TIM KIMMET,	:	Order Affirming Decision
Appellant	:	
	:	
v.	:	
	:	Docket No. IBIA 95-36-A
ACTING BILLINGS AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	June 27, 1995

This is the latest round in a seemingly endless series of appeals concerning 1986 and 1987 cattle trespasses on now-cancelled leases L-2643 and L-2734 on the Blackfeet Reservation. The principals are Tim Kimmet, lessee under both leases, and Claire Smith, sole owner of the allotment subject to lease L-2734 and one of several owners of the four allotments subject to lease L-2643. 1/

In Smith v. Acting Billings Area Director, 17 IBIA 231, reconsideration denied, 17 IBIA 285 (1989), the Board affirmed a Bureau of Indian Affairs (BIA) decision holding that Smith's cattle were in trespass on the two leases. Following the Board's decision, Kimmet submitted a claim against Smith for trespass damages. The Superintendent, Blackfeet Agency, BIA, denied the claim, and the Area Director affirmed the denial. On appeal, the Board affirmed the Area Director's decision in part but remanded the matter to BIA for consideration of, inter alia, whether and to what extent damages should be assessed against Smith and paid to appellant for the value of forage consumed by the trespassing cattle. Kimmet v. Billings Area Director (Kimmet I), 19 IBIA 72 (1990). 2/

1/ Only lease L-2643 is involved in this appeal.

2/ 25 CFR 166.24(b) provides:

"Unauthorized grazing. The owner of any livestock grazing in trespass on trust or restricted Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass * * * together with the reasonable value of the forage consumed by their [sic] livestock and damages to property injured or destroyed, and for expenses incurred in impoundment and disposal. The Superintendent shall take action to collect all such penalties and damages, reimbursement for expenses incurred in impoundment and disposal, and seek injunctive relief when appropriate. All payments for such penalties and damages shall be credited to the landowners where the trespass occurs except that the value of forage or crops consumed or destroyed may be paid to the lessee of the lands not to exceed the rental paid."

In Kimmet I, 19 IBIA at 75, the Board found that the determination whether to compensate a lessee under this provision is discretionary with BIA, although the duty to collect penalties and damages in the first instance is mandatory.

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On remand, the Superintendent set the value of the forage consumed at $355.32. 3/ He determined, however, that Kimmet would not have made use of the grass and crop aftermath which were consumed during the trespasses and that, therefore, he should not receive any damages for forage consumed. The Area Director affirmed the Superintendent's decision on September 13, 1991, and the Board affirmed the Area Director's decision on June 25, 1992. Kimmet v. Billings Area Director (Kimmet II), 22 IBIA 148 (1992).

On September 16, 1993, the Superintendent issued a decision concerning an assessment against Smith. It appears that the total assessment imposed against her was $3,706.55, representing five years rental for the pasture portion of lease L-2643. It further appears that the Superintendent intended that part of that amount would be paid to Kimmet and part distributed to Smith's co-owners. Smith appealed the decision to the Area Director. The Area Director affirmed the assessment on January 21, 1994. He did not include appeal instructions in his decision.

On February 9, 1994, BIA sent Smith a bill for $6,065.35. Under "Description," the bill stated: "Payment for use of pastureland located in cancelled lease L-2643 @ $2.33/acre, decision by Area Director on 9/13/91, confirmed by IBIA on 6/25/92 741.31 @ $2.33 x 5 years - $3,706.56 + interest $2,358.80 - $6,065.35."

By letter dated July 15, 1994, Smith asked the Area Director to reconsider his January 21, 1994, decision. On September 14, 1994, the Area Director reversed his January 21, 1994, decision and cancelled the assessment against Smith. Kimmet appealed the September 14, 1994, decision to the Board.

Kimmet contends that the Area Director's September 14, 1994, decision was invalid because his September 13, 1991, decision and/or the Board's decision in Kimmet I constituted a final Departmental decision approving an assessment against Smith for Kimmet's benefit. Kimmet also contends that Smith's July 15, 1994, request for reconsideration was untimely because it was, in effect, a request for reconsideration of the September 13, 1991, decision.

The assessment at issue in this appeal was evidently based upon a statement made in the Area Director's September 13, 1991, decision. As noted above, the actual holding in that decision was an affirmation of the Superintendent's determination that Kimmet should not receive any damages for loss of forage, a holding which was affirmed by the Board in Kimmet II. However, the Area Director's decision also stated: "[T]he [S]uperintendent points out in his report, that you were assessed rental for grazing on Lease

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3/ The Superintendent did not assess damages for the landowners' benefit because he concluded that the trespasses had not damaged trust property. He stated, however, that the penalty assessed against Smith in accordance with 25 CFR 166.24(b) (i.e., $1 per head per day of trespass) would be collected from her and paid to the landowners in their proportionate shares (Superintendent's Mar. 1, 1991, Decision at 1). The Board assumes that this collection has now been completed.

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No. L-2643 and either did not, or were unable to, utilize the grazing for which you paid. That amount, with interest, should be given back to you." This statement was not appealed by any party and was not addressed by the Board.

To the extent that Kimmet contends here that the Board in Kimmet II approved an assessment against Smith for Kimmet's benefit, the Board rejects that contention. As is clear from a reading of the Board's decision, the only issue before the Board was whether Kimmet should receive damages for the destruction of forage. The Board affirmed the Area Director's decision that he should not.

Kimmet also contends, however, that the above-quoted statement, as it appeared in the Area Director's September 13, 1991, decision, should have been recognized by Smith as a holding that she would be held liable for the amount Kimmet had paid in grazing rentals for lease L-2643. Because Smith failed to appeal the statement in a timely manner, Kimmet contends, she was precluded from challenging a later decision based upon it.

The Board cannot agree that the statement in the September 13, 1991, decision was recognizable as a holding authorizing an assessment against Smith. For one thing, the statement does not identify Smith as the person who should "give back" the lease rentals. In fact, if a refund of lease rentals is the subject of the statement, as it appears to be, all the owners of the allotments covered by lease L-2643 would be affected, because all had received their proportionate shares of the rentals. Further, the statement does not order a refund of lease rentals. 4/ It states only that the rentals, with interest, "should" be returned to Kimmet, suggesting that the Area Director was simply recommending that a refund be made. The Board finds that the statement was not clear enough to put Smith on notice that she would be assessed an amount for "refund" of lease rentals. 5/ Under these circumstances, the Board finds that Smith was not precluded from challenging the assessment made against her in the Superintendent's September 16, 1993, decision.

Further, because the Area Director's January 21, 1994, decision failed to include appeal information, Smith's time to appeal that decision never began to run. 6/ Therefore, her July 15, 1994, request for reconsideration

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4/ Indeed, there is no authority of which the Board is aware under which BIA could have ordered a refund of lease rentals.

5/ The Board certainly did not recognize the statement as an attempted holding when it decided Kimmet II. In retrospect, it appears that the Board should have addressed the statement despite the fact that it did not appear to be a holding and was not challenged by any of the parties.

6/ 25 CFR 2.7 provides:

"(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal. delivery or mail.

"(b) Failure to give such notice shall not affect the validity of the decision or action but the time to file a notice of appeal regarding such a

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was not untimely, and the Area Director had authority to consider the request and issue another decision, as he did on September 14, 1994.

Upon reconsideration, the Area Director concluded that it was inappropriate to assess Smith the amount of the pasture lease rentals for lease L-2643. This conclusion is clearly correct. The bases for assessing penalties and damages for livestock trespass are specified in 25 CFR 166.24(b). See note 1, supra. The value of pasture lease rentals is not one of these bases. Further, as the regulation makes clear, and as the Board discussed in Kimmet I, the only portion of the total penalties and damages collected from a trespasser which may be paid to a lessee is an amount for "the value of forage or crops consumed or destroyed." There is absolutely no basis upon which the value of the pasture lease rentals may be deemed a measure of damages payable to a lessee for livestock trespass.

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 September 14, 1994, decision is affirmed.

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Anita Vogt
Administrative Judge

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Kathryn A. Lynn
Chief Administrative Judge

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fn. 6 (continued)
decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.

"(c) All written decisions * * * shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

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