ADMINISTRATIVE APPEAL OF

JUANITA HUMPHREY MICHALEK

(Crow Allottee No. 3292)

v.

AREA DIRECTOR, BILLINGS ET AL.

IBIA 74-19-A Decided February 26, 1974

Appeal from an administrative decision.

Reversed and Remanded.

Indian Lands: Allotments: Generally--Trespass: Generally

The Superintendent, as a representative of the Secretary, owes a duty to protect the land of a competent Crow Indian against livestock trespass so long as the land remains in trust status and is unleased.

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APPEARANCES: Towe, Neely and Ball, Attorneys at Law, for appellant, Juanita Humphrey Michalek.

OPINION BY MR. WILSON

The above-entitled matter comes before the Board on an appeal by Juanita Humphrey Michalek through counsel, Towe, Neely and Ball, from a decision of the Area Director, Bureau of Indian Affairs, Billings, Montana, dated January 30, 1973, affirming the action of the Superintendent, Crow Agency, in refusing to initiate trespass penalty action under 25 CFR 151.24 on appellant's trust allotment No. 3292.

In brief, the basis of the appeal herein arises out of appellant's complaint to the Superintendent of the Crow Agency requesting that livestock trespass action against a non-Indian owner of cattle drifting onto her allotment be initiated. The Superintendent refused to take the requested action. In lieu thereof, the Superintendent made the following determination:

> It is the decision of this office to assess voluntary trespass charges on the users of the land in the amount of $1.40 per acre per year for damages. The damages will be assessed from the time the last lease expired until present. The collected charges will be placed in a special deposit account in your name and at your disposal.

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> The foregoing decision is made on the premise that you have several options at your disposal which this office considers adequate to protect your interests; and further that you are a competent Indian with capacity to handle your own affairs, and that imposition of penalties cited in CFR 25 151.24(sic) would not be in your best interest or represent any adequate solution to your problem.

The Area Director affirmed the Superintendent's decision, hence this appeal.

This appeal, directed to the Assistant Secretary of Indian Affairs, was by special delegation of authority, transferred to the Director, Office of Hearings and Appeals, on October 4, 1973, for final determination. Appellate authority was delegated to the Board of Indian Appeals as an Ad Hoc Board by the Director, Office of Hearings and Appeals, under date of August 6, 1973. Copies of the aforementioned delegations were heretofore attached and made a part of the Notice of Docketing, dated November 2, 1973.

The appellant, in response to the Board's Notice of Docketing and Order to Show Cause, dated November 2, 1973, filed a brief together with sundry related exhibits. Neither the Area Director nor the other parties in interest have filed an answer denying or refuting the allegations set forth by appellant in her brief.

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In support of her appeal appellant contends that the Superintendent owes (1) a competent Crow Indian the same duty of protecting him or her in the quiet enjoyment of his or her allotment as he owes an Indian who is non compos mentis. (2) It is the affirmative duty of the Superintendent upon filing of a complaint alleging livestock trespass to investigate and, if sufficient grounds exist, to prosecute and levy penalties prescribed in 25 CFR 151.24.

The Act of May 26, 1926 (44 Stat. 658), as amended, March 15, 1948 (62 Stat. 80), authorizes competent Crow Indians to lease their allotment without the assistance and approval of the Superintendent. 25 CFR 131.15 implements the foregoing Act, supra, in the following language:

> (a) Notwithstanding the regulations in other sections of this part 131, Crow Indians classified as competent under the Act of June 4, 1920 (41 Stat. 751), as amended, may lease their trust lands * * * for farming or grazing purposes without the approval of the Secretary pursuant to the Act of May 26, 1926 (44 Stat. 658), as amended by the Act of March 15, 1948 (62 Stat. 80). * * * Approval of the Secretary is required on leases signed by Crow Indians not classified as competent * * *. Emphasis supplied.)

We note that 25 CFR 131.15(e) casts full responsibility on a competent Crow Indian as lessor in obtaining compliance with any lease made. This section however we note further provides:

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> * * * This shall not preclude action by the Secretary to assure conservation and protection of these trust lands.

An examination of the record, as presently constituted, clearly indicates no basis in fact whatsoever to support the Superintendent's conclusions or reasons for refusing to act on appellant's complaint under 25 CFR 151.24. Accordingly, the Board so finds.

The Area Director, in affirming the Superintendent's decision and as reasons for denying and dismissing appellant's appeal, determined that since the appellant is a competent Crow Indian under 25 CFR 131.15, the Superintendent owed her no duty to protect her land against livestock trespass, notwithstanding appellant's land is held in trust and notwithstanding that the complaint does not arise out of a competent Crow lease. The Area Director went on further to state:

> Accordingly, your appeal is denied on the grounds that the demands you have made of the Superintendent are beyond the scope of his jurisdiction.

We find nothing in the Act of May 26, 1926, as amended, March 15, 1948, supra, and 25 CFR 131.15 that relieves the federal government of its trust responsibilities or jurisdiction with respect to allotted land. Only the issuance of a patent in fee could accomplish that

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result. This, however, is not the case at bar. The Superintendent under the Crow Competency Act, supra, and subsequent regulations, 25 CFR 131.15, is relieved of overseeing the leasing of trust lands by competent Crow Indians. Moreover, a competent Crow Indian under the foregoing regulation is fully responsible for obtaining compliance with the terms of any lease made by him. This section, however, goes on to state:

> * * * This shall not preclude action by the Secretary to assure conservation and protection of these trust lands. (Emphasis supplied.)

In view of the fact that the appellant's land is held in trust and that her complaint does not stem from any lease agreement, we disagree with the Area Director's decision regarding loss of jurisdiction. On the contrary, we find the Bureau of Indian Affairs had jurisdiction over appellant's lands and that it was the affirmative duty of the Superintendent to take such measures as were necessary to protect appellant against livestock trespass on her allotted trust lands. United States v. Fraser, 156 F. Supp. 144 (D.C. Mont. 1957), aff'd, 261 F.2d 282 (9th Cir. 1958). The District Court in Fraser, supra, in holding that the government is a proper party to bring an action for livestock trespass on allotted lands, notwithstanding the present lessee is a non-Indian, remarked:

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> * * * "It is the right and duty of the government to maintain such suits as may be necessary for the protection of its Indian wards. * * * And particularly is this true where the United States holds lands in trust for the use and benefit of these wards and suit is necessary for the protection of these lands," [citing cases].

156 F. Supp. at 150.

It is settled law that by virtue of the peculiar "guardian-ward" relationship existing between the United States and Indian persons the Federal Government has not only the capacity, but also the duty to protect and enforce Indian rights in property held by it as trustee. Federal Indian Law, page 328, United States Department of Interior, United States Government Printing Office, Washington, D.C. (1958); United States v. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L.Ed. 228 (1886).

In view of the views hereinabove set forth the decision of the Area Director, Billings Area Office, Billings, Montana, must be reversed and remanded.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Area Director, Bureau of Indian Affairs, Billings, Montana, dated January 30, 1973, is hereby REVERSED AND the matter is REMANDED to the Area Director for the purpose of

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implementing the provisions of 25 CFR 151.24, and for whatever other action he deems necessary to protect the appellant's rights in her allotment.

This decision is final for the Department.

Alexander H. Wilson, Member

I concur:

David J. McKee, Chairman

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