



INTERIOR BOARD OF INDIAN APPEALS

Cheyenne River Sioux Tribe v. Aberdeen Area Director, Bureau of Indian Affairs

23 IBIA 103 (12/14/1992)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

CHEYENNE RIVER SIOUX TRIBE

v.

ABERDEEN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-142-A

Decided December 14, 1992

Appeal from a decision declining to cancel two grazing permits on the Cheyenne River Sioux Reservation.

Affirmed.

1. Bureau of Indian Affairs: Administrative Appeals: Generally

In appeals arising under 25 CFR Part 2, interested parties are entitled to respond to an appellant's argument by filing an answer under 25 CFR 2.11. Therefore, a Bureau of Indian Affairs Area Director may not issue a decision in an appeal prior to expiration of the time allowed for answers in sec. 2.11.

2. Indians: Leases and Permits: Farming and Grazing

25 CFR 166.4 provides that tribal law may supersede Bureau of Indian Affairs grazing regulations under certain circumstances.

3. Indians: Leases and Permits: Farming and Grazing

Where a grazing permit covers trust land in multiple ownership, the Bureau of Indian Affairs must take the interests of all Indian landowners into consideration when determining whether or not to revoke the permit for cause.

APPEARANCES: Steven C. Emery, Esq., Eagle Butte, South Dakota, for appellant; Priscilla A. Wilfahrt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Twin Cities, Minnesota, for the Area Director.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Cheyenne River Sioux Tribe (Tribe) seeks review of a February 28, 1992, decision of the Aberdeen Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to cancel grazing permits for range

units 237 and 297 on the Cheyenne River Sioux Reservation. For the reasons discussed below, the Board affirms the Area Director's decision.

### Background

Range unit 237 contains 1,160 acres of tribal trust land and 2,881.28 acres of individually owned trust land. Range unit 297 contains 5,510.02 acres of tribal trust land and 1,111.70 acres of individually owned trust land. The Superintendent, Cheyenne River Agency, BIA, issued a grazing permit for range unit 237 to Gene Hunt on December 4, 1989. On March 12, 1990, the Superintendent issued a grazing permit for range unit 297 to Gene and Jeff Hunt. Both permits were for 5-year terms beginning November 1, 1988, and ending October 31, 1993. Gene and Jeff Hunt are members of the Tribe. Gabe Black Moon, also a tribal member, holds a grazing permit for range unit 23, which borders on units 237 and 297.

On October 5, 1988, the Cheyenne River Sioux Tribal Council enacted a Grazing Code, which provides at section 15-5-1.3: "Range Unit boundaries must be fenced and meet ASC fencing standards (bordering operators to share 50/50 in the fencing)."

On September 27, 1991, the Superintendent wrote to Gene Hunt, stating:

The Cheyenne River Sioux Tribal Grazing Code requires that range unit boundaries must be fenced, meeting ASC standards, and bordering operators are to share 50/50 in the fencing. You have failed to meet this requirement on Range Units 237 and 297.

Please be advised that you have (30) calendar days from receipt of this notice to take the necessary steps to insure that the fencing requirement is met. Failure to initiate acceptable action to correct this situation may subject your grazing permits, for these units, to be cancelled.

On October 22, 1991, Gene Hunt called the agency and stated that he had started fencing the south boundary of the units. On November 27, 1991, the agency was informed that the Tribal Council had voted to request cancellation of the Hunts' permits for units 237 and 297. A BIA employee inspected the units and found that the Hunts had not constructed any fence. He also found, however, that Black Moon had not completed his half of the fence and that the portion of the fence he had completed did not meet the standards established in the Grazing Code.

By letter of December 2, 1991, the Superintendent advised the Tribal Chairman of these findings. He continued:

Since both individuals are in violation of the Grazing Code due to the fencing requirements, this office has no alternative but to take the following action. Inform each individual that they have until May 1, 1992, (the normal start of summer grazing

period) to fence the units in question in accordance with the ASCS standards. Staff will stake area in question to ensure fence is on correct starting line and right starting points are observed. Failure to properly fence would subject the violator to cancellation of their range units. Staff from this office would make a check of the units on May 1, 1992, for compliance, and initiate appropriate action for those found in non-compliance.

(Superintendent's Dec. 2, 1991, Letter at 1-2).

The Tribal Council objected to this course of action and, on December 11, 1991, voted to request the Superintendent to pursue cancellation of range units 237 and 297 for violation of section 15-5-1.3 of the Grazing Code. On December 18, 1991, the Superintendent wrote to Gene Hunt, stating:

This is your notification that it is my decision to cancel Range Units 237 and 297 for the following reasons:

1. You did not begin fencing of the area as you had indicated in your telephone conversation with [a BIA employee].
2. You have had since passage of the Grazing Code in 1988 to accomplish this task.
3. You did communicate to the [Tribal] Land & Natural Resources Director that you had no intentions to fence the area in question.
4. You failed to gain the required pasturing authorization before allowing livestock to graze on lands within range units assigned to you.

(Superintendent's Dec. 18, 1991, Decision at 1-2).

Gene and Jeff Hunt filed separate notices of appeal to the Area Director. They both signed a third document which, although titled "Notice of Appeal," is more in the nature of a statement of reasons. This document is dated January 21, 1992.

On February 4, 1992, the Area Director issued a decision reversing the Superintendent's decision. In a letter of that date to Gene Hunt, he stated:

In reviewing all background information supplied by you and the agency, we have determined this proposed cancellation to be the result of a dispute between Jeff Hunt, permittee of range units 237 and 297, yourself, co-permittee of range units 237 and 297, and Mr. Gabe Blackmoon, permittee of range unit 23, concerning border fencing.

The Cheyenne River Sioux Tribe Grazing Code, Section 15-5-1(3), requires range unit boundaries to be fenced, meeting ASC fencing standards, and bordering operators are to share the fencing 50/50; meaning, the bordering operators of range units 23, 237 and 297 are to share in these range unit separations.

Further review indicates approximately 5.5 miles of border fence is required to separate range unit 23 from range units 237 and 297.

Removable improvement records filed with the agency in December 1991, indicate you have constructed approximately 2.0 miles of border fence between range unit 23 and 297, while inspection records indicate Mr. Blackmoon has constructed approximately 1.75 miles of fence between range unit 23 and 297 and 237. This leaves approximately 1.75 of fence remaining to separate these range units, of which you have agreed to construct on or before May 1, 1992. By completing this section you will have fenced 3.75 miles or 68% of the bordering fence in question.

Under those circumstances, I am reluctant at this time to uphold the cancellation of range units 237 and 297. This cancellation shall be suspended, provided you fulfill your signed agreement to construct on or before May 1, 1992, the remaining 1.75 miles of fence bordering range unit 23; however, failure to follow this agreement will be cause for immediate cancellation. [1/]

(Area Director's Feb. 4, 1992, Decision at 1-2).

On February 6, 1992, the Superintendent sent the Tribe a copy of the Area Director's decision. The Tribe then requested the Area Director to suspend the decision. The Area Director responded on February 28, 1992, stating: "A thorough review of background information was conducted which led to my original decision not to uphold [the Superintendent's] cancellation of these units. I feel my decision was fair and equitable under the circumstances; therefore, [I] will hold to that decision." The letter informed the Tribe of its right to appeal to this Board.

The Tribe's notice of appeal was received by the Board on April 3, 1992. Both the Tribe and the Area Director filed briefs.

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1/ A May 1, 1992, memorandum to the file, prepared by the Area Supervisory Range Conservationist, states: "The boundary fenceline between these range units [Nos. 23, 237, and 297] was put in according to ASCS specifications. This fence was completed before the May 1, 1992, deadline."

Discussion and Conclusions

[1] There are procedural problems with this appeal. For one thing, the Area Director issued his February 4, 1992, decision prior to the expiration of the briefing period allowed under 25 CFR 2.10 and 2.11, thereby depriving the Tribe, or any other interested party, of the opportunity to file an answer. <sup>2/</sup> BIA's appeal regulations clearly contemplate that interested parties will be allowed to respond to an appellant's argument by filing an answer. Therefore, an Area Director may not issue a decision in an appeal until the time for filing answers, as set out in 25 CFR 2.11, has expired. See Peace Pipe, Inc. v. Acting Muskogee Area Director, 22 IBIA 1 (1992). Here, as far as the Tribe is concerned, the Area Director's error may be deemed cured in this proceeding, because the Tribe has had an opportunity to file briefs before the Board.

This is not the case with the individual landowners. No notice was given to them concerning the decisions issued by the Superintendent or the Area Director. Nor were the landowners identified as interested parties in the appeal to this Board. Unfortunately, the fact that individually owned land, as well as tribal land, was involved in this appeal did not become apparent to the Board until the Area Director's answer brief was filed. Accordingly, the individual landowners, who are interested parties here, have not been served with any of the notices or pleadings in this appeal.

Given the conclusion reached below, it is not clear that any purpose would be served at this point by delaying resolution of this matter in order to allow participation by the landowners. <sup>3/</sup> The Board will therefore not require service on the landowners at this time. The Area Director is requested to ensure that the landowners receive notice of this decision.

The Tribe contends that BIA is obligated to enforce the Grazing Code which, it further contends, supersedes 25 CFR Part 166 by virtue of 25 CFR 166.4. The Tribe argues that the Hunts' failure to construct fencing in the more than three years they have had their permits justifies cancellation of the permits and that the Area Director had no authority to apply his personal views of equity and fairness in preference to the clear requirement of the Grazing Code.

The Area Director contends that the Grazing Code complements rather than supersedes Part 166 but agrees with the Tribe that BIA may cancel a grazing permit for violation of the Grazing Code. He further contends,

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<sup>2/</sup> Also, as the Tribe notes, the Area Director failed initially to inform the Tribe of his decision or of the Tribe's right to appeal. That error was corrected in the Area Director's Feb. 28 decision.

<sup>3/</sup> Given the large amount of land in individual ownership, the Board assumes that there are numerous landowners.

<sup>4/</sup> The Area Director states.

"While the permit itself does not specifically incorporate the tribal code by reference, [BIA] agrees that permittees are deemed to have knowledge of tribal law and are subject to it. Thus, the Hunts' failure to fence

however, that the decision in this case was discretionary with BIA, that BIA must take the interests of all the landowners into account in deciding whether or not to cancel the permit, and that

[i]t is clearly in the best interest of all of the landowners to enforce the terms of the permit, rather than cancel it, where enforcement results in the installation of improvements to the unit and maintains the flow of income from the permit. Terminating the contract would have resulted in a potential loss of income if another permittee could not be found. Further, the current permittee has the right to remove his improvements. In the event he removed his improvements the unit would be less attractive and therefore less marketable. The range improvement records for Units 237 and 297 indicate that the Hunts have constructed improvements with an estimated value of approximately \$60,000.

(Area Director's Brief at 7-8).

It is not clear whether the Tribe intends to argue that its Grazing Code supersedes Part 166 in all cases, *e.g.*, where individually owned land as well as tribal land is involved, or whether it intends to limit its argument to cases where only tribal land is involved. The Tribe's brief appears to assume that all the land in range units 237 and 297 is tribal land. For instance, at page 2 of its opening brief, the Tribe refers to range units 237 and 297 as tribal units. It states that it issued a grazing permit to the Hunts and quotes from Article VIII, section 3, of its constitution, which provides: "Grazing permits covering tribal lands may be issued by the tribal council, with the approval of the Secretary of the Interior." No copy of the tribal permit has been submitted to the Board. In any event, the permits at issue here are not tribal permits but BIA- issued permits. <sup>5/</sup> Further, as noted above, the range units covered by the BIA permits are not limited to tribal land. Rather, a substantial portion of the land included is in individual ownership. The Board therefore considers the Tribe's argument in the context of this case, where both tribal and individually owned land is involved.

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fn. 4 (continued)

could provide a basis for the cancellation of their permit, at the discretion of [BIA]." (Area Director's Brief at 6).

<sup>5/</sup> 25 CFR 166.7 provides:

"All grazing use of range units shall be authorized by a grazing permit except Indians' use of their own land pursuant to § 166.8. Permits on range units containing trust or restricted land which is entirely tribally owned, or is in combination with Government land, may be issued by the [tribal] governing body, subject to approval by the Superintendent, or by the Superintendent pursuant to § 166.9(b). The Superintendent shall issue all permits on range units containing trust or restricted land which is entirely individually owned or is in combination with tribal and or Government land."

[2] 25 CFR 166.4 provides: "The grazing regulations in this part apply to individually owned, tribal and Government lands under the jurisdiction of the Bureau of Indian Affairs, except as superseded \* \* \* by provisions of any tribal constitution, bylaws or charter, heretofore duly ratified or approved, or by any tribal action authorized thereunder." Although the Tribe now contends that the Grazing Code supersedes Part 166, the Code itself does not declare such an intent. Rather, the Code clearly appears to assume the continued viability of Part 166. See, e.g., section 15-3-1 ("Authorized stocking rates shall not be exceeded unless approved by the Superintendent of the Cheyenne River Agency, subject to approval by the Area Director, in accordance with Title 25 - CFR Part 166"). Further, the Tribe does not cite any provision in its constitution which arguably would authorize the Tribe to supplant the regulations in Part 166 with respect to individually owned land. The constitutional provision cited by the Tribe is applicable only to tribal land. 6/

Although the precise intended scope of section 166.4 is unclear from the text of the section, other provisions in Part 166 offer some guidance. These provisions specifically authorize tribes to take certain actions or make certain decisions with respect to grazing on range units consisting entirely of tribal land or a combination of tribal and Government land. E.g., Sections 166.7 (issuance of grazing permits; see note 5); 166.10 (allocation of grazing privileges); 166.12(a) (kinds of livestock that may be grazed); 166.13(a) (grazing fees); and 166.14(a) (duration of permits). Under most of these provisions, the Superintendent is explicitly authorized to apply the tribal decisions to range units which include individually owned land. 7/ In this case, BIA agrees that it has authority to apply the Tribe's fencing requirement to range units which include individually owned land. By analogy to the cited provisions of Part 166, the Tribe's fencing requirement, once adopted by BIA for application to individually owned land, becomes, in essence, a BIA regulation, to be enforced by BIA.

In the only case the Board has found which addressed the issue of a tribe's authority to supersede a BIA grazing regulation, the court held that the BIA regulation prevailed over tribal law where individually owned lands were concerned. The court stated: "The Secretary is charged not only with the duty to protect the rights and interest of the tribe, but also the rights of the individual members thereof. And the duty to protect these rights is the same whether the attempted infringement is by non-members or

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6/ No copy of the Tribe's constitution was submitted by the Tribe or included in the administrative record for this appeal.

7/ See, e.g., section 166.10: "The Superintendent may implement the governing body's allocation program by authorizing the allocation of grazing privileges on individually owned land;" subsection 166.12(b):

"The Superintendent shall designate the same kind of livestock to be grazed on range units composed entirely of individually owned land, or in combination with tribal and or Government land, as that determined by governing bodies pursuant to paragraph (a) of this section, unless the principles of proper land management or efficient permit administration require otherwise."

members of the tribe.” (Emphasis in original.) United States v. Camp, 169 F. Supp. 568, 572 (E.D. Wash. 1959). <sup>8/</sup>

For all the reasons discussed, the Board concludes that the Grazing Code did not supersede 25 CFR Part 166 with respect to range units which include individually owned land. Accordingly, the Board further concludes that the decision whether to revoke grazing permits for those units was a decision to be made by BIA.

[3] BIA's principal responsibilities with respect to Indian grazing lands are to protect them and to promote their efficient use for the benefit of the Indian owners. Kimmet v. Billings Area Director, 19 IBIA 72 (1990). In a case where a grazing permit covers land in multiple ownership, BIA must take the interests of all landowners into consideration. Cf. Murphy v. Sacramento Area Director, 19 IBIA 228 (1991). BIA is authorized, but not required, to revoke a grazing permit for violation of the permit. 25 CFR 166.15(b). <sup>9/</sup> In this case, the Area Director determined that the landowners would be better served by requiring the Hunts to come into compliance with the Grazing Code than by cancelling their permits. This determination, the Board agrees, was within the Area Director's discretion to make. The Area Director's judgment appears to have been proven sound by the fact that the Hunts did, as they promised, complete the fence by May 1, 1992. The Board finds that appellant has not shown the Area Director's exercise of discretion to have been improper in this case.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's February 28, 1992, decision is affirmed.

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//original signed  
Anita Vogt  
Administrative Judge

I concur:

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//original signed  
Kathryn A. Lynn  
Chief Administrative Judge

<sup>8/</sup> The grazing regulations at issue in Camp, although different from the present regulations in some respects, included a provision virtually identical to the present section 166.4. See 25 CFR 151.4 (1958).

<sup>9/</sup> 25 CFR 166.15(b) provides in part: "The Superintendent may revoke or withdraw all or any part of a grazing permit by cancellation or modification on 30 days' written notice for violation of the permit."