

American Indian Law Review

Volume 16 | Number 1

1-1-1991

Can Indian Tribes Afford to Let the Bureau of Indian Affairs Continue to Negotiate Permits & Leases of Their Resources?

Ronald E. Johnny

Follow this and additional works at: <https://digitalcommons.law.ou.edu/air>



Part of the [Indigenous, Indian, and Aboriginal Law Commons](#), and the [Land Use Law Commons](#)

Recommended Citation

Ronald E. Johnny, *Can Indian Tribes Afford to Let the Bureau of Indian Affairs Continue to Negotiate Permits & Leases of Their Resources?*, 16 AM. INDIAN L. REV. 203 (1991), <https://digitalcommons.law.ou.edu/air/vol16/iss1/6>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact Law-LibraryDigitalCommons@ou.edu.

CAN INDIAN TRIBES AFFORD TO LET THE BUREAU OF INDIAN AFFAIRS CONTINUE TO NEGOTIATE PERMITS & LEASES OF THEIR RESOURCES?

Ronald E. Johnny*

Introduction

The Bureau of Indian Affairs (BIA) has been the subject of much criticism for mismanagement of trust resources and violation of its trust responsibility¹ to individual Indians and tribes.² As discussions and newspaper accounts have illustrated, the focus of attention has been on oil, gas, and timber management issues. Although more than 40 million acres (80% of all Indian land) is classified as range land,³ neither the mismanagement of Indian grazing lands nor the failure to secure fair market range permitting⁴ or leasing⁵ prices has received

* B.A., 1982, University of California, Berkeley; J.D., 1985, University of Denver College of Law. At the time this article was written, Mr. Johnny was both Chairman of the Fort McDermitt Paiute-Shoshone Tribe of Oregon & Nevada and Chairman of the umbrella organization for Nevada's 26 Indian tribes, the Inter-Tribal Council of Nevada. Mr. Johnny is a former Reginald Heber Smith Community Lawyer Fellow, and was employed with California Indian Legal Services (1985) and the Dakota Plains Legal Services at the Standing Rock Sioux Indian Reservation (1986-87). Mr. Johnny resides on the Fort McDermitt Indian Reservation and practices law in Nevada tribal court systems only.

1. See *Mitchell v. United States*, 445 U.S. 535 (1980) (*Mitchell I*); *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*).

2. See *Federal Trust Responsibility at Issue in Oil and Gas Cases*, NARF LEGAL REV., Summer 1988, at 1. The article states:

The federal government's management or rather mismanagement of Indian oil and gas resources is illustrated in the *Arizona Republic's* series titled "Fraud in Indian Country: A Billion Dollar Betrayal." The newspaper's investigation [in 1987] reported that the loss of revenue to tribes and individuals from their oil and gas resources ran into billions of dollars. . . . The series has led to a special Senate investigation into the management of Indian programs and the government's handling of its trust responsibility to Indian tribes.

Id.

3. D. GETCHES & C. WILKINSON, *CASES AND MATERIALS ON FEDERAL INDIAN LAW* 15 (2d ed. 1986).

4. "Permit" means a privilege revocable at will in the discretion of the Secretary of the Interior and not assignable, to enter on and use a specific tract of land for a specified purpose. 25 C.F.R. § 162.1(e) (1987).

5. "Lease" is not defined in 25 C.F.R. § 162. However, a reading of the provisions implies that a lease is more permanent in nature than a "permit." See 25 C.F.R. § 162.2 (1987).

much attention.⁶ However, in my estimation, the financial loss to individual Indian allottees and tribes due to permitting and leasing mismanagement has likely been greater than the oil, gas, and timber losses.

During my tenure as chairman of my tribe, I discovered that local BIA personnel were not qualified with regard to permitting my tribe's grazing lands. This article shows that BIA personnel did, and likely still do: (1) use negligent methods to establish tribal grazing permit fees; (2) lack the expertise or ability to establish a fair market value for tribal grazing lands; and (3) lack training in permit-fee negotiation skills and tactics. More importantly, it is obvious that the problems and practices are not restricted to the Western Nevada Agency but exist nationwide as well.

The Fort McDermitt Tribe of Oregon and Nevada

The Fort McDermitt Tribe (the Tribe) possesses land holdings in southeastern Oregon and north central Nevada. The Tribe controls more than 35,000 acres of tribal trust property and leases about 60,000 acres.⁷ Not all of the Tribe's lands are contiguous to the main reservation. The "Lasa Purchase," 180 acres near Orovada, Nevada, is approximately 22 miles south of the main reservation.

The Tribe also owns the Hog John Ranch. The Hog John Ranch contains 3560 acres in the vicinity of the King and Quinn River drainage. The ranch stands along the Denio Highway and is approximately 35 miles southwest of the main reservation. Because state law places limits on the drilling of new water wells and the cost of drilling water wells, the existing water wells on the ranch make the ranch valuable not for its grazing lands but for its water.

The Tribe is one of 10 western Nevada tribes under the control of the BIA's Phoenix Area Office and Western Nevada Agency. The Agency office is more than 250 miles southwest of the reservation. Fort McDermitt is one of three Nevada Indian tribes

6. See D. GETCHES & C. WILKINSON, *supra* note 3, at 15 ("The land has been seriously overgrazed. In addition, most grazing land is leased to non-Indians, often at less than market value.").

7. Through its Stockmen's Association, the Tribe leases grazing land from the United States Bureau of Land Management (BLM) and the U.S. Forest Service.

with land holdings in Humboldt County, Nevada.⁸ For many reasons Fort McDermitt tribal officials have relied on the efforts and suggestions of BIA personnel in the permitting of tribal grazing lands. While the list of reasons is too long to list here, the main reasons are discussed *infra*.

First, and most importantly, educational opportunities in the Fort McDermitt area are extremely limited. Nevada has one of the highest high school dropout rates in the nation and has one of the worst student-to-teacher ratios in the United States.⁹ Based on an empirical study, the local public school system affords Indian students only poor to fair educational opportunities.¹⁰ Many Indian high school students drop out and of those who do graduate, a significant number are given “unsigned” high school diplomas.¹¹ The local college — Northern Nevada Community College, located 77 miles south of the Fort McDermitt tribal office complex — has offered only one course on the reservation.¹² Its courses overall are usually targeted towards homemakers.

Second, the tribe lacks the financial resources to hire an attorney or other qualified persons to investigate and negotiate grazing land permits or manage its grazing lands; no Public Law 93-638 contract or grant with the BIA has ever been offered for such. Third, tribal council members usually serve without pay. Thus, in order to support themselves and their families they have to work full-time jobs.

Thus, in part, the lack of adequate education and trained personnel and the inability to make their own in-depth investigations leads many tribal council members to rely on the judgment and advice of BIA personnel. Tribal leaders accept, in most cases without question, BIA suggestions or recommenda-

8. See Johnny, *Nevada Indian Courts: Viable Alternatives for Resolving Client Disputes*, INTER ALIA, May/June 1989, at F1 (journal of the State Bar of Nevada). The other two tribes are the Summit Lake Paiute Tribe and the Winnemucca Indian Colony. For a discussion on the validity of the latter's constitution, see Hunt v. Hunt, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6030 (March 1989).

9. See *Student/Teacher Ratios*, FACTS ABOUT EDUCATION IN HUMBOLDT COUNTY, 1990-91. The average ratio for kindergarten to 5th grade was 21/1. The average ratio of sixth to eighth grade in science classes was 25/1; music, 33/1; English, 23.6/1.

10. R. Johnny, Tribal Chairman's Report to the Fort McDermitt Tribal Council: State of Our Children's Education in Humboldt County School System 6 (July, 1988) (unpublished survey).

11. *Id.* at introduction, 3. “Unsigned” diplomas do not attest to the fact that the student has met all the educational requirements of state law.

12. During the Fall 1988 semester “Introduction to Federal Indian Law” was taught by this author. The course was funded by a Public Law 93-638 grant.

tions. This connotes that BIA personnel have done the best that can be done.

*The BIA's Method of Establishing Grazing Fees and
Permitting the Hog John Ranch*

A review of past grazing land permits held by the Tribe's Hog John Ranch shows a dismal, negligent record of management of tribal resources. Apparently in many instances local BIA personnel merely telephoned the BLM and asked what it was charging in the same region.

The BIA permits for the Tribe's Hog John Ranch state, in pertinent part:

PERIOD	ACRES	AUMs ¹³	FEES NEGOTIATED BY BIA	BASIS FOR FEE
01/01/79 to 12/31/81	3560	2400	\$1.89	BLM Equivalent
01/01/83 to 12/31/86	3560	2400	\$2.00	BLM Equivalent
01/01/87 to 12/31/87	3560	2400	\$2.60	[Not Identified]

The BIA uses two methods in securing a permittee of tribal grazing lands: private negotiations and public bid.¹⁴ The first method is almost always used where, as with the Hog John Ranch, the permittee has had the permit for many years and where the same person either owns the adjacent lands or controls the adjacent BLM-managed public lands.

During my tenure as tribal chairman, the permit for the Hog John Ranch expired. The BIA suggested private negotiations with the person who also held the permit for the surrounding BLM-managed public lands. BIA Land Operations and Realty Branch personnel told me in February and March of 1988 that

13. AUM (animal unit per month) is defined as the amount of forage consumed by a cow and calf, or five sheep, in a month. See Underwood, *Bureau [of Land Management] Boosts Stock Grazing Fees*, Nev. State Journal, Jan. 13, 1979, at 23.

14. See 25 C.F.R. § 162.2 (1987).

a costly and time-consuming public bid process would not achieve a greater financial return or gain than a private negotiation.¹⁵

The Fort McDermitt tribal council approved the use of private negotiations, and required me in my capacity as tribal chairman to take an active part in the negotiation process. The Council felt this was especially necessary in light of newspaper accounts of BLM AUMs in the immediate area being subleased for \$11.00 per AUM.¹⁶

Before negotiations took place, the Agency personnel advised they believed that a permit fee in excess of \$2.60 per AUM would likely scare off the interested party,¹⁷ given the destruction of AUMs and other factors.¹⁸ Also prior to negotiations, in response to questions regarding the basis for the \$1.60 per AUM fee suggested by the BIA (that was collected the previous term), BIA personnel indicated that they sought that amount because it was almost identical to BLM's standards and that a local rancher might not permit Indian lands at a higher rate given the availability of BLM lands in the vicinity. Not knowing the land, or that it holds the most valuable resource in Nevada and in the area of Hog John Ranch, i.e., water, it would appear that the BIA was justified in its position.

15. Interviews with Don Hettervic, Land Operations Officer, and Don Vaile, Range Conservationist, BIA, Western Nevada Agency, in Carson City, Nevada (December, 1988). The discussions were in regards to the development lease (permit) of the Tribe's Hog John Ranch.

16. The *Sacramento Bee* reported in 1987 that a North Dakota rancher, who leased BLM-managed AUMs in Orovada, Nevada (33 miles south of the main Fort McDermitt reservation and about 18 miles east of the Hog John Ranch) for \$1.35 per AUM, was subleasing 10,800 AUMs for \$11.00 per AUM. The rancher realized a \$120,000 profit through this arrangement. See Bowman, *Ranchers Reap Profits Subleasing Public Land*, *Sacramento (Cal.) Bee*, May 5, 1987, at A1, A18.

17. Roy Shurtz, co-owner of the Happy Creek Land & Cattle Co., the successor in interest to the previous permittee.

18. In 1988, the BIA Land Operations Branch completed a range survey of the Hog John Ranch. It discovered that overgrazing by the previous BIA permittee and trespass by the stock of the adjacent BLM-Sod House Allotment permittee led to tribal grazing land AUM reduction from 2400 to 600. D. VAILE, *HOG JOHN RANCH RANGE STUDY (1987-88)*. Arguably, two factors may have precipitated this reduction. First, the season of use for every permit term (except January 1, 1983 to December 31, 1986) was nine months, i.e., April 1st to December 31st. From January 1, 1983, to December 31, 1986, the permit term was designated as "year long," thus allowing for overgrazing by livestock. Second, the multi-tribal BIA office complex is located more than 250 miles from tribal resources and has an insufficient number of qualified range management employees. As a result, it can neither meet its trust responsibilities nor supervise the permittee as provided for in the permit.

BLM's Permitting and Leasing Practices

What BIA personnel did not know in relying on BLM fees was that BLM was prohibited by federal law from charging the fair market value for AUMs on public grazing lands under its management. BLM's range use fees are established in accordance with the 1978 Public Rangelands Improvement Act (PRIA),¹⁹ an act lobbied for by the livestock industry.²⁰

Prior to 1979, there had not been an increase in the BLM's AUM fees since 1976. Beginning in 1979, under the PRIA, the AUM rate increased from \$1.51 to \$1.89. The higher fees were the result of a sliding scale the livestock industry convinced Congress to include in the PRIA. As stated by Jan Layton, an aide to then-Representative Jim Santini, D-Nevada, "ranchers supported the new formula because when livestock prices go down, the fee also will drop."²¹

The formula under the PRIA was calculated on the basis of beef prices and a rancher's cost of production.²² The formula prevented BLM from raising the fees more than 25% in any given year.²³ The PRIA states, in pertinent part:

For the grazing years 1979 through 1985, the Secretaries of Agriculture and Interior shall charge the fee for domestic livestock grazing on the public rangelands which Congress finds represents the economic value of the use of the land to the user, and under which Congress finds fair market value public grazing equal to the \$1.23 base established by the 1966 Western Livestock Grazing Survey multiplied by the result of the Forage Value Index (computed annually from data supplied by the Economic Research Service) added to the Combined Index (Beef Cattle Price Index minus the Price Paid Index) and divided by 100; *Provided*, That the annual increase or decrease in such fee for any given year shall be limited to not more than plus or minus 25 per centum of the previous year's fee.²⁴

19. Pub. L. No. 95-514, 92 Stat. 1803 (1978).

20. See Brewer, *BLM Wants to Boost Grazing Fees*, Reno (Nev.) Gazette J., July 10, 1985, at 9A.

21. *Id.*

22. *Id.*

23. *Id.* The \$1.89 figure is the maximum fee the BLM could impose in 1979. Without the 25% limitation, the new fee would have been \$2.03 per AUM.

24. 43 U.S.C. § 1905 (1978).

In 1988, the price of a BLM-managed AUM was \$1.51.²⁵ The price in 1989 had not been calculated at the time this article was written. However, it was suggested that it would not rise.²⁶

Given that the major supply of water in the area of the Hog John Ranch is on Indian land, it is not clear why the BIA did not, in its assessment of AUM value, at least consider a 1977 federal plan sponsored by President Jimmy Carter, and opposed by most non-Indian ranchers.²⁷ This plan called for a fixed-fee schedule that would have increased at the rate of 25% per year until it equaled grazing fees on private lands. Some critics of the plan estimated the fee could have gone as high as \$3.30 by 1981;²⁸ a substantial increase over the \$1.89 collected by BIA Western Nevada Agency personnel for that year alone.

Carter Administration officials had argued that the formula, known as a "fair market formula," would give taxpayers a more fair return by tying public grazing fees to the much higher private fees.²⁹ Considering this, the BIA, in actual practice, has been giving non-Indian ranchers price supports to the great financial loss of Indian tribes and individual Indian allotment owners.

What is the Fair Market Value of AUMs?

To be sure, geographical location plays a significant role in determining the value of an AUM. However, BLM officials in the Reno Office have concluded that the market value of a single AUM in 1978, stretched out over the usual life of a grazing allotment, was \$30.00.³⁰ Yet in actual practice, the highest sublease of an AUM on public lands known to date is \$11.00 per AUM.³¹ In addition, given the lack of water delivery systems adjacent to the Hog John Ranch, the value of the tribal grazing AUMs (for water rights only) may be closer to \$30.00 per AUM than \$11 per AUM.

25. Telephone interview with Bob Neary, Chief of Resources, District Office, Bureau of Land Management, Winnemucca, Nev. (Oct. 14, 1988).

26. *Id.*

27. Given the restricted availability of water in the area of Hog John Ranch, even the Carter plan may have been a violation of the federal trust responsibility: cattle cannot survive without water. In my estimation, the BIA should have suggested \$12.00 per AUM in 1979, not \$1.89.

28. See *Humboldt Ranchers Say BLM Plan Based on Misinformation*, Reno (Nev.) Gazette J., Mar. 15, 1981, at 9D.

29. *Id.*

30. *Nevada Sierra News*, Nev. State J., July 4, 1978, at 11.

31. See *supra* note 16.

*Other Factors the BIA Should Consider
in Establishing AUM Value*

The availability of AUMs for non-Indian ranchers in the county or region should be a primary consideration for the BIA in establishing a value for Indian land AUMs. For example, in 1981, the Winnemucca District Office of the BLM considered fourteen major grazing plans. The effect of the plans would have been to cut grazing allotments for cattle and sheep almost in half on four million acres of the Winnemucca District, beginning the following year.

The third plan covered the area where the Tribe's Hog John Ranch is located, the "Paradise-Denio Resource Area," and nearly all of nearby Humboldt County. This plan, if chosen, would have slashed the area's AUMs from 192,000 to 102,000. If the third plan had worked, it was estimated that grazing allotments would have gradually increased, reaching 162,000 AUMs by 1991, more than a 50% increase above the 1982 levels. It was estimated that for the 35 years following 1981, the AUMs would have eventually increased to 191,000. However, the third plan was never put into effect. The BLM opted instead to conduct range surveys on a regular timetable to assess the condition of the lands under their jurisdiction.³²

Effects of Tribal Involvement

What happened when there was significant tribal involvement in the permit process? The facts — a \$7.40 increase in the AUM fee — speak for themselves:

PERIOD	ACRES	AUMs	FEES NEGOTIATED BY BIA	BASIS FOR FEE
01/01/88 to 12/31/88	3560	600	\$10.00	Investigation by tribal official of private AUM lease fees and subleasing fees of BLM AUMs in the immediate area.

32. Telephone interview with Bob Neary, Chief of Resources, District Office, Bureau of Land Management, Winnemucca, Nev. (Oct. 14, 1988).

But for the reduced AUMs, caused by the BIA's failure to supervise the permittee as required by the Permit and to guard against trespass by an adjacent BLM permittee, the \$10.00 per AUM fee would have been a significant victory for the Tribe.

Recommendations to Other Tribes

I would suggest that Tribes take immediate steps to:

(1) Not utilize the private negotiation process of permitting *unless* the BIA has completed a study on its effectiveness;

(2) Investigate independently the local and regional leasing and subleasing of public and private grazing land (market rate) fees and evaluate financial needs against the possibility of no one permitting at the market rate;

(3) Do not be misled by BIA personnel. Make sure they are *qualified*;

(4) Contact the BIA about a Public Law 93-638 contract for the hiring of a range specialist/consultant to assist in independently evaluating the market rate of AUMs and in locating permittees willing to pay top dollar;

(5) Demand that the BIA factually support detailed analytical data on the value of your tribe's AUMs; and

(6) Contact an attorney if the BIA has breached its trust responsibility to your tribe.³³

In conclusion, no tribe — no matter how small — should continue to rely on BIA personnel in the leasing or permitting of their resources unless they are sure that the BIA possesses the needed expertise in that area.

33. Based on the lack of supervision of the Hog John Ranch permittee and the trespass by the adjacent BLM permittee between 1979 and 1987, the Tribe probably lost \$18,000 in annual income (\$10.00 per AUM x 1800 lost AUMs) for an approximate total of \$144,000. Based on my personal estimations of the financial loss to the Tribe, the total loss considering the failure of the BIA to consider the value of tribal water rights on the Hog John Ranch, would be more than \$200,000.00.

