WALTER TORSKE & SONS
v.
ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 96-48-A Decided January 10, 1997

Appeal from a decision requiring the construction of fences in connection with leases of trust land on the Crow Reservation.

Vacated and remanded.

1. Board of Indian Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Generally

   Where an issue was raised in proceedings before the Bureau of Indian Affairs but not addressed there, the Board of Indian Appeals may remand that issue for initial determination by the Bureau.

2. Bureau of Indian Affairs: Generally--Indians: Leases and Permits: Farming and Grazing--Indians: Tribal Government: Constitutions, Bylaws, and Ordinances

   The Bureau of Indian Affairs lacks authority to enforce a tribal fencing ordinance against owners or lessees of fee land within an Indian reservation.

3. Indians: Leases and Permits: Farming and Grazing--Indians: Tribal Government: Judicial System

   Where the Bureau of Indian Affairs lacks jurisdiction over the totality of a dispute concerning fencing, and a tribal court arguably has jurisdiction over the entire dispute, it is appropriate for the Bureau to require the parties to take the dispute to tribal court.

APPEARANCES: Harold G. Stanton, Esq., Hardin, Montana, for appellant; Clara Nomee, Madam Chairman, and Michael B. Austin, Esq., Crow Agency, Montana, for the Crow Tribe.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Walter Torske & Sons seeks review of a January 9, 1996, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), requiring the construction of fences by appellant

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and by lessee Jack Cline 1/ on the Crow Reservation. For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further proceedings, as discussed below.

Background

On April 20, 1995, the Superintendent, Crow Agency, BIA, issued Notice of Sale 95-2, a lease advertisement for farming and grazing leases on the Crow Reservation. Both appellant and Cline submitted bids on ten allotments included in the advertisement, with Cline making the high bid. Bids were opened on May 18, 1995. On May 22, 1995, a determination was evidently made to award the leases for these ten allotments to Cline. On the same day, a determination was evidently made to award at least four other leases to appellant. 2/

On May 25, 1995, appellant wrote to the Superintendent concerning the ten tracts upon which Cline was the high bidder. Its letter stated:

> [T]hese tracts lie within the fenced boundaries of our pasture. We have learned that Mr. Cline's son-in-law * * * plans to turn cattle into this pasture at the commencement of the lease period, with the idea of running "in common" with us.
>
> We are protesting any such action * * * if Mr. Cline is successful in obtaining leases on said tracts. We have spent over 35 years building a herd of Hereford cattle, most of them Registered, and we are not willing to have them mixed with other herds of different breeding and health problems. We have been very careful to carry out a program of preventive medicine by vaccinating all our cattle against the prevalent diseases and problems. * * *
>
> The tracts which Mr. Cline bid on are in several different areas of the pasture; they are bordered by our deeded and leased land. If the bids made by Mr. Cline could be rejected under the stipulation in Paragraph 3, Page 2, of the Lease Advertisement, reserving the right of the Superintendent to reject any and all bids, [3/] we would certainly be willing to meet Mr. Cline's bid.

1/ Cline is a member of the Crow Tribe (Tribe).

2/ A partial copy of the bid abstracts for Sale 95-2 is included in the record. This copy, with the annotation "AWARD 5-22-95" appearing next to most tracts, includes only the pages upon which the ten leases awarded to Cline appear. As it happens, four leases awarded to appellant also appear on these pages. However, it is possible that appellant was awarded other leases which do not appear on these pages.

3/ This paragraph provides in relevant part:

"The Superintendent reserves the right to reject any and all bids and to waive strict formality or technical defects in the bids received whenever such rejection or waiver is in the interest of the Crow Tribe or the United States."

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> The price difference between the two bids was 17¢ per acre, being a total of approximately $325.00.
>
> If this is not an option, then we request that Mr. Cline be required to fence the tracts in question, per the paragraph on Page 4 of the Lease Advertisement which states that Lessees may be required to construct boundary fences as a method of resolving disputes when the Lessee does not lease or control the use of the land adjoining. [4/]

On July 8, 1995, appellant wrote again, stating that it had received no response to its earlier letter. The second letter further stated that the tracts bid on by Cline were without water. The letter continued:

> It would appear that Mr. Cline bid on these tracts with the idea in mind, not only of grazing "in common" with us, but also of using our water system, which has taken years and thousands of dollars to complete. We feel we can not stand idly by for this kind of take-over.

The record copies of both letters are shown as having been received by "Realty T & M" on August 10, 1995. No other date of receipt is shown. It is not clear, therefore, where these letters were between the time they were written and August 10, 1995.

On June 15, 1995, the Agency Realty Officer sent Cline his lease forms and stipulations, requesting that Cline return "ALL documents, signed and completed, within ten (10) working days from the date of this letter along with the filing fee and applicable rental and/or irrigation bonds." According to a narrative statement included in the record, 5/ "[t]hese documents, fees and bonds were all returned to Crow Agency on June 28, 1995, or within nine (9) days."

In light of the concerns expressed in appellant's letters, a meeting was held at the Agency on August 15, 1995, at which Cline, representatives of appellant, and Agency realty staff were present. Although an attempt was made to reach a solution agreeable to both parties, no agreement was reached.

4/ This paragraph provides in relevant part:

"Lessees may be required to construct boundary fences as a method of negotiated resolution for disputes between parties regarding livestock trespass or when the lessee does not lease or control use of the adjoining land to the leased tract. The Superintendent, Crow Indian Agency, reserves the right to modify the lease agreement to the extent necessary to resolve disputes between parties regarding fencing requirements."

5/ This narrative is unsigned and undated but clearly appears to have been prepared at the Agency. It was included in the record sent by the Superintendent to the Area Director when this matter was on appeal to the Area Director.

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On August 18, 1995, the Superintendent issued a decision requiring fencing by both parties. In a letter of that date to appellant, he stated:

> During [the August 15, 1995,] meeting, the parties discussed several issues which included running cattle in common, fencing of Mr. Cline's leases, exchange of leases, seasons of use, water availability and the "giving up" of the leases to you by Mr. Cline. While Mr. Cline was agreeable to several of the compromise solutions, you and you son were adamant about fencing out Mr. Cline's leases as the only solution. I am sorry that the parties leasing in this unit cannot come to some simple compromise which would benefit all involved. It appears to me the only legitimate and legal solution is to award Mr. Cline the leases in which he was high bidder and then require the leases to be fenced. Based on the maps we looked at, I calculate the need to erect fence for a distance of 13.75 miles. Your share, as shown on the attached map in red, is approximately 8.0 miles. Mr. Cline's share, as shown in blue is approximately 5.75 miles. Your share is larger since fee or deeded land owners, on the Crow Reservation, are required to 100% fence their cattle in or the Indian's cattle out. I have determined, from Big Horn County records, that your deeded land is described as: [description omitted]. Where this property abuts Mr. Cline's leases, you have the responsibility to fence.
>
> * * * * * *
>
> Please have your share of the fencing completed as soon as possible after the commencement date of Mr. Cline's leases, which will be November 1, 1995. Failure to fence may create a situation where cattle belonging to either yourselves [or] Mr. Cline will run in common, or trust leases with you as lessee may be canceled.

The Superintendent sent a similar, but not identical, letter to Cline, also stating the fencing requirement. In both letters, he advised the recipients that the decision could be appealed.

Appellant appealed to the Area Director who, on January 9, 1996, affirmed the Superintendent's decision. The Area Director held that the Superintendent's decision was supported by the provision in the lease advertisement concerning fencing; a provision in Cline's leases concerning fencing; 6/ Crow Resolution No. 75-22; and Crow Ordinance No. 1. 7/

6/ Paragraph 17.L of the leases is a fencing provision almost identical to the provision in the lease advertisement. See footnote 4, supra.

7/ Resolution No. 75-22 and Ordinance No. 1, "Fencing Ordinance for the Crow Indian Reservation," were both adopted by the Crow Tribal Council on Apr. 12, 1975. The resolution authorizes and instructs the Tribal Chairman to enforce the ordinance.

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Appellant's notice of appeal from the Area Director's decision was received by the Board on February 9, 1996. Briefs, including supplemental briefs permitted by Board order, were filed by appellant and the Tribe. 8/

The Superintendent has requested expedited consideration, stating that the outcome of this case will affect numerous other tracts on the reservation. The Board hereby grants expedited consideration.

Discussion and Conclusions

On appeal to the Board, appellant first argues that Cline did not comply with the requirements of Notice of Sale 95-2, with respect to returning his signed leases and acquiring his lease bonds. Appellant contends that Cline's leases should therefore be declared void.

Appellant made a similar, albeit more succinctly stated, argument before the Area Director. The Area Director, however, did not address the argument, focusing instead upon the fencing issue addressed in the Superintendent's decision.

In making this argument, appellant raises an issue entirely distinct from the original issue in this appeal, i.e., appellant now challenges Cline's right to retain his leases, as well as BIA's fencing decision.

From the materials in the record, it does not appear that appellant ever appealed Cline's lease awards or asked the Superintendent to void Cline's leases. Rather, it appears that appellant first raised this issue collaterally in its appeal from the Superintendent's fencing decision.

[1] Where an issue is raised for the first time on appeal to the Board, the Board normally declines to consider it, e.g., Welk Park North v. Acting Sacramento Area Director, 29 IBIA 213 (1996). In this way, the Board avoids addressing an issue that BIA has not had an opportunity to address. Even in a case such as this one, where an appellant has raised an issue before the Area Director but the Area Director has not addressed it, the Board may remand the issue to the Area Director so that BIA may render the initial decision on the matter. E.g., Redfield v. Billings Area Director, 13 IBIA 356, 360 (1985). Such a course of action is particularly appropriate here, where the unaddressed issue does not actually challenge the decision on appeal but, rather, a different BIA decision, i.e., the decision to award leases to Cline.

8/ Appellant questions the standing of the Tribe to participate in this appeal, on the grounds that the leases awarded to Cline covered allotted land only. As discussed below, appellant has challenged the Tribe's fencing law. Appellant has also offered its interpretation of the Tribe's constitution and certain other tribal enactments. Even if the Tribe were not otherwise entitled to participate in this appeal, it would clearly be entitled to participate on the issues concerning its own laws.

The Board finds that the Tribe is entitled to participate in this appeal.

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Therefore, upon remand of this case, as further discussed below, the Area Director shall consider appellant's argument that Cline's leases should be declared void. The Area Director may, of course, consider procedural questions, such as whether the issue was properly raised in the context of an appeal from the Superintendent's fencing decision. The Area Director is also entitled to take into consideration the fact that BIA exercises discretion in awarding leases. E.g., Fenner v. Acting Billings Area Director, 29 IBIA 116 (1996).

In the second part of its appeal, appellant continues its challenge to the fencing requirement, contending that BIA should not have relied upon Crow Resolution No. 75-22 or Ordinance No. 1 because those enactments are racially discriminatory and because the Tribe lacks jurisdiction over fee lands owned by appellant. Appellant further contends that Cline cannot invoke the provisions of Ordinance No. 1 because he is a lessee and not a landowner.

The Tribe contends that the matter at issue requires construction of tribal law, offers its construction of its own law, and contends that this dispute should be resolved in tribal court. Appellant counters that the tribal court is a court of limited jurisdiction which, among other limitations, is precluded from reviewing BIA actions.

There is a pivotal issue in this case which neither appellant nor the Tribe has discussed. That is the question of BIA's jurisdiction over appellant insofar as appellant owns or leases fee land. BIA appears to have assumed authority to order appellant to construct fencing, not only with respect to trust land which it leases, but also with respect to fee land which it owns or leases. 9/ Indeed, both the Superintendent's decision and the Area Director's decision suggest that those officials intended to implement Ordinance No. 1 with respect to both leased trust land and fee land. The Superintendent's decision also suggests that he believes BIA could enforce the fencing requirements imposed upon appellant, possibly even as BIA purported to apply them to fee land, by cancelling appellant's leases of trust land.

In its Ordinance No. 1, the Tribe asserts jurisdiction over non-Indians owning or leasing fee lands adjacent to trust lands. Section II of the ordinance provides:

> DUTY OF NON-INDIAN
>
> A. If land (deeded or trust) owned or leased by a non-Indian adjoins Indian-owned land not leased to a non-Indian, then the non-Indian shall upon request by the Indian landowner be responsible

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9/ Nothing in the record indicates how much of the land bordering on Cline's leases is trust land leased by appellant and how much is fee land owned or leased by appellant. From the wording of the Superintendent's decision, however, it seems clear that at least some of that land is fee land. See Superintendent's Aug. 18, 1995, decision, quoted above.

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> for the construction and maintenance of the fence between the two properties and shall pay the entire cost therefor and may not pass the cost onto any Indian landowner.
>
> B. If land (deeded or trust) owned or leased by a non-Indian adjoins Indian-owned land leased to a non-Indian, then upon request by either non-Indian, each shall be responsible for construction and maintenance of one-half of the fence between said lands and each shall pay the cost of half of the fence and may not pass the cost onto any Indian landowner.

Section X of the ordinance vests jurisdiction over disputes arising under the ordinance in the tribal court.

As noted above, appellant challenges the Tribe's authority to exercise jurisdiction over fee land. The extent of the Tribe's authority in this regard is not for this Board to decide. Rather, it is a question to be addressed in the first instance by the tribal court. E.g., Burlington Northern Railroad v. Crow Tribal Council, 940 F.2d 1239, 1246 (9th Cir. 1991) (Exhaustion of tribal remedies is required when a regulatory tribal ordinance is challenged because the "Tribe must itself first interpret its own ordinance and define its own jurisdiction").

[2] The Board may, however, address the question of BIA's authority to enforce a tribal ordinance, when that ordinance touches upon activities on fee land. BIA clearly has supervisory authority over lessees of trust land. It also has some authority to enforce tribal law on trust land. E.g., 25 U.S.C. § 3712(b); 25 C.F.R. 166.4, 166.10. However, the Board is not aware of any authority, and the Area Director cited none in his decision, under which BIA may require owners or lessees of fee land to construct fences in cases like this one. The Board finds that, whatever authority BIA has to implement Ordinance No. 1 on trust land, that authority does not extend to fee land. Thus, as specific to this case, the Board finds that BIA may order appellant to construct fencing only where that fencing divides trust land leased by appellant from trust land leased by Cline. BIA may not order appellant to construct fencing between fee land owned or used by appellant and trust land leased by Cline.

As noted above, the record does not show how much of the land appellant is using is fee land and how much is trust land. Thus, it is not possible to determine how much of the 8 miles of fencing appellant was required to construct is subject to BIA's jurisdiction. Moreover, even assuming BIA has jurisdiction over part of this length, it would probably be useless for BIA to require a partial fence if the remaining border between appellant and Cline would remain unfenced.

[3] Therefore, the Board vacates the Area Director's decision and remands this matter to him for further proceedings. The Area Director should first consider appellant's argument concerning the voiding of Cline's leases. If he rejects appellant's argument in this regard, and the parties remain unable to reach agreement concerning their respective operations, the Area

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Director should require the parties to take the matter to tribal court for resolution. Cf. United States v. Plainbull, 957 F.2d 724 (9th Cir. 1992), requiring the Federal Government to resort to tribal court to enforce a Federal livestock trespass statute with respect to tribal land. 10/

Whatever the scope of the tribal court's jurisdiction is determined to be, it is almost certainly broader that BIA's jurisdiction where the fencing of fee land is concerned. In any event, the tribal court is the only forum of first resort with arguable jurisdiction over the entirety of this dispute. Because the Board vacates BIA's decision concerning fencing, no question should arise in the tribal court proceedings as to whether that court has jurisdiction to review BIA decisions. Appellant's contentions concerning alleged discriminatory provisions in Ordinance No. 1 are, like questions concerning the Tribe's jurisdiction over appellant and over fee lands, appropriately directed to the tribal court. See, e.g., Mosay v. Minneapolis Area Director, 27 IBIA 126 (1995).

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 Area Director's January 9, 1996, decision is vacated, and this matter is remanded to him for further proceedings as discussed above.

_____
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Chief Administrative Judge

10/ This case differs from Plainbull in that it concerns allotted land, rather than tribal land. In the American Indian Agricultural Resource Management Act of 1993, Congress recognized tribal authority over Indian agricultural lands, both allotted and tribal. E.g., 25 U.S.C. §§ 3712(b), 3713(c), 3715(b); but see 25 U.S.C. § 3715(c). At the same time, Congress continued to recognize the trust responsibility of the United States for Indian lands. E.g., 25 U.S.C. § 3702. In the Board's view, BIA, in its role as trustee, retains authority to review a tribal court decision which affects allotted land, for the purpose of ensuring that the decision is not adverse to the interests of the Indian landowners. Cf. Camel v. Assistant Portland Area Director, 21 BIA 179 (1992) (BIA is not required to enforce a tribal court order against individually owned trust land).

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