



INTERIOR BOARD OF INDIAN APPEALS

John Benally v. Hopi Tribe and Bureau of Indian Affairs

63 IBIA 170 (06/23/2016)



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

JOHN BENALLY,)	Order Docketing and Dismissing
Appellant,)	Appeal
)	
v.)	
)	Docket No. IBIA 16-062
HOPI TRIBE and BUREAU OF)	
INDIAN AFFAIRS,)	
Appellees.)	June 23, 2016

On April 11, 2016, the Board of Indian Appeals (Board) received a notice of appeal from John Benally (Appellant).¹ Appellant is a Navajo Indian who grazes livestock on the Hopi Partitioned Lands (HPL), is a non-signer to “accommodation agreements” for grazing on the HPL, and has no grazing permit. On August 18, 2015, the Hopi Tribe issued a notice of intent, effective for 12 months, to impound (and if not claimed, then sell) Appellant’s unpermitted livestock found on the HPL under Hopi Ordinance #43. Appellant asserts that on April 5, 2016, his livestock were impounded on orders of the Hopi Tribe, the Bureau of Indian Affairs’ (BIA) Hopi Agency Superintendent (Superintendent), *or* BIA’s Western Regional Director (Regional Director), and that he is under threat of future impoundments.² Appellant seeks review of a purported BIA decision to impound his livestock and prevention of any further impoundment. The Board gave Appellant an opportunity to show that he had appealed from a decision of the Regional Director that—unlike a decision by the Hopi Tribe or the Superintendent—is subject to Board review. But as the Hopi Tribe argues and evidence submitted by Appellant confirms, the impoundment was an action or decision of the Hopi Tribe and not the Regional Director. Because Appellant does not show that he appeals from action or a decision by the Regional Director, we dismiss this appeal for lack of jurisdiction.

¹ Appellant subsequently retained counsel. Based on the nature of Appellant’s allegations, the Board has amended the case caption to add the Hopi Tribe as an Appellee.

² Appellant apparently redeemed and returned his livestock to the HPL. *See* Hopi Tribe’s Response to Order for Information, May 18, 2016, at 2 (unnumbered) (Hopi Tribe’s Response). On June 14, 2016, the Board received a copy of correspondence from Appellant’s attorney to the Hopi Tribe, stating that Appellant’s livestock were again impounded on June 7, 2016, and asking that “the Hopi Tribe refrain from selling his livestock . . . so that the Hopi Tribe, Navajo Nation and [Appellant] can address this issue.” Letter from Smith to Pennington, June 8, 2016.

The Board's jurisdiction is limited to the authority vested in it by regulation or otherwise delegated to it by the Secretary of the Interior (Secretary). *See* 43 C.F.R. § 4.1(b)(1); *State of California v. National Indian Gaming Commission*, 44 IBIA 22, 22 (2006). The Board's jurisdiction under 25 C.F.R. Part 2 is limited to reviewing specific decisions or actions taken by BIA regional directors or officials in the Office of the Assistant Secretary - Indian Affairs. *See* 25 C.F.R. § 2.4(e) (describing the Board's jurisdiction under 25 C.F.R. Part 2).³ With exceptions not relevant here, the Board lacks jurisdiction to review a decision or action by a BIA superintendent. Instead, an appellant must first exhaust his appeal rights before the appropriate regional director. *See id.*; 43 C.F.R. § 4.331(a); *Garcia v. Eastern Nevada Agency Superintendent*, 58 IBIA 42, 43 (2013). Nor does the Board have jurisdiction to review actions or decisions of an Indian tribe or its agencies. *See Muñoz v. Arctic Slope Regional Corporation*, 51 IBIA 209, 210 (2010) (citing *Hardy v. Midwest Regional Director*, 46 IBIA 47, 58 & n.13 (2007); *Rousseau v. Acting Aberdeen Area Director*, 25 IBIA 137 n.1 (1994)).

Because it was not clear from Appellant's notice of appeal whether he was appealing from an action or decision that the Board has been delegated authority to review, the Board ordered Appellant to specifically identify the BIA administrative action or decision that he sought to appeal. Pre-Docketing Notice and Order for Information from Appellant, Apr. 12, 2016. The Board invited BIA and other interested parties to respond to Appellant's submission, and gave Appellant an opportunity to reply.

In his response to the Board's order, Appellant stated that he was appealing from (1) the Superintendent's decision to approve Hopi Ordinance #43, which he asserted was "the basis" for the impoundment; (2) a BIA decision "to not provide for a grazing management system that recognizes [his] rights to have and graze animals"; and (3) the impoundment of Appellant's livestock under orders of the Hopi Office of Range Management, the Superintendent, *or* the Regional Director. Appellant's Response to Order for Information, May 3, 2016, at 1 (Appellant's Response). Appellant variously asserts that the impoundment was carried out by "Hopi Rangers," Appellant's Affidavit, Apr. 9, 2016, at 1, and/or "federal agents," Appellant's Response at 1. Enclosed with Appellant's May 3, 2016, response is a copy of a "Notice of Appeal" dated the same day and addressed to the Regional Director, in which Appellant stated that he was appealing a decision by the Superintendent to enforce Hopi Ordinance #43. Appellant's notice asked the Regional Director to "*make a decision* to prohibit the impoundment and confiscation of [his] livestock by the Hopi BIA Agency pending [his] appeal and until such time as a proper permitting system is in place." Notice of Appeal to Regional Director, May 3, 2016, at 1 (emphasis added). The notice further stated that, if the Regional Director did not issue such a

³ Section 2.4(e) refers to decisions by BIA area directors, who are now titled regional directors.

decision, Appellant would then file an appeal based on inaction under 25 C.F.R. § 2.8 (Appeal from inaction of official). *Id.* at 2.

The Hopi Tribe responded to Appellant's May 3, 2013, submission and moved to dismiss the present appeal, arguing that Hopi Ordinance #43 was approved by the Superintendent on March 23, 1989, and by the Acting Area Director (now Regional Director) on June 14, 1989, that any appeal from BIA's approval is untimely, and that Appellant failed to identify any other final BIA action or decision from which he could appeal to the Board. Hopi Tribe's Response at 1 & Exhibit A (BIA approvals of Hopi Ordinance #43). The Hopi Tribe notes that grazing in the HPL area is governed by overlapping tribal and BIA regulations—Hopi Ordinance #43 and 25 C.F.R. Part 168—each requiring grazing permits and authorizing impoundment for trespass, but providing different procedures for seeking redress of an allegedly improper impoundment. *Id.* at 1-2 (unnumbered). The Hopi Tribe argues, correctly, that impoundment decisions issued by BIA under Part 168 may be appealed in accordance with the 25 C.F.R. Part 2 appeal procedures. *See id.* at 2 (unnumbered) (citing 25 C.F.R. § 168.18 (“Appeals from decisions issued under this part will be in accordance with procedures in 25 CFR part 2.”)). In contrast, the Hopi Tribe argues, “[a]fter an impoundment by the Hopi Office of Range Management, Hopi Ordinance #43 . . . provides for judicial review of the action in *Hopi Tribal Court*.” *Id.* (emphasis added). The Hopi Tribe insists that its own Office of Range Management impounded Appellant's livestock on April 5, 2016, under Hopi Ordinance #43, and “[t]here was no involvement by BIA in the impoundment. The BIA advised [Appellant] by letter of April 18, 2016 that it did not impound and confiscate his livestock.” *Id.* Therefore, the Hopi Tribe argues, the Board should dismiss this appeal for lack of jurisdiction. *Id.*

Appellant did not timely file a reply with the Board.⁴ The Board did receive a copy of correspondence dated May 19, 2016, from Appellant to Secretary of the Interior

⁴ Even were we to consider Appellant's belated reply to the Hopi Tribe, we would nonetheless dismiss this appeal for the reasons stated *infra*. Although Appellant initially suggested that he was seeking to appeal from BIA's approval of Hopi Ordinance #43, he contends in his reply brief that the version of the ordinance at issue was amended in 2014 and was *not*, apparently, approved by BIA. Appellant's Response to Hopi Tribe, June 16, 2016, at 2-3 (Appellant's Reply). Appellant also posits that cross-deputized officers executed the impoundment acting under the authority of both the Hopi Tribe and BIA. *Id.* at 4-5. Even if Appellant's theories are correct (which we do not decide), they would not show that the Regional Director has issued a decision that is reviewable by the Board. In particular, the jurisdiction of the Board is not dependent on the affiliation of the officers who conducted the challenged impoundment, because the Board would lack jurisdiction if the Superintendent had ordered BIA officers or cross-deputized officers to conduct the impoundment.

(Secretary), stating that Appellant is “appealing the Regional Director’s *inaction*” to the Board. Letter from Appellant to Secretary at 1 (emphasis added). Appellant refers to his May 3, 2016, request for a decision by the Regional Director. *See id.* To the extent that Appellant contends that the scope of the present appeal includes alleged inaction by the Regional Director under 25 C.F.R. § 2.8, we disagree. Appellant has not shown that a decision by the Regional Director is overdue or that he first complied with the requirements of § 2.8 for filing an appeal with the Board to compel issuance of decision by the Regional Director.

Appellant also enclosed with his correspondence to the Secretary a copy of the above-referenced April 18, 2016, letter from the Regional Director to Appellant, which confirms that “the [BIA] did not impound and confiscate [Appellant’s] livestock . . . [T]he [BIA] will defer this matter for discussion between [Appellant] and the Hopi Tribe.” Letter from Appellant to Secretary, Attachment A.

We conclude that Appellant has not demonstrated that he is timely appealing from a decision or action by the Regional Director, and we dismiss this appeal for lack of jurisdiction. The evidence before the Board confirms the Hopi Tribe’s position that the impoundment from which Appellant appealed was an action or decision of the Hopi Tribe and not the Regional Director. Further, to the extent that Appellant challenges the “grazing management system” under 25 C.F.R. Part 168, the Board does not have authority to review the validity of a duly promulgated Departmental regulation. *City of Bloomfield, Nebraska v. Acting Great Plains Regional Director*, 61 IBIA 296, 298 (2015).

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 docketed but dismisses this appeal for lack of jurisdiction.⁵

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

⁵ In light of the dismissal, the requests of several other Navajo Indians living on the HPL to intervene in Appellant’s appeal are moot.