Tab R-H).² During

¹ BIA grants permits for grazing on range units that contain individual Indian land, and BIA approves tribally granted permits for grazing on range units that consist entirely of tribal lands. 25 C.F.R. § 166.217(a) & (c).

² Range Unit #313 comprises both allotted land (i.e., individual Indian land) and tribal land, and therefore the grazing permit, identified as No. 0003130813, was granted by BIA. Based on the permit, it appears that the co-permittees were allocated shared grazing privileges for RU #313 by the Cheyenne River Sioux Tribe (Tribe) for the 2008-2013 grazing period, however, the record contains only the application for allocation of grazing privileges and not documentation of their selection by the Tribe to receive the privileges. *See* Application for Allocation, Oct. 20, 2008 (AR Tab CR-A).

June 2010 to October 2010, the co-permittees³ held pasturing authorizations for RU #313 allowing them to pasture up to 160 head of cattle owned by Roger Randall. Pasturing Authorization #1, June 30, 2010 (AR Tab CR-C); Pasturing Authorization #2, Aug. 2, 2010 (AR Tab CR-G). After the pasturing authorizations expired, Randall left 150 cattle in Appellant's care for the winter. Memorandum from Superintendent to File, Jan. 20, 2011 (AR Tab CR-N).

During January and February 2011, BIA staff conducted several permit compliance inspections on RU #313. The first permit compliance inspection, performed on January 11, 2011, revealed the cattle to be in "very poor" condition and without feed or water available in the corral. Compliance Report, Jan. 11, 2011 (AR Tab CR-J). Four of the cattle in the corral were dead, and most of the live cattle were in the pasture. *Id.*

On January 14, 2011, BIA staff conducted a second compliance inspection and found 18 dead cattle on RU #313, including 5 carcasses in the corral and 13 carcasses in the pasture. Compliance Report, Jan. 14, 2011 (AR Tab CR-M).⁴

On January 21, 2011, the Superintendent issued Appellant a notice of violation regarding the 18 carcasses, advising Appellant that pursuant to Range Control Stipulation No. 12, Disposition of Carcasses, he was required to dispose of these carcasses. Letter from Superintendent to Appellant, Garreau, and Francine Hall, Jan. 21, 2011 (Carcass Disposal NOV), at 1 (unnumbered) (AR Tab CR-O).⁵ The Superintendent advised Appellant that, pursuant to 25 C.F.R. § 166.704, he had 10 days from receipt of the notice to cure the violation and notify BIA that he had done so; explain why the permit should not be cancelled; or request in writing additional time to complete corrective actions. Carcass

³ By that time, Steven Garreau had been removed from the permit. Permit Modification, Sept. 28, 2009 (AR Tab R-I).

⁴ On the same day, the Superintendent notified Appellant that, because the pasturing authorizations had expired and cattle were found in the pasture, RU #313 was overstocked in violation of the grazing permit. Letter from Superintendent to Appellant, Garreau, and Francine Hall, Jan. 14, 2011, at 1 (unnumbered) (AR Tab CR-L). The permit was not cancelled based on that violation and we address the violation no further.

⁵ Range Control Stipulation No. 12 states in full: "The permittee will promptly bury or burn the carcasses of all animals which die upon lands covered by his grazing permit." AR Tab R-H at 4. The Superintendent, citing snow cover as an impediment to Appellant burying the carcasses and a need for coordination with others to locate a proper burn site, requested that Appellant remove the 18 carcasses or have them removed by an animal rendering service. Carcass Disposal NOV at 1 (unnumbered).

Disposal NOV at 2 (unnumbered). The notice was hand-delivered to Appellant on January 21, 2011. *See id.*

On February 3, 2011, the Superintendent replied to a letter that Appellant had submitted in response to a notice of violation concerning his eligibility for tribal allocation of grazing privileges based on residency. Letter from Superintendent to Appellant and Francine Hall, Feb. 3, 2011 (AR Tab CR-R).⁶ After addressing Appellant's response to the Residency NOV (for which the compliance deadline was February 7, 2011), the Superintendent reiterated that the deadline for complying with the Carcass Disposal NOV was January 31, 2011. *Id.* at 2 (unnumbered). The Superintendent stated that, "[i]f you fail to comply or take measures on either issue to bring your permit back into compliance, I will proceed with the cancellation." *Id.* Also on February 3, 2011, BIA staff conducted a compliance inspection of RU #313 and found that none of the 18 carcasses identified in the Carcass Disposal NOV had been removed. Compliance Report, Feb. 3, 2011 (AR Tab CR-S).

On February 8, 2011, the Superintendent cancelled Appellant's grazing permit for failure to properly dispose of deceased livestock in accordance with Range Control Stipulation No. 12. Letter from Superintendent to Appellant, Garreau, and Francine Hall, Feb. 8, 2011 (Superintendent's February 8 decision) (AR Tab CR-T). In doing so, the Superintendent found that Appellant "did not respond" to the Carcass Disposal NOV by the January 31, 2011, deadline. *Id.* at 1 (unnumbered).

After the Superintendent's cancellation decision, BIA continued to monitor the conditions on RU #313. On February 15, 2011, BIA staff found some carcasses remaining in the same places as from the earlier inspections, but noted that due to snow settling into two pasture draws where most of the carcasses were located staff did not find them all. Compliance Report, Feb. 15, 2011 (AR Tab CR-V). During the inspection, BIA staff witnessed Appellant on RU #313 with a rendering truck from Dakota Rendering. *Id.* BIA staff told Appellant that carcasses were located in the two pasture draws, to which they pointed. *Id.*; *see also* Notice of Appeal to Board, Oct. 18, 2011 (Appellant alleges that staff told him the carcasses were "over that hill and a couple over that hill"). The next day, BIA staff found 12 carcasses on the range unit. Compliance Report, Feb. 16, 2011 (AR Tab CR-W). The Superintendent telephoned Dakota Rendering on February 17, 2011, and the

⁶ *See also* Letter from Superintendent to Appellant, Garreau, and Francine Hall, Jan. 26, 2011 (Residency NOV) (AR Tab CR-P); Letter from Appellant and Francine Hall to Superintendent, Jan. 28, 2011 (AR Tab CR-Q) (Appellant's response to the Residency NOV).

owner reported that his company had removed eight carcasses on February 15, 2011. Memorandum from Superintendent to File, Feb. 17, 2011 (AR Tab CR-Y).

On March 4, 2011, Appellant appealed the Superintendent's February 8 decision to the Regional Director. Notice of Appeal and Statement Reasons, Mar. 4, 2011 (First NOA and SOR) (AR Tab CR-Z). Appellant asserted that in light of weather conditions the Superintendent "could have given us additional time to remove the carcasses," and that the carcasses "were frozen and posed no immediate threat." *Id.* at 1. Appellant also requested a prorated refund of his grazing fees for 2011, and contested a requirement that he post an appeal bond. *Id.* at 1-2.

On March 9, 2011, the Superintendent requested that the Regional Director remand the February 8 decision to him for further consideration. Memorandum from Superintendent to Regional Director, Mar. 9, 2011 (AR Tab CR-AA). The Regional Director granted this request on March 17, 2011. Memorandum from Regional Director to Superintendent, Mar. 17, 2011 (AR Tab CR-BB). On April 3, 2011, Appellant wrote to the Regional Director, stating that BIA required him to respond to each notice of violation within 10 days and that it was "well beyond 10 days" after March 17, 2011, but he had yet to receive a decision from the Superintendent. Letter from Appellant to Regional Director, Apr. 3, 2011 (AR Tab CR-CC).

On April 5, 2011, the Superintendent issued a new decision reaffirming his cancellation of Appellant's grazing permit. Letter from Superintendent to Appellant, Garreau, and Francine Hall, Apr. 5, 2011 (Superintendent's April 5 decision) (AR Tab CR-DD). The Superintendent reiterated that Appellant did not respond to the Carcass Disposal NOV by the January 31, 2011, deadline. *Id.* at 1 (unnumbered). The Superintendent also stated that he found "no extenuating or new evidence to negate the violation" *Id.*⁷

Appellant again appealed to the Regional Director. Notice of Appeal and Statement of Reasons, May 4, 2011 (Second NOA and SOR) (AR Tab CR-FF). Appellant first asserted that he removed all of the carcasses by February 15, 2011, and that BIA visited RU #313 on February 16, 2011, to confirm the removal. *Id.* at 3.

⁷ However, the Superintendent agreed to provide Appellant a prorated refund from the date of any reallocation of the grazing privileges for RU #313, and waived the requirement to post an appeal bond. AR Tab CR-DD at 1 (unnumbered). As these matters were not raised by Appellant in the present appeal, we consider them no further.

In a subsequent statement of reasons, Appellant argued that the grazing permit should not have been cancelled on February 8, 2011, because at the time he was allegedly discussing with the Superintendent how to comply with the Carcass Disposal NOV. Notice of Appeal and Statement of Reasons, June 2, 2011 (Third NOA and SOR), at 2 (AR Tab CR-II). Appellant asserted that the Superintendent's February 3, 2011, letter—which was in reply to Appellant's response to the Residency NOV—"clearly left open the discussion of both remaining issues" *Id.* And Appellant alleged that during a meeting with the Superintendent on February 8, 2011, the Superintendent handed him the cancellation decision but they also "discussed the removal of the carcasses, the result of which, I have complied." *Id.*

In addition, Appellant stated that, due to a snow storm in late December 2010, a decision by the Tribe not to plow into range units where no one was residing, and his inability to truck feed into RU #313 at that time, he walked into the range unit in early January 2011 and released the cattle from the corral. *Id.* at 3. He argued that, after BIA notified him of the resulting dead cattle, "I have always contended that the severe cold weather kept the carcasses frozen and posed no immediate danger and removed the carcasses I could when I agreed to remove them." *Id.*

On September 12, 2011, the Regional Director issued his Decision affirming the Superintendent's April 5 decision to cancel Appellant's grazing permit. Decision, Sept. 12, 2011 (AR Tab R-B). The Regional Director found that Appellant removed no dead cattle by the expiration of the 10-day deadline for complying with the Carcass Disposal NOV, that the only removal attempt identified by Appellant was on February 15, 2011, and that Appellant did not provide any proof that he removed all 18 known carcasses as he alleged. *Id.* at 2-3.

Appellant appealed the Decision to the Board. He filed a notice of appeal but no briefs. The Regional Director filed an answer brief, a motion for an appeal bond, and a motion to dismiss or in the alternative to make the Decision effective immediately. After the completion of merits briefing, the Board placed the Decision into immediate effect on March 30, 2012. Because Appellant had not responded to the Regional Director's motions or filed any briefs in this matter, the Board also ordered Appellant to file a statement confirming that he wished to proceed with the appeal, which he did.

Discussion

I. Standard of Review

The standard of review that the Board applies to a Regional Director's decision to cancel a grazing permit was described in *Gorneau v. Acting Rocky Mountain Regional Director*, 50 IBIA 33, 43 (2009), as follows:

A BIA decision to cancel a permit involves an exercise of discretion. When a BIA decision is based on the exercise of discretion, the appellant challenging the decision bears the burden of proving that the BIA official issuing the decision failed to properly exercise that discretion. In reviewing BIA discretionary decisions, the Board does not substitute its judgment for that of BIA; rather, its responsibility is to ensure that BIA gave proper consideration to all legal prerequisites to the exercise of that discretion. Simple disagreement with BIA's reasoning or a general allegation of error is not enough to sustain an appellant's burden.

(citations omitted); *see also Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 140 (2007) (the Board reviews the Regional Director's decision to determine whether it comports with the law, whether it is supported by substantial evidence, and whether it is arbitrary and capricious, and the Board reviews questions of law *de novo*).

II. Merits⁸

In his notice of appeal to the Board, Appellant advances two arguments, which we consider in turn. First, he argues that BIA "failed to meet the deadline placed upon them by their own rules." Notice of Appeal to Board. Appellant does not explain this argument or identify any rules or regulations establishing a deadline for BIA to make a permit cancellation decision. Appellant's bare assertion about a missed deadline is insufficient to meet his burden of showing that the Regional Director's decision was unreasonable or in error. *See Linabery v. Acting Great Plains Regional Director*, 53 IBIA 42, 48 (2011). Further, even if we were to consider Appellant's earlier suggestion to the Regional Director that the *Superintendent* failed to meet a purported 10-day deadline to issue his April 5

⁸ The grazing permit at issue in this appeal was for a 5-year term, beginning on November 1, 2008, and expiring on October 31, 2013. Thus, it is possible that the expiration of the permit rendered the appeal moot. However, because the Board placed the Decision into effect, and it is at least possible that BIA's cancellation of the permit would have continuing consequences, we proceed to review the merits of the appeal.

decision following the remand from the Regional Director, *see supra* at 140, we would conclude that the argument lacks merit. Section 166.704 of 25 C.F.R. expressly establishes a deadline for permittees to respond after receiving a notice of violation. That deadline does not apply to the Superintendent's (or the Regional Director's) decision, and the regulations governing grazing permits do not otherwise impose a deadline by which BIA must decide whether a permittee has adequately responded to a notice of violation. *See* 25 C.F.R. Part 166, Subpart H (Permit violations).⁹

Next, Appellant argues that the “record’ that the regional director refers to so much in his [Decision] contains inaccurate information that I was not made privy to before this decision.” Notice of Appeal to Board. In support of this argument, Appellant alleges that he requested maps and other information from BIA to locate the carcasses; the Superintendent assured him that maps were unnecessary because field agents would be sent to help him locate and remove the carcasses; and the field agents provided him little information when he attempted to remove the carcasses, but the same agents “went out and located carcasses the very next day.”¹⁰ *Id.* Appellant alleges that he was told he would be informed if more carcasses were found and that he would be given an opportunity to remove them, but he was not informed when BIA discovered the remaining carcasses. *Id.* Thus, Appellant asserts, BIA “was more of a hindrance than a help,” and despite that he tried to comply with the Carcass Disposal NOV. *Id.*

In his answer brief, the Regional Director responds that these arguments were not made to him and should not be considered by the Board. Regional Director's Answer Brief at 12. Ordinarily, the Board will not consider for the first time on appeal matters that could have been, but were not, raised to the Regional Director. *See* 43 C.F.R. § 4.318; *Hopi Tribe v. Western Regional Director*, 58 IBIA 71, 81 (2013). Appellant offers no explanation why he did not raise these arguments earlier, for which reason we decline to consider them now. And even were we to consider these arguments, we would reject them. Absent a promise by BIA to do so, which Appellant fails to demonstrate, BIA had no duty to help Appellant locate or remove the carcasses, as carcass disposal was expressly the responsibility

⁹ Once BIA decides to cancel a permit, then written notice of the cancellation should be sent to the permittees “within five business days of that decision.” 25 C.F.R. § 166.705(c). We also note that Appellant does not allege that he demanded but did not receive a decision pursuant to 25 C.F.R. § 2.8 (appeal from inaction of BIA official).

¹⁰ Although the administrative record contains a map showing the location of the 18 carcasses discussed in the Carcass Disposal NOV, *see* AR Tab CR-M, it is unclear whether or not Appellant received that map. The Carcass Disposal NOV itself references an “attached map which identifies the location of the carcasses,” but the copy of the notice in the record does not include the attachment. AR Tab CR-O at 1 (unnumbered).

of Appellant under the permit. *See* AR Tab R-H at 4. Moreover, Appellant does not argue, or fails to provide evidence, that he made any request to BIA for assistance *before* the January 31, 2011, deadline specified in the Carcass Disposal NOV to remove the carcasses. That is the relevant timeframe in this case, as Appellant does not demonstrate that he requested and was granted an extension of the deadline. Appellant does not allege on appeal, as he did to the Regional Director, or provide any evidence, that the Superintendent extended his deadline to cure the violation. *See supra* at 141. Indeed, Appellant now concedes that “I may not have complied completely in this timeline as [the Regional Director] states” Notice of Appeal to Board.

The record supports BIA’s finding that Appellant did not respond at all to the Carcass Disposal NOV by the deadline, and on appeal Appellant identifies no contrary evidence. Appellant’s previous statements to BIA indicate that Appellant did not remove the carcasses within 10 days following the notice of violation because *Appellant* had decided that it was not necessary to do so. *See* First NOA and SOR at 1 (Appellant contended that the carcasses were frozen and posed no immediate danger); Third NOA and SOR at 3 (same).

Based on the foregoing, BIA was not required to consider Appellant’s actions subsequent to the January 31 deadline. To the extent that BIA in its discretion nonetheless considered Appellant’s subsequent efforts to remove the carcasses, the record supports the Regional Director’s finding that Appellant removed 8 out of the 18 carcasses referred to in the Carcass Disposal NOV, all on February 15, 2011. Decision at 2; AR Tab CR-Y; AR Tab CR-FF at 3. Appellant does not allege that he made any subsequent efforts to remove the remaining carcasses or that the Regional Director was incorrect in finding that he never removed all of the carcasses—and thus never fully cured the violation. Accordingly, we find no basis to conclude that the Decision is unreasonable or is not supported by law or substantial evidence.

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 affirms the Regional Director’s September 12, 2011, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge