



## INTERIOR BOARD OF INDIAN APPEALS

Jarrett "Shane" Johnson v. Great Plains Regional Director, Bureau of Indian Affairs

61 IBIA 92 (07/10/2015)



# 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

JARRETT "SHANE" JOHNSON,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 13-074
GREAT PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS	)	
Appellee.	)	July 10, 2015

Jarrett "Shane" Johnson (Appellant) appealed to the Board of Indian Appeals (Board) from a January 31, 2013, decision (Decision) of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Decision upheld an August 14, 2012, decision by BIA's Fort Berthold Agency Superintendent (Superintendent) to rescind a 5-year grazing permit issued to Appellant on July 26, 2012, for Range Unit (RU) 103 on the Fort Berthold Indian Reservation, North Dakota. The Regional Director reasoned that, when the permit was issued, there was no tribal allocation of grazing privileges for RU 103 by the Three Affiliated Tribes of the Fort Berthold Reservation (Tribe), and thus BIA acted without authority in issuing the permit to Appellant.

On appeal, Appellant contends that the permit was validly issued, the Superintendent lacked authority to rescind the permit once issued, and the Regional Director's decision was untimely. We reject Appellant's arguments. Allocation of grazing privileges is an intra-tribal matter, and BIA's role is ministerial in issuing grazing permits pursuant to a tribe's allocation decisions. In the absence of a tribal allocation of RU 103 to Appellant, BIA lacked authority to issue the permit, and, accordingly, the Regional Director was correct to affirm the Superintendent's decision to rescind the permit upon discovering the error. Therefore, we affirm the Decision, which does not prejudice Appellant's ability to receive a grazing permit for RU 103 upon issuance of a favorable and final tribal allocation award.

## Regulatory Framework

BIA issues permits for grazing on “range units,” which are consolidated tracts of Indian trust or restricted land that BIA creates after consultation with the Indian landowners. *See* 25 C.F.R. §§ 166.4 (definition of Range Unit), 166.302. Generally, anyone seeking to graze livestock on Indian trust or restricted land must obtain a permit. *See id.* § 166.200. Grazing permits may be issued through processes of tribal allocation, negotiation, or competitive bidding. *See id.* §§ 166.217-.221. Applicable to this case, an Indian tribe may develop an allocation procedure to apportion grazing privileges on range units to tribal members without competition. *See id.* §§ 166.4 (definition of Allocation), 166.218(a) & (b) (acquiring a permit through allocation). BIA implements a tribe’s allocation procedure, which may include eligibility requirements for allocations, by authorizing the allocated grazing privileges through granting or approving permits. *See id.* § 166.218(c). “BIA does not second-guess a tribe’s [allocation] decisions, but processes the decisions in a ministerial capacity.” *Claymore v. Great Plains Regional Director*, 56 IBIA 246, 247 (2013).

The allocation of grazing privileges on the Fort Berthold Reservation is governed by Tribal law. The Tribe has an allocation procedure for awarding grazing privileges, including criteria and an order of preference to apply where two or more eligible applicants request an allocation of the same range unit. *See* Tribal Resolution No. 11-129-VJB, Dec. 14, 2011, § II (Resolution) (Administrative Record (AR) Tab 14). The Resolution provides that allocation decisions are made by the Tribal Business Council (Business Council), and “[a]ppeals of an adverse decision made by the . . . Business Council concerning the denial of an allocation . . . may be made by filing a notice of appeal with the Fort Berthold Tribal District Court” (Tribal Court). *Id.* § V.

## Background

Appellant requested allocation of grazing privileges for RU 103 for the 5-year permit term of December 2011 through November 2016. *See* Grazing Permit, July 26, 2012, at 1 (AR Tab 10).<sup>1</sup> Appellant was the prior permittee, had met all contractual obligations during the previous permit period, and held a possessory interest in fee land within the unit. He thus met certain criteria for receiving a preferential allocation over any other eligible applicants. *See Johnson v. Three Affiliated Tribes*, CIV2012-0279, at 2 (Fort Berthold Dist. Ct. July 25, 2012) (Tribal Court Order) (AR Tab 11). On April 2, 2012,

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<sup>1</sup> Although the permit was issued after its 5-year term had begun, a permit may be made effective on a past date by agreement. *See* 25 C.F.R. § 166.211.

the Business Council instead allocated the grazing privileges to its Chairman, Tex Hall (Hall). Tribal Business Council Meeting Minutes at 2 (AR Tab 12).

Appellant appealed the Business Council's decision to the Tribal Court. Appellant contended that, pursuant to the selection criteria, the Business Council was required to allocate RU 103 to him. Tribal Court Order at 1-2. On July 25, 2012, the Tribal Court decreed that the Business Council had abused its discretion in awarding RU 103 to Hall by applying a criterion not contained in the Resolution. *Id.* at 3-4. The Tribal Court remanded the matter to the Business Council to reconsider its decision. *Id.* at 4.

The following day, July 26, 2012, the Superintendent issued the permit to Appellant for RU 103, apparently based on his understanding of the Tribal Court Order. *See* Grazing Permit. Days later, on August 14, 2012, the Superintendent issued his decision rescinding the permit.<sup>2</sup> Superintendent's Decision at 1 (AR Tab 9). The Superintendent explained that BIA "erred in the approval of this permit," because a grazing permit "should not [be] issued until the . . . Business Council makes a *final* determination of the allocation." *Id.* (emphasis added).

Appellant appealed the Superintendent's rescission to the Regional Director. Notice of Appeal, Aug. 22, 2012 (AR Tab 8). Appellant contended that he was entitled to allocation of grazing privileges for RU 103 as a matter of Tribal law, enclosed the Tribal Court Order and the Resolution, and requested that BIA "allow the permit to stand." Statement of Reasons, received Oct. 16, 2012 (AR Tab 6). On December 6, 2012, the Regional Director "confirm[ed]" for Appellant that the appeal was suspended for 90 days, to "allow the . . . Business Council to reconsider [its] decision on the Allocation of Range Unit 103." Letter from Acting Regional Director to Appellant, Dec. 6, 2012 (AR Tab 4). On that same day, the Regional Director notified Hall, as Chairman of the Business Council, that Appellant had "agreed" to suspend the appeal, and the Regional Director requested that the Business Council make an allocation decision for RU 103 within 60 days. Letter from Acting Regional Director to Chairman Hall, Dec. 6, 2012 (AR Tab 4).

On December 18, 2012, the Business Council reaffirmed the allocation of RU 103 to Hall. Tribal Business Council Memorandum, Dec. 19, 2012 (AR Tab 3). Appellant appealed that allocation decision to the Tribal Court on December 27, 2012. Appellant's

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<sup>2</sup> Appellant had paid the grazing rental and administrative fee, which the Superintendent advised would be refunded. *See* Superintendent's Decision at 1.

Opening Brief to the Board, May 2, 2013 (Opening Br.), Exhibit (Ex.) 10 (Appeal Brief to the Tribal Court).<sup>3</sup>

On January 31, 2013, the Regional Director issued his Decision affirming the Superintendent's rescission of the permit. The Regional Director stated because the Business Council had issued its decision after remand, "[t]he reason for the temporary suspension of [Appellant's] appeal no longer exists." Decision at 1 (AR Tab 2). As grounds for affirming the Superintendent's rescission, the Regional Director found that the Superintendent's issuance of the permit to Appellant was "premature," because the July 25, 2012, Tribal Court Order had remanded the original allocation determination back to the Business Council for a new decision. *Id.* The Regional Director concluded that, because the permit was issued "without any authority from the . . . Business Council," the Superintendent was correct to rescind it. *Id.* at 2.

During the time period for appealing the Regional Director's decision, on March 5, 2013, the Tribal Court issued its decision on Appellant's appeal from the second allocation decision. *Johnson v. Three Affiliated Tribes*, CIV2012-0279 (Fort Berthold Dist. Ct. Mar. 5, 2013) (Order After Remand) (AR Tab 5). The Tribal Court decreed that the Business Council had again abused its discretion in allocating RU 103 to Hall, and remanded the matter to the Business Council for reconsideration.<sup>4</sup> *Id.* at 1.

The following day, Appellant appealed the Regional Director's decision to the Board. Notice of Appeal to the Board, Mar. 6, 2013. Appellant filed an opening brief and the Regional Director filed an answer brief.

### Discussion

An appellant bears the burden of proving error in the challenged BIA decision, and we review the decision to determine whether it comports with the law, whether it is supported by substantial evidence, and whether it is arbitrary or capricious. *Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 140 (2007). We review questions of law *de novo*. *Id.*

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<sup>3</sup> Appellant contends that he served a copy of the appeal on the Regional Director, which the Regional Director does not appear to dispute, and the record shows that the Fort Berthold Agency received a copy on December 27, 2012. *See* Opening Br., Ex. 10 at 1.

<sup>4</sup> It is unclear whether the Business Council has issued another allocation decision for RU 103.

Appellant fails to demonstrate that BIA issued the permit to him in accordance with the tribal allocation procedure or that BIA lacked authority to rescind the permit. We therefore affirm the Regional Director's decision.

Appellant first argues that the permit was validly issued. He argues that, because neither Hall nor the Business Council appealed the July 25, 2012, Tribal Court Order, the order "became final, as a matter of law, [and] the [Business] Council was estopped from allocating [RU 103] to Chairman Hall." Opening Br. at 7. Even if that argument had merit, it would be beside the point. Appellant admits that "[f]ollowing the Tribal Court's July 25, 2012 Order *neither* [Appellant] nor Chairman Hall had the allocation for [RU 103]." *Id.* (emphasis added). Because there was no tribal allocation of grazing privileges to Appellant, BIA lacked authority to issue the permit to Appellant through the tribal allocation procedure.<sup>5</sup> See *Claymore*, 56 IBIA at 253.

Appellant next argues that, once the permit was issued, the Superintendent lacked authority to rescind it. Opening Br. at 8. The permit was effective immediately upon issuance. See 25 C.F.R. §§ 166.210-211. But that did not vest in Appellant an absolute right or entitlement to the permit. The Superintendent's decision to issue the permit would not have become final for the Department of the Interior until, at a minimum, the 30-day time limit for filing appeals had expired. See *id.* §§ 2.6-7. The permit was issued on July 26, 2012, and was rescinded on August 14, 2012, and thus it never constituted a final Departmental decision. Appellant cites no authority, and we are aware of none, for the proposition that the Superintendent could not rescind the permit under the circumstances.

In remaining part, Appellant's arguments concerning the timing of the Regional Director's decision are equally unavailing. Appellant argues both that the Regional Director's decision was late pursuant to 25 C.F.R. § 2.19, and that the Decision was premature because it was issued during the pendency of Appellant's latest appeal to the Tribal Court. Opening Br. at 8-9. As relevant to Appellant's argument, § 2.19 provides that an "area director" (now regional director) will issue a decision "within 60 days after all time for pleadings (including all extensions granted) has expired." 25 C.F.R. § 2.19. Even if the Regional Director did not meet that requirement, the issue is now moot because the Regional Director has issued the Decision, and Appellant's argument does not provide grounds for setting aside the Decision. In addition, the Tribal Court proceedings held after the Superintendent's decision to rescind the permit are irrelevant to our review of the

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<sup>5</sup> Appellant also appears to assert that the permit was issued through negotiation instead of tribal allocation. See Opening Br. at 7-8. Appellant fails to identify any evidence to support the assertion, which is denied by the Regional Director. See Answer Br., June 3, 2013, at 4 n.3. Thus, we consider it no more.

Decision being appealed. The Regional Director affirmed the rescission on the ground that the permit was issued without a tribal allocation decision.<sup>6</sup> *See* Decision at 2. The subsequent proceedings in the Tribal Court, and the actions of the Business Council, might ultimately result in Appellant receiving the allocation of RU 103, but even so, that would have no bearing on the validity of the permit at the time the Superintendent rescinded it.

### 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 affirms the Regional Director's January 31, 2013, decision.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Robert E. Hall  
Administrative Judge

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<sup>6</sup> It is unclear why the Regional Director chose to suspend or stay the administrative appeal pending the Business Council's decision after remand from the Tribal Court. To the extent that Appellant objected to the stay, we agree that the stay was unnecessary because the Business Council's decision after remand was irrelevant to the issue of whether the permit was properly rescinded. Instead, it would appear that the Regional Director should have proceeded to affirm the rescission.