



INTERIOR BOARD OF INDIAN APPEALS

Chuck and Jennifer Jacobs v. Great Plains Regional Director, Bureau of Indian Affairs

43 IBIA 249 (08/23/2006)

Reconsideration denied:

43 IBIA 272



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

CHUCK and JENNIFER JACOBS,	:	Order Dismissing Appeal
Appellants,	:	
	:	
v.	:	
	:	Docket No. IBIA 05-9-A
GREAT PLAINS REGIONAL	:	
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	August 23, 2006

Chuck and Jennifer Jacobs (Appellants) seek review of a September 3, 2004 decision of the Great Plains Regional Director, Bureau of Indian Affairs (Regional Director; BIA). In that decision, the Regional Director affirmed the Superintendent’s approval of an assignment of the grazing permit for Range Unit #510, on the Oglala Sioux Tribe’s (Tribe) Pine Ridge Indian Reservation (Reservation) in South Dakota, from the Estate of Charles H. Merrill, III, to Mr. Chancy Wilson (Wilson). For the reasons stated below, the Interior Board of Indian Appeals (Board) dismisses this appeal for lack of jurisdiction.

Regulatory Framework

With limited exceptions, anyone wishing to graze livestock on Indian trust or restricted land must first obtain a permit to do so. Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director, 41 IBIA 308 (2005) (citing 25 C.F.R. § 166.200). Grazing is administered through permits on “range units,” consolidated tracts of Indian rangelands that BIA creates after consultation with the Indian landowners. 25 C.F.R. § 166.200. BIA grants permits for range units, unless they consist solely of tribal lands. BIA grants the permit but BIA must approve it. Id. § 166.217(a).

Indian tribes may develop allocation procedures to apportion grazing privileges, including the number and kind of livestock to be grazed, on range units to tribal members without competition. 25 C.F.R. §§ 166.4, 166.218(a) & (b). The tribal allocation procedure gives tribal member recipients a preference to obtain grazing permits without having to engage in competition against other ranchers. Hall v. Great Plains Regional

Director, 43 IBIA 39, 40 (2006). BIA implements a tribe's allocation procedures by authorizing the allocated grazing privileges through granting or approving grazing permits. See 25 C.F.R. § 166.218(c).

The Tribe has enacted a grazing ordinance that governs grazing on the Reservation. See Oglala Sioux Tribe (OST) Ordinance No. 95-05. 1/ Under the grazing ordinance, the Tribal Allocation Committee (Allocation Committee) determines whether a potential permittee is eligible for allocation of grazing privileges for a particular range unit. Id. §§ 95-05(c), 95-05.3. 2/ If the Allocation Committee determines during the course of a permit period that a permittee is no longer eligible for grazing privileges, the range unit "will become available for allocation applications." Id. § 95-05.3(f)(2). In that situation, the Allocation Committee may revoke its allocation of grazing privileges and re-allocate grazing privileges to another eligible tribal member. Id. § 95-05.21. The Allocation Committee may also recommend that BIA cancel the permit and issue a new permit to a tribal member who is eligible. Id.

Relevant to this appeal, the Tribe's grazing ordinances also include an "estates" clause. That clause provides:

In the event of the death of an Oglala Sioux Tribal Member who has been previously declared eligible for allocation privileges the estate of the deceased member shall be eligible to continue in possession of the allocated grazing privileges for the remainder of the contract period or until such time as the estate is settled, whichever first occurs, provided that the estate continues to meet the eligibility requirements of this Ordinance. In the event the estate is settled prior to the end of the contract period the range unit shall be made available for allocation purposes. In the event an estate is not settled by the end of a contract period the allocation privilege shall be terminated and the range unit made available for allocation privileges.

Id. § 95-05(l).

1/ The grazing ordinance has been amended a number of times — twice in 1995 (OST Ordinance Nos. 95-06 and 95-09), once in 2000 (OST Ordinance No. 00-15), and twice in 2001 (OST Ordinance Nos. 01-21 and 01-32).

2/ The grazing ordinance establishes specific requirements that a potential recipient of an allocation of grazing privileges must satisfy in order to be deemed eligible. Id. § 95-05.3(c), (d) & (e).

Factual Background

This case involves a grazing permit, originally held by Charles Merrill, III, a member of the Tribe, for Range Unit #510 for the five-year period beginning on November 1, 2000 and ending on October 31, 2005. In 2002, Mr. Merrill died and the permit became part of the estate, administered by his son, Charles Merrill, IV (Merrill), as executor. On January 20, 2004, on behalf of the estate, Merrill completed a BIA “Assignment of Grazing Permit” form to assign the grazing permit to Wilson, a member of the Tribe, for the remaining term of the permit — from January 20, 2004 through October 31, 2005. ^{3/}

The minutes of an Allocation Committee meeting, dated February 26, 2004, indicate that the Allocation Committee had received three applications for allocation privileges on Range Unit #510 for the 2004-2005 grazing season, including an application from Appellants and an application from Wilson. ^{4/} The record does not reflect any event that precipitated the submission of these applications to the Allocation Committee. According to the minutes, at that meeting the Allocation Committee voted to not make any decision regarding allocation of the unit until the Committee received a statement from Merrill “releasing the unit.”

The minutes of a second Allocation Committee meeting, held on March 9, 2004, indicate that the Allocation Committee, by a vote of 4 to 3, declined to “acknowledge” the assignment of the permit to Wilson. The minutes also reflect, however, that the Allocation Committee unanimously voted to “declare all applicants eligible.” The minutes indicate that later in the meeting, the Allocation Committee voted 4 to 3 to deny a motion approving allocation of grazing privileges on Range Unit #510 to Wilson, and to grant a motion approving allocation of grazing privileges on the unit to Appellants.

In letters dated May 6, 2004, and May 17, 2004, the Superintendent notified the President of the Tribe and Appellants, respectively, that BIA had approved the assignment of the grazing permit for Range Unit #510 from the Merrill estate to Wilson. The Superintendent stated that approval of the assignment was appropriate because Merrill, as executor of the estate, requested that the permit be assigned to Wilson; the Allocation Committee had found Wilson to be eligible for an allocation of grazing privileges; and the

^{3/} Assignment of a grazing permit is defined as “an agreement between a permittee and an assignee, whereby the assignee acquires all of the permittee’s rights, and assumes all of the permittee’s obligations under a permit.” 25 C.F.R. § 166.4.

^{4/} The third application was from Karen Twiss.

Solicitor's Office had advised BIA that there was no legal impediment to an executor of an estate conducting business "just as a regular permittee." May 6, 2004 letter from Superintendent to Tribe at 2; May 17, 2004 letter from Superintendent to Appellant at 1.

Appellants appealed the Superintendent's decision, arguing that the assignment "was made in direct conflict to the actions taken by the Allocation Committee on February 26, 2004 and March 9, 2004." Notice of Appeal of Superintendent's Decision at 2. Appellants argued that Merrill had voluntarily forfeited the estate's allocation of grazing privileges on Range Unit #510 ^{5/}, and that the Allocation Committee had accepted his forfeiture and properly re-allocated grazing privileges on that unit to Appellants for the remainder of the permit period. *Id.* Appellants also argued that the assignment was improper under the Tribe's grazing ordinance because the estates clause does not authorize an estate to assign a permit to a third party. Appellants further contended that the estates clause allows an estate to retain possession of a grazing permit only if it continues to meet certain eligibility requirements and that, here, the estate was no longer eligible for allocation of grazing privileges because it was not in compliance with the livestock terms of the permit.

On September 3, 2004, the Regional Director issued the decision now on appeal. The Regional Director rejected Appellants' arguments that the assignment was unlawful under the Tribe's grazing ordinance. The Regional Director first determined that, in accordance with the estates clause, because the Merrill estate was still pending and because the estate was still eligible to possess grazing privileges, "there was no reason for Range Unit 510 to be canceled for a violation of the permit." Regional Director's Decision at 2. Second, the Regional Director determined that there was no evidence that Merrill had released or forfeited Range Unit #510, and that, in fact, the assignment document "express[ed] [his] desire to transfer the range unit to Chancy Wilson." *Id.* Third, the Regional Director determined that the Allocation Committee's authority extends to determining the eligibility of applicants for allocation of grazing privileges and making recommendations for allocation, but does not include the authority to issue or cancel grazing permits. As such, the Regional Director concluded that because the minutes from the Allocation Committee's March 9, 2004 meeting reflect that Wilson was declared to be eligible for the allocation of grazing privileges, the Superintendent's approval of the assignment to Wilson "without the Allocation Committee's recommendation is within the Superintendent's discretionary authority." *Id.*

^{5/} Appellants stated that at the February 26, 2004 Allocation Committee meeting, Merrill "opted to forfeit the estate's possession of R.U. #510" because the estate could not meet the permit's stocking requirements for the unit or afford the 2004 lease rate. *Id.* at 4.

Appellants appealed the Regional Director's decision to the Board. Appellants, BIA, and the Tribe filed briefs.

Discussion

In an order issued on July 6, 2006, the Board stated that it appeared that Appellants' claim was moot "because the grazing permit at issue expired by its own terms on October 31, 2005 and the Board cannot order the relief requested by Appellants." July 6, 2006 Order at 2. In response, Appellants contend that all grazing permits for the 2000-2005 permit period were extended to October 31, 2006. No party disputes this contention. Therefore, we conclude that this appeal is not moot.

On the merits, Appellants advance the same arguments on appeal before the Board that they made in their appeal of the Superintendent's May 17, 2004 decision. Appellants argue that the Tribe's grazing ordinance must "prevail" in this case, Opening Brief at 2, and that the Regional Director lacked the authority to approve the assignment of the grazing permit for Range Unit #510 to Wilson. Appellants specifically argue that the Regional Director's decision was in error because: (1) the estates clause does not authorize assignment of grazing privileges to a third party, (2) the estate, through Merrill, had voluntarily forfeited its possession of grazing privileges on Range Unit #510 because the estate could not meet the permit's livestock requirements, and (3) based on the estate's noncompliance and forfeiture, the Allocation Committee had properly re-allocated grazing privileges on the unit to Appellants.

The only issue before the Superintendent and the Regional Director, and the only issue decided, however, was whether to approve or disapprove an assignment of the permit for Range Unit #510 from the Merrill estate to Wilson. As we explain more fully below, we conclude that Appellants lack standing to challenge BIA's approval of the assignment.

As an Executive Branch adjudicatory body, the Board is not bound by the case or controversy requirement of Article III of the U.S. Constitution. As a matter of prudence, however, the Board limits its jurisdiction to cases in which the appellant can show standing. See Santa Ynez Valley Concerned Citizens v. Pacific Regional Director, 42 IBIA 189, 192 (2006); Brown v. Navajo Regional Director, 41 IBIA 314, 317 (2005). The Board adheres to the three elements of standing described in Lujan v. Defenders of Wildlife,

504 U.S. 555, 560-61 (1992). One of these elements is that an appellant must demonstrate that it has a legally-protected interest that is injured by the decision at issue. 6/

A legally-protected interest is a property interest, a contractual right, or a right created by statute. See Hall, 43 IBIA at 44 (citing Warth v. Seldin, 422 U.S. 490, 500 (1975) for the proposition that an injury may exist solely by virtue of a statute creating legal rights, the invasion of which creates standing). Here, Appellants have no legally-protected interest in assignment of the permit for Range Unit #510. If BIA approves the assignment to Wilson, Wilson becomes the assignee and permittee until the permit period expires on October 31, 2006. If BIA does not approve the assignment to Wilson, or if BIA's approval is found to be invalid, the Merrill estate retains the permit — and must continue to satisfy all of the eligibility requirement of the Tribe's grazing ordinance and BIA's regulations — until the permit expires on October 31, 2006 or is lawfully terminated. Under neither scenario are Appellants entitled to the permit based on the validity or invalidity of the assignment decision.

Moreover, Appellants do not claim that they have any present property interest or contractual right to the existing permit for Range Unit #510. 7/ Rather, they appear to claim that, because the Allocation Committee re-allocated the grazing privileges on the unit to them — they state that they are the “beneficiaries of the OST Grazing Ordinance and Allocation Committee members' vote to the rights and use of Range Unit #510,” Response Brief at 6 — they should be issued a new permit for the unit for the remainder of the permit period. But neither the Tribe's grazing ordinance nor BIA's grazing regulations give Appellants any right to a permit before the existing permit has been properly terminated by BIA, and there is no evidence in the record that BIA has terminated the permit. The

6/ Summarized, the other two elements are that the injury is fairly traceable to the challenged action and that the injury will likely be redressed by a favorable decision. See id. at 560-61.

7/ We note that although Appellants state at one point in their response brief that the Allocation Committee “vote[d] to reassign Range Unit #510” to them, Response Brief at 6, Appellants do not claim that BIA should have approved assignment of the estate's permit to them, rather than Wilson.

Allocation Committee's action of re-allocating grazing privileges on the unit to Appellants has no effect unless and until a new permit becomes available. 8/

Appellants additionally argue that BIA's approval of the assignment was unlawful because the estates clause in the tribal grazing ordinance prohibits any assignment by an estate to a third party. Because our first task is to determine whether Appellants have standing to challenge BIA's approval of the permit's assignment, we need not decide the merits of Appellants' argument with respect to the estates clause. Instead, we look to the estates clause for purposes of determining whether it somehow vests in Appellants a legally-protected interest sufficient to give Appellants standing to challenge the Regional Director's September 3, 2004 decision approving the assignment. We conclude that it does not.

The plain language of the estates clause provides that an estate inherits the deceased member's allocated grazing privileges for the remainder of the permit period or until the estate is settled, so long as the estate continues to meet the grazing ordinance's eligibility requirements. There is nothing in the estates clause that evidences any intent to allow individual tribal members who are seeking an allocation of grazing privileges and a future, new permit for a range unit held by an estate to participate in a BIA decision to either approve or disapprove the estate's request to assign the existing permit. We therefore conclude that the estates clause does not give Appellants standing to challenge BIA's approval of the assignment of the permit for Range Unit #510 based on an alleged violation of the new estates clause of the tribal grazing ordinance.

The only conceivable scenario under which Appellants might have standing to challenge BIA's assignment decision would be if the facts demonstrated that the estate had voluntarily and effectively relinquished the permit for Range Unit #510. If that were the case, BIA's approval of the assignment would be improper because the estate no longer had a permit to assign. Thus, the practical effect of BIA's approval of the assignment would be

8/ We note that to the extent Appellants are arguing that the estate's permit should be canceled based on the alleged violations of various provisions of the tribal grazing ordinance, Appellants would face a significant threshold question of whether they have standing to raise this claim. As noted above, the Allocation Committee's re-allocation of grazing privileges for Range Unit #510 to Appellants is only triggered when the unit becomes available for permitting. Nothing in the tribal grazing ordinance or BIA's regulations governing permit cancellation suggests that a beneficiary of a future allocation of grazing privileges for a range unit would have standing to pursue cancellation of an existing permit.

to effectively deny Appellants the opportunity to obtain a new permit for the unit pursuant to the Allocation Committee's re-allocation of grazing privileges.

There is no evidence, however, that the estate voluntarily relinquished the permit, or that BIA accepted such a voluntary relinquishment. Appellants claim that "the Estate administrator relinquished [its] grazing privileges on #510" at the February 26, 2004 Allocation Committee meeting. Id. at 3 (emphasis added). But Appellants do not claim that the estate relinquished the permit for the unit. Moreover, the affidavits offered by Appellants from members of the Allocation Committee are simply irrelevant to the issue of whether the estate voluntarily relinquished the permit. 9/ The affidavits address the estate's purported forfeiture of its allocation of grazing privileges, not the grazing permit. It is BIA — not the Allocation Committee — that has final say over the permit. See OST Ordinance No. 95-05.1; 25 C.F.R. §§ 166.217(a) & (c) (authority to approve and grant permits, respectively), 166.705(c) (authority to cancel permits). And even assuming that the estate had forfeited its allocation of grazing privileges — either voluntarily or involuntarily — that would only become relevant when the unit is available for permitting, either after the existing permit is properly terminated or after it expires by its own terms, neither of which has occurred. Because there is no evidence that the permit was relinquished, the permit remains in effect until October 31, 2006, and is not yet available for issuance to another permittee.

We therefore conclude that Appellants have no protected interest, either derived from a property or contractual right, or derived from the Tribe's grazing ordinance or BIA's grazing regulations, that was injured by the Regional Director's decision approving the assignment of the estate's permit for Range Unit #510. Appellants therefore lack standing to bring their appeal. 10/

9/ With their notice of appeal, Appellants submitted affidavits by three Allocation Committee members. The affidavits, which are identical, assert that the minutes of the Allocation Committee meetings "are incorrect and should * * * document that [Merrill] did opt to forfeit Range Unit #510, the Committee did accept his forfeiture, and the Committee did recess for him to document his forfeiture."

10/ Appellants seek as relief "remand * * * to the Tribal Allocation Committee for a more fair and complete review of the continued eligibility of the estate * * * to hold [its] original permit." Response Brief at 8. The Board, however, is not a court of general jurisdiction and only has jurisdiction when a BIA Regional Director, or other Departmental official over whose decisions it has jurisdiction, has issued a decision. See, e.g., Doney v.

(continued...)

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 dismisses the appeal for lack of jurisdiction.

I concur:

// original signed
Amy B. Sosin
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

10/(...continued)

Carrywater, 39 IBIA 165, 166 (2003). The Board therefore cannot remand a matter to a tribe, which is outside of its jurisdiction. Similarly, to the extent Appellants seek to challenge the original allocation to Charles H. Merrill, III, or Wilson's eligibility, the Board is not the proper forum in which to pursue such claims. See, e.g., Rosebud Indian Land and Grazing Association v. Acting Great Plains Regional Director, 42 IBIA 47, 52 (2005) (Board does not have jurisdiction to review an appeal from a tribe's actions). Moreover, under the Tribe's grazing ordinance, decisions of the Allocation Committee, including allocation of grazing privileges and eligibility determinations, must be appealed to the Tribe's Grazing Ordinance Appeals Board. OST Ordinance No. 95-05.3(g).