



INTERIOR BOARD OF INDIAN APPEALS

Mary Jane Anderson v. Great Plains Regional Director, Bureau of Indian Affairs

52 IBIA 327 (12/10/2010)



United States Department of the Interior

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

MARY JANE ANDERSON,)	Order Dismissing Appeal in Part
Appellant,)	and Affirming Decision
)	
v.)	
)	Docket No. IBIA 09-092
GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	December 10, 2010

Mary Jane Anderson (Appellant) seeks review of an April 20, 2009, decision (Decision) of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director declined to intervene on behalf of Appellant in response to her complaint that the Cheyenne River Sioux Tribe (Tribe) violated tribal law in failing to allocate a tribal grazing permit preference to Appellant for Range Unit 275 (RU #275). The Tribe allocated the grazing permit preference to another tribal member, Thomas Ducheneaux, after which the BIA Cheyenne River Agency Superintendent (Superintendent) issued the permit to Ducheneaux. Responding to Appellant’s complaint, the Regional Director concluded that the dispute involved an interpretation of tribal law, the Tribe has authority to interpret its own laws, BIA would not substitute its judgment for a decision by the Tribal Council, and the Cheyenne River Sioux Tribal Court (in which Appellant had filed an action) was the proper venue for resolving the dispute.

Appellant appealed to the Interior Board of Indian Appeals (Board), asking the Board to “review the actions taken by the Tribe under the [Tribe’s] Grazing Ordinance” and to “requir[e] the Tribal Council to follow the Ordinance [allocation] preference requirements, as established in [the Tribal] Ordinance.” Notice of Appeal at 3-4. The Board ordered Appellant to show cause why this appeal should not be summarily dismissed because to the extent it appeared that Appellant might be able to show injury, that injury appeared to be the result of tribal action (over which we lack jurisdiction), not that of BIA; or show cause why the Regional Director’s decision should not summarily be affirmed on the grounds that he properly concluded that this was a dispute to be resolved by the Tribe. In response, Appellant argues that she is separately seeking review of BIA’s “independent” wrongful action of issuing the grazing permit to Ducheneaux. *See* Appellant’s Response to

Order to Show Cause (Appellant's Response) at 8. Appellant contends that BIA has a trust responsibility to Appellant and a duty to enforce tribal law, and thus BIA was required to "disapprove" the grazing permit and return the matter to the Tribal Council "with direction to the Council to reallocate [the] permit[] in accordance with [tribal law]." *Id.* at 1.

We dismiss Appellant's challenge to BIA's issuance of the grazing permit to Ducheneaux because in order to appeal to the Board, an appellant must have a legally protected interest that was adversely affected by a BIA decision. Unless and until the Tribe allocated a permit preference to Appellant, she did not have a legally protected interest that was affected by BIA's issuance of the permit to Ducheneaux. BIA's issuance of the permit to Ducheneaux did no more than implement, as a ministerial matter, the Tribe's allocation decision. BIA's action was not itself an "allocation" decision, nor an approval of the Tribe's allocation decision, and thus it did not affect any right to a permit preference that the Appellant asserts she is entitled to as a matter of tribal law. Therefore, BIA's issuance of the permit to Ducheneaux did not adversely affect any legally protected interest held by Appellant, and she lacks standing to challenge that action by BIA.

On the other hand, to the extent that Appellant also characterizes her appeal as a separate challenge to BIA's refusal to intervene in the dispute and BIA's failure to comply with its alleged duty to enforce tribal law — i.e., BIA's failure to force the Tribe to allocate the permit preference to Appellant — Appellant's arguments fail as a matter of law. Thus, whether we review the merits of the Regional Director's decision not to intervene on Appellant's behalf against the Tribe, or view Appellant's arguments in the context of having to show causation and redressability as elements of standing, the result is the same. BIA does not have a duty to Appellant to "enforce" tribal grazing allocation preference laws against the tribal institutions charged with the application and enforcement of those laws, nor would BIA have jurisdiction over the Tribe to require it to allocate the grazing permit preference to Appellant. As the Regional Director correctly concluded, the disputed issue — whether as a matter of tribal law Appellant was entitled to receive the preference allocation from the Tribe for the permit for RU #275 — was one that was for a tribal forum to resolve, not BIA. It is for the Tribe, not BIA, to apply and enforce the Tribe's grazing allocation preference laws.

Background

I. Regulatory Framework for Tribally Allocated Grazing Permit Preferences

Grazing on Indian trust or restricted lands is administered through permits issued or approved by BIA for range units. *See* 25 C.F.R. §§ 166.200, 166.203, 166.206. These

“range units” are consolidated tracts of rangelands that BIA creates after consultation with the Indian landowners. *Id.* §§ 166.4, 166.302. With limited exceptions, anyone wishing to graze livestock on Indian trust or restricted land must first obtain a permit to do so. *See id.* § 166.200.

Indian tribes may develop allocation procedures to apportion grazing privileges to tribal members without competition, thereby giving the recipient a preference over other prospective permittees to receive a grazing permit for a particular range unit. *See id.* §§ 166.218(a) & (b) (acquiring a permit through allocation), 166.4 (definition of “allocation”). The permit preference gives the recipient tribal member a right, as against other prospective permittees, to accept (at the offered grazing rate and under the permit conditions), and to be issued, a grazing permit for the range unit to which the member has been granted an allocation. The allocation of grazing privileges on the Cheyenne River Reservation (Reservation) is governed by tribal law. The Tribe has developed allocation procedures and criteria for awarding grazing privileges to tribal members. The allocation procedures and criteria are detailed in the Tribe’s Grazing Ordinance No. 71.¹

BIA implements a tribe’s allocation decisions by issuing (for range units that include allotted lands) or approving (for range units that are entirely tribal or government lands) grazing permits, subject to certain regulatory provisions not relevant to this matter. *See id.* §§ 166.218(c), 166.400(b) & (c); *see also Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 135 (2007) (BIA implements a tribe’s allocation decisions).

II. Factual Background

Appellant identifies herself as a member of the Tribe who operates a ranch on the Reservation. According to Appellant, she and Ducheneaux jointly held the grazing permit for RU #275 for a period of 5 years. The permit expired on October 31, 2008, and before it expired, Appellant and Ducheneaux filed separate applications with the Tribe for reallocation of the grazing privilege for the subsequent 5-year term. The Tribal Council

¹ Appellant cites the Tribe’s authority under its Constitution to issue grazing permits for tribal land, with the approval of the Secretary. Appellant’s Response at 5 (citing, but not enclosing, Tribe’s Constitution, Art. VIII, § 3). Although not relevant to the outcome of this appeal, the cited provision appears to refer to range units consisting entirely of tribal lands, for which the Tribe itself actually issues the permit, which is then approved by BIA. *See* 25 C.F.R. § 166.217(a). The range unit involved in the present case consists of both tribal and allotted land, and thus the permit is issued by BIA. *See* Regional Director’s Answer Brief, Attachment (copy of grazing permit for RU #275).

allocated the grazing permit preference for RU #275 to Ducheneaux on October 30, 2008. The Superintendent then implemented the Tribe's decision by issuing a grazing permit to Ducheneaux on December 5, 2008. On April 3, 2009, the Superintendent wrote to Appellant and requested that she remove her bales of hay from RU #275.

The Superintendent's letter prompted several complaints from Appellant to the Regional Director, alleging that the Tribe had acted contrary to tribal law in failing to allocate to her the grazing permit preference for RU #275. *See* Notice of Appeal at 1-2 (discussing Appellant's letters of November 12, 2008; April 3, 2009; and, April 14, 2009). Appellant asked that BIA not take any action to acknowledge, enforce, or effectuate the terms of the grazing permit for RU #275. She also requested that BIA investigate the allocation process that had taken place on the Reservation. On April 14, 2009, Appellant apparently filed an appeal with the Regional Director from the Superintendent's issuance of the grazing permit to Ducheneaux.² On April 20, 2009, the Regional Director informed Appellant that the issues she presented in her letters involved an interpretation of tribal law, the Tribe has authority to interpret its own laws, BIA would not substitute its judgment for a decision by the Tribal Council, and the Cheyenne River Sioux Tribal Court was the proper venue for resolving the dispute.³

Appellant appealed the Regional Director's April 20, 2009, decision to the Board, contending that BIA wrongfully issued the grazing permit to Ducheneaux and failed to

² Because we conclude that we are able to resolve this appeal based on the briefs and exhibits filed in response to the Board's order to show cause, we have not ordered the record. Neither party submitted to the Board a copy of Appellant's April 14, 2009, appeal to the Regional Director.

³ Procedurally, there is some confusion over what issues are within the scope of the Decision. Appellant appealed the Superintendent's issuance of the grazing permit to Ducheneaux shortly before the Regional Director issued the Decision. The Decision does not mention Appellant's appeal and in his brief to the Board, the Regional Director suggests that his decision was intended only to respond to Appellant's earlier complaints, and not to her appeal. *See* Regional Director's Answer Brief at 3, n.3 (citing the Regional Director's letter of May 27, 2009). The Decision, however, unequivocally declined to intervene in the dispute over the permit, and the Regional Director has not suggested that Appellant's appeal from the issuance of the permit presents any discrete issues that he wishes to separately consider, or which would not be subsumed within our review of Appellant's appeal. We thus construe his Decision, in substance, as encompassing all of Appellant's complaints, including her challenge to the issuance of the permit to Ducheneaux.

meet its duty to ensure that the Tribal Council follow the criteria contained in the Tribe's Grazing Ordinance No. 71 when allocating grazing permit preferences.

After reviewing the notice of appeal, the Board, on its own motion, raised the issue of Appellant's standing to bring this appeal. In the alternative, the Board suggested that even if Appellant has standing, summary affirmance of the Regional Director's decision might be appropriate because the issues appeared to be ones properly addressed and resolved in a tribal forum (as the Regional Director had concluded). The Board issued an order for Appellant to show cause why her appeal should not be dismissed for lack of standing or why, in the alternative, the Regional Director's decision should not be summarily affirmed. Appellant filed a response to the show cause order and a reply brief. The Regional Director filed an answer brief in opposition to Appellant's response.

Discussion

I. Appellant Lacks Standing to Challenge BIA's Issuance of the Grazing Permit to Ducheneaux.

In order to bring an appeal to the Board, an individual must demonstrate that she has standing, and standing must be established with respect to each separate claim. *See* 25 C.F.R. § 2.2 (definitions of "Appellant" and "Interested Party"); 43 C.F.R. § 4.331 (Who may appeal); *see also Northern Cheyenne Livestock Ass'n v. Acting Rocky Mountain Regional Director*, 48 IBIA 131, 136 (2008); *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 19 (2008); *Skagit County v. Northwest Regional Director*, 43 IBIA 62, 70 (2006). More specifically, an appellant must establish that she was "adversely affected" (i.e., injured) by a BIA decision being appealed, and to be "adversely affected," within the meaning of the regulation, one must have a legally protected "interest" that was or allegedly was adversely affected by the challenged decision. *See* 25 C.F.R. § 2.2; 43 C.F.R. § 4.331; *Northern Cheyenne Livestock Ass'n*, 48 IBIA at 136. For an appellant to show that she was injured "by" the BIA decision, the alleged injury must be causally connected with or fairly traceable to the actions of BIA and not caused by the independent action of a third party. *See Skagit County*, 43 IBIA at 71 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Appellant describes the injury to her in this case, at least in part, as "the denial of her range unit grazing permit." Appellant's Response at 6. She attributes this "denial" of a permit to BIA's issuance of the permit to Ducheneaux. *Id.*; *see also id.* at 4 n.3 (BIA's action resulted in a "less[] qualified individual" receiving the permit). As relief, Appellant seeks to have the permit "vacated." *Id.* at 7; *see also* Notice of Appeal at 4.

But BIA did not “deny” a permit to Appellant. Instead, BIA simply implemented the Tribe’s permit preference decision by offering and issuing the permit to Ducheneaux in accordance with the Tribe’s decision. When BIA issued the permit to Ducheneaux, that action did not cause injury to any legally protected right or interest of Appellant in receiving a permit for RU #275 because the Tribe, not BIA, had apparently declined to allocate the permit preference to her. As Appellant concedes, the “the authority to allocate a permit is within the exclusive authority of the [Tribal] Council.” Appellant’s Response at 6. *See also Frank*, 46 IBIA at 144 (“grazing *allocations* are made under tribal law, and the Superintendent issues *permits* in accordance with decisions made by the Tribe”). Thus, the exclusive authority to create any legally protected right or interest in Appellant for being offered a permit by BIA lay in the Tribe. *See Hall v. Great Plains Regional Director*, 43 IBIA 39, 46 (2006) (“25 C.F.R. § 166.218(c) may allow a *tribe* to create a protectable interest in the recipient” of a permit preference (emphasis added)). And absent the exercise of that authority by the Tribe to award a permit preference to Appellant for RU #275, issuance of the permit by BIA did not adversely affect any legally protected interest of Appellant. Therefore, because Appellant had no legally protected interest affected by BIA’s issuance of the permit, we conclude that Appellant lacks standing to challenge BIA’s issuance of the permit to Ducheneaux and to seek to have the permit vacated.

Appellant has also failed to show that her alleged injury — the failure to receive the permit for RU #275 — is traceable to an action taken by BIA or is one that would be redressed by a favorable decision by the Board. Because the authority to allocate a preference lies exclusively with the Tribe, even if the Regional Director had vacated the permit issued to Ducheneaux, Appellant cannot show that the Tribal Council would then have allocated the permit preference to her. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 44-45 (1976) (speculation is insufficient to establish a basis for standing); *Skagit County*, 43 IBIA at 71 (citing *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1152 (9th Cir. 2000) (“the causal connection * * * cannot be too speculative, or rely on conjecture about the behavior of other parties”)). Thus, to the extent that Appellant characterizes BIA’s action in issuing the permit to Ducheneaux as the “denial” of a permit to her, that action is traceable to the Tribe’s independent decision to deny a permit preference to Appellant. Furthermore, an action by BIA, or this Board, “vacating” the issuance of the permit to Ducheneaux would not grant Appellant relief from the alleged injury because BIA would still be without authority, in the absence of a tribal allocation decision (or a competitive bidding process), to award a permit to Appellant or anyone else.

II. The Regional Director did not Err in Refusing to Intervene in the Allocation Dispute

In response to the Board's order to show cause, Appellant clarifies that she is separately seeking to challenge the Regional Director's refusal to intervene, on Appellant's behalf, to ensure that she receives the tribal preference for a permit for RU #275, to which she believes she is entitled under tribal law. We accept, for purposes of this claim, that Appellant has some legally protected interest under tribal law to have the Tribe's allocation law and procedures properly applied. But Appellant's arguments that BIA has a duty to her "to review Tribal Council decisions" and to "ensure [that] the Tribal Council is following its laws" fail as a matter of law. *See* Appellant's Reply to Order to Show Cause (Appellant's Reply) at 3-4; *see also* Notice of Appeal at 3. Thus, whether treated as a decision on the merits of the Regional Director's failure to intervene in the dispute on behalf of Appellant, or evaluated as a matter of the causation and redressability elements of standing, our legal conclusion is the same.⁴

As Appellant's briefs make clear, her request for relief ultimately remains centered upon the Tribal Council, but she argues that BIA has a duty to her to obtain that relief on her behalf by "enforcing" tribal law against the Tribe. Appellant argues that her alleged injury will be redressed "if the Tribal Council is required to follow the preference requirements in the Ordinance," Appellant's Reply at 4, and she insists that BIA is responsible for seeing that the Tribe does so, *see id.* at 5; Appellant's Response at 6-8; Notice of Appeal at 4. We disagree.

First, Appellant cites no authority for the proposition that BIA has a *trust* responsibility to her as a prospective permittee to enforce tribal law with respect to the Tribe's allocation of permit preferences or in the context of BIA's issuance of permits in a manner that implements the Tribe's permit preference decisions. We have previously

⁴ Although Appellant concedes, *see supra* at 332, that the Tribal Council has the "exclusive authority" to allocate a permit preference, Appellant also contends that BIA has the authority and responsibility to "enforce" tribal law against the Council and to "ensure" that the Council follows tribal law as interpreted by BIA. Thus, although Appellant purports to stop short of requiring a specific outcome, she contends that "if the Ordinance is followed, justice demands that the Council ultimately allocate the permit to Appellant." Appellant's Response at 7. Presumably, under Appellant's theory, BIA would be required to refuse to issue a new permit and to repeatedly return the matter to the Tribal Council until the Council "correctly" exercised its "exclusive authority" to allocate the preference to Appellant.

considered and rejected this contention. *See Frank*, 46 IBIA at 145 n.16; *see also Tafoya v. Acting Southwest Regional Director*, 46 IBIA 197, 203 (2008) (and cases cited therein). BIA has fiduciary responsibilities as trustee toward the Indian landowners, *see Tafoya*, 46 IBIA at 203, but that trust responsibility does not extend to prospective permittees, whether Indian or non-Indian.

Second, we reject Appellant's reliance on the grazing regulations in support of her contention that BIA has a duty to enforce tribal permit preference laws, on behalf of prospective permittees, against the tribal decision making entities. Appellant relies on 25 C.F.R. § 166.103(b)(1), which states that "[w]hile the tribe is primarily responsible for enforcing tribal laws" pertaining to Indian agricultural lands, BIA will "[a]ssist in the enforcement of tribal laws." As the language makes clear, however, BIA's commitment is to assist tribes in enforcing their laws. Nothing in the language suggests that BIA has a duty under § 166.103(b) to "enforce" a tribe's permit preference allocation law against the tribe and in contravention of the tribe's own interpretation and decision about which tribal member is entitled to the permit preference under tribal law.

To the contrary, the Board's precedent is clear that BIA's issuance of a permit to a tribal member to whom a tribe has allocated a preference (and who has accepted the terms of the permit), is a ministerial act. *See e.g., Frank*, 46 IBIA at 144 (citing *Ewing v. Rocky Mountain Regional Director*, 40 IBIA 176, 183 (2005)). The Board has construed BIA's regulations to require BIA to implement a tribe's allocation *decisions*, *see Frank*, 46 IBIA at 135, and not to independently apply or "enforce" tribal law separate and apart from — and, in the present case as urged by Appellant, in contravention of — those tribal decisions. In *Frank*, we held that BIA "need not examine the particular process by which [a] Tribe determines eligibility for grazing allocations," *id.* at 143, and that holding applies equally in the present case. As we noted in *Frank*, BIA's responsibility in issuing grazing permits is threefold: to ensure that issuance of the permit is in the best interests of the landowner; to implement the Tribe's allocation decisions; and to record the permit in BIA's records. *Id.* at 144. We have also stated that "[t]he substantive issue of whether [a prospective permittee] should be awarded [a] grazing allocation [is a] matter[] of tribal law which should be resolved within the Tribe" and not by BIA. *Ewing*, 40 IBIA at 183.

Third, it is well-established that neither the Board nor BIA has jurisdiction over the Tribal Council. *See Frank*, 46 IBIA at 144 ("As a general rule, neither the Board nor BIA has authority to order the allocation of grazing privileges in a manner inconsistent with the expressed wishes of the Tribe."); *Hunt v. Aberdeen Area Director*, 27 IBIA 173, 179 (1995) (the Board "does not have authority to review the actions of duly constituted tribal governing bodies") (citations omitted).

In summary, Appellant’s argument — that the Board and BIA have oversight authority to review the Tribe’s permit preference allocation actions, to oversee Tribal Council decisions, and to “require” the Tribe to carry out tribal law as interpreted by BIA — is contrary to Board precedent and contrary to Federal law and policy. Nothing in the grazing regulations, or in the Tribe’s laws relied upon by Appellant, requires a different result.⁵

Finally, we note that only after this appeal was filed did Appellant apparently exhaust any tribal remedies that were available to her in seeking to challenge the Tribal Council’s allocation decision.⁶ Considering how Appellant’s legal argument with respect to this claim has been presented on appeal — that BIA has a separate and independent duty to enforce tribal law, even contrary to the Tribe’s own interpretation and application — we have addressed Appellant’s merits arguments rather than deciding whether her failure to exhaust tribal remedies *before* seeking relief from the Regional Director would otherwise be fatal to this appeal.⁷

Conclusion

We dismiss Appellant’s challenge to the Regional Director’s April 20, 2009, decision, to the extent it seeks to challenge the Superintendent’s issuance of the permit to Ducheneaux and the Regional Director’s failure to vacate that permit, on the ground that Appellant lacks standing to assert that claim or to seek that relief. We affirm the Regional

⁵ As noted *supra* at 329 n. 1, Appellant cites a provision in the Tribe’s Constitution that is applicable to permits issued by the Tribe and approved by BIA, which does not appear to apply to the permit issued for RU #275. But even if a provision in tribal law recognizes that BIA must either issue or “approve” grazing permits for range units that include allotted lands, such as RU #275, BIA’s approval of a permit does not constitute approval of the Tribe’s underlying permit preference allocation decision that BIA is implementing when it issues the permit.

⁶ Appellant did not obtain relief from the tribal court. Appellant’s Reply at 6.

⁷ Ordinarily, issues governed by tribal law must be determined in the first, if not the only, instance by the Tribe itself absent a compelling Federal reason to do otherwise. *Peltier v. Great Plains Regional Director*, 46 IBIA 16, 21 (2007); *see also Chris Reeves v. Great Plains Regional Director*, 49 IBIA 126, 127-28 (2009) (noting that even absent other procedural issues, a challenge to the Tribe’s allocation and award of grazing permits must be dismissed for failure to exhaust tribal remedies).

Director's decision declining to intervene in the allocation dispute and declining to "enforce" tribal law against the Tribal Council because Appellant's claims that BIA had a duty to intervene and to provide her with relief fail as a matter of law.

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 dismisses this appeal in part and affirms the Regional Director's decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge