



INTERIOR BOARD OF INDIAN APPEALS

Mountain Fir Lumber Co.

6 IBIA 86 (05/25/1977)

Judicial review of this case:

Summary judgment for plaintiff, *Mountain Fir Lumber Co. v. United States*, No. 361-78
(Ct. Cl. Oct. 22, 1979)

Reversed and remanded, No. 361-78 (Ct. Cl. Feb. 8, 1980)



United States Department of the Interior

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

ADMINISTRATIVE APPEAL OF MOUNTAIN FIR LUMBER COMPANY

IBIA 77-13-A

Decided May 25, 1977

Appeal from the decision of the Acting Assistant Area Director, Portland Area Office, Bureau of Indian Affairs, declining to reimburse Mountain Fir Lumber Company for alleged overcharges on certain timber contracts.

Affirmed and Dismissed.

APPEARANCES: Leonard B. Netzorg, Esq., for Appellant; C. Richard Neely, Assistant Solicitor, Portland Region, for Appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This appeal involves a controversy over the interpretation of four timber sale contracts relating to the McQuinn Strip of the Warm Springs Indian Reservation in Oregon. These contracts were entered into between the appellant and the Department of Agriculture, Forest Service prior to July 1, 1973.

The four contracts are: La Hash, No. 02760-1, Snowshoe, No. 02486-3, Sunshine, No. 02144-8, and Swamper, No. 02678-5.

On September 21, 1972, the Congress of the United States declared title to Federal lands known as the McQuinn Strip to be in the United States in trust for the use and benefit of the Confederated Tribes of the Warm Springs Reservation. See P.L. 92-427, 86 Stat. 719.

At and prior to the time of the passage of P.L. 92-427, the Secretary of Agriculture was administering active timber sales contracts on the McQuinn Strip through the Forest Service. Although transfer of title was effected immediately upon passage of P.L. 92-427, congressional committees agreed that it would be proper for the Forest Service to continue its administration of the McQuinn Strip timber contracts through June 30, 1973. Thereafter, management of the McQuinn Strip was to be assumed by the Bureau of Indian Affairs, Department of the Interior.

Accordingly, a joint letter was issued by the Mt. Hood Forest Supervisor and the Superintendent, Bureau of Indian Affairs, Warm Springs Agency, to all Mt. Hood timber purchasers in late May 1973, advising all existing contract holders that B.I.A. would assume management of the McQuinn Strip on July 1, 1973. In addition, the joint letter instructed the timber purchasers that the B.I.A. planned to inform all contract holders of any changes in requirements that might occur in the transferring of contracts by June 1, 1973. In the meantime, if any contract holders had any questions about procedural differences, they were advised through the letter to contact the Branch of Forestry of the B.I.A. at Warm Springs, Oregon.

By letter dated June 6, 1973, the Superintendent, B.I.A., Warm Springs Agency, again advised Mountain Fir Lumber Company that B.I.A. was assuming administration of existing timber contracts written under the Department of Agriculture regulations on areas within the McQuinn Strip as of July 1, 1973.

The June 6, 1973 letter further offered that certain information which might be helpful in arranging for a "smoother transfer of administration," of which we cite the following--

2. Payment by the purchaser shall be to the Bureau of Indian Affairs and purchaser copies of volume and payment will be furnished by the Bureau.
3. Scaling will be accomplished by the U.S. Forest Service under an agreement between the Forest Service and the Bureau of Indian Affairs. This agreement is being circulated for approval and signing at the present time.
4. The timber sale contracts will be administered by the Superintendent, Warm Springs Agency, with the Forest Manager as operational representative. Certain actions provided for in the contract and any modifications of the contract will require approval by the Area Director or his authorized representative.
5. Road maintenance on Indian lands previously the responsibility of the Forest Service may be accomplished by the Bureau of Indian Affairs through cooperative maintenance agreements.
6. Many particulars of the contracts will need to be translated in terms of Bureau of Indian Affairs' administrative authority and procedure and it is expected that the bulk of these may be accomplished at the operational level.

We look forward to meeting with you on June 12, 1973 to discuss particular aspects of this transfer * * *.

The Bureau of Indian Affairs began administering the existing timber sales contracts, including the four in question, on July 1, 1973.

On June 9, 1976, Mountain Fir Lumber Company informed the Bureau of Indian Affairs, Warm Springs Agency, that they had been improperly billed \$89,702.86 which they paid and which is the value of per acre material. This claim involves the four contracts in question, namely, La Hash No. 02760-1, Snowshoe No. 02486-3, Sunshine No. 02144-8, and Swamper No. 02678-5.

On August 12, 1976, the Acting Superintendent, Warm Springs Agency, advised Mountain Fir Lumber Company that its claim for reimbursement had not been authorized by the Portland Area Office, Bureau of Indian Affairs.

On August 27, 1976, the Acting Assistant Area Director, Bureau of Indian Affairs, Portland Area Office, issued a formal written decision rejecting Mountain Fir's claim. The decision was timely appealed to the Commissioner of Indian Affairs who referred the matter to this Board for determination pursuant to 25 CFR 2.19(a)(2).

In its notice of appeal, Mountain Fir avers the following:

- 1) Bureau of Indian Affairs declines paying money it owes Mountain Fir because of overcharges imposed by BIA in the billings for the Swamper, Sunshine, Snowshoe and La Hash timber sales.
- 2) Each of these contracts is between Mountain Fir and the United States.
- 3) Each contract includes or makes reference to specific provisions for scaling timber involved.
- 4) Each contract contains a disputes clause.
- 5) A dispute [previously] having arisen concerning proper scaling of the timber and the consequent amounts

to be paid therefore, [1/] Mountain Fir pursued to final judgment the administrative proceeding prescribed in the disputes clause. That judgment sustained the Mountain Fir

1/ Prior to the passage of P.L. 92-427 and through June 30, 1973, the Secretary of Agriculture had been authorized to administer active timber sale contracts on the McQuinn Strip, Mt. Hood, through its Forest Service. Mountain Fir Lumber Company had entered into several timber sale contracts with the Department of Agriculture, Forest Service, including the four in question here. Each of the contracts had a similar disputes clause which substantially provided:

“It is the intent of this contract that Purchaser and Forest Service shall agree upon the interpretation and performance of this contract. Upon failure to reach an agreement on a question of fact, the decision of Forest Service shall prevail within the limitations of law * * * and subject to appeal under Regulations of the Secretary of the Agriculture (36 CFR 211.20 et seq.) * * *.”

Pursuant to 36 CFR 211.21, anyone who is adversely affected by a decision of a Forest Supervisor may appeal to the Regional Forester. Any person who is adversely affected by a decision of the Regional Forester may take an appeal to the Board of Forest Appeals.

Mountain Fir submitted a claim affecting timber sales relating to seven contracts for alleged inequities and over charges to the Forest Service, Department of Agriculture, on February 1, 1973.

The Forest Supervisor on July 19, 1973, ruled that it was not proper to make the adjustment requested by Mountain Fir. In his decision the Forest Supervisor stated among other things:

“Historically, the Forest Service has always scaled logs by the piece regardless of whether the net volume was a composite of one, three, or four segments. Merchantable volume was to be paid for at established rates stated in the contract. The same consideration was given to a log when per acre pricing was being developed for twenty-foot maximum sales on the east side * * *. There never was any intention that the minimum specifications would apply to each segment * * *.”

On January 4, 1974, Mountain Fir filed a claim arising out of alleged overcharging and/or double charging affecting timber sales relating to 23 contracts. On January 28, 1974, the Forest Supervisor decided not to make the requested adjustment on these sales. The Forest Supervisor stated that Mountain Fir's questions were already decided by the July 19, 1973 decision, referred to supra.

Mountain Fir appealed the Forest Supervisor's decision to the Regional Forester on February 6, 1974. On May 7, 1974, the Regional Forester reversed the Forest Supervisor and found in favor of Mountain Fir stating among other things:

"Action was taken by my office to obtain pertinent portions of each contract for a more detailed review. By that review it has been

position. Notwithstanding that favorable judgment, the Bureau of Indian Affairs refuses to return the funds that it improperly demanded and received from Mountain Fir.

In its brief, the appellant in substance makes the following contentions:

- 1) The McQuinn Strip Act (P.L. 92-427) does not and is not intended to constitute a unilateral amendment or revocation of the disputes clause or any other clause of these contracts.
- 2) These contracts have not been assigned to BIA or the Confederated Tribes.
- 3) If there was in fact an assignment of these contracts, the assignment does not operate to amend or revoke the disputes clause.
- 4) If there was in fact an assignment, BIA may not elect to enforce its version of the Forest Service scaling rules incorporated into the contract while revoking Mountain Fir's vested right that disputes be settled under the disputes clause. BIA may not pick and choose which part it will abide by and which part it will ignore.
- 5) A final decision has been rendered under the disputes clause. BIA may not modify or revoke that decision.
- 6) Assuming the Regional Forester's decision were reviewable and there is an ambiguity in these adhesion contracts, it must be resolved against the government, the party that prepared the contracts.

fn. 1 (continued)

confirmed that, although contrary to the original intent of per-acre pricing as discussed on several occasions with the Forest Products Industry, the literal wording of the twenty-three contracts supports the Mountain Fir Lumber Co., Inc. position * * *."

The Regional Forester's decision of May 7, 1974, is the decision that Mountain Fir contends is final and binding regarding the same factual situation arising in future disputes under presently existing contracts entered into between Mountain Fir Lumber Company and the Department of Agriculture Forest Service prior to P.L. 92-427.

We are of the opinion that the Congress of the United States possessed the authority to unilaterally transfer beneficial ownership of the McQuinn Strip to the Confederated Tribes of the Warm Springs Reservation to be held in trust and administered by the Secretary of the Interior in the stead of the Department of Agriculture, Forest Service.

We do not believe that Congress' transfer of administration to the Department of the Interior of the McQuinn Strip under P.L. 92-427 in the stead of the Department of Agriculture is sufficient to constitute a breach of the aforementioned contracts.

Moreover, we find that Mountain Fir Lumber Company acquiesced in the transfer of the overall management to the Secretary of the Interior and the Bureau of Indian Affairs including responsibility for resolving disputes.

The record shows that after the passage of P.L. 92-427, Mountain Fir remained silent. It did not raise a voice in protest either to the interdepartmental transfer of management or to the substitution of the Secretary of the Interior and the Bureau of Indian Affairs as contract administrators until after the adverse decision of the Acting Superintendent of August 12, 1976. Appellant's silence is particularly probative of acquiescence since specific notices had been sent advising of future changes and inviting inquiries. Further, after the Bureau of Indian Affairs assumed management of the McQuinn Strip, Mountain Fir made their payments for which they were billed, to the Bureau of Indian Affairs. In addition, Mountain Fir requested of the Bureau and the Confederated Tribes several extensions of time within which to remove timber and complete the contracts. These requests were agreed to by the Confederated Tribes of the Warm Springs Reservation and were approved by the Bureau of Indian Affairs. It can only be concluded therefore that the Secretary of the Interior and the Bureau do indeed have jurisdiction over this matter. 2/

We now turn to the contention that the decision of the Regional Forester, Department of Agriculture, rendered on May 7, 1974, in another matter though factually similar, was final and binding on the Secretary of the Interior and the Bureau of Indian Affairs in this case.

2/ Jurisdiction is not based solely upon appellant's record of acquiescence or on the various memoranda of the Forest Service and the Bureau of Indian Affairs acknowledging assumption by the Bureau

It has been consistently held that the doctrines of res judicata and stare decisis do not apply in administrative proceedings. This does not mean however that weight or consideration cannot be given to the Regional Forester's decision in an overall review of the record.

The purpose of administrative review is to ascertain the truth in a matter, not to foreclose the correction of error, if error is found to exist. Under the Department of Agriculture appellate process, had Mountain Fir been dissatisfied with the Regional Forester's decision, it had a further right to appeal (with a right to a hearing) to the Board of Forest Appeals. A decision of the Board of Forest Appeals would have exhausted Mountain Fir's administrative remedies. Any further appeal would then have been to the Federal Courts.

The same rights and opportunities are and were afforded Mountain Fir by the Department of the Interior in this matter. Consequently, appellant cannot now maintain it was not afforded due process. See 25 CFR 2.10, et seq. and 43 CFR 4.350, et seq. 3/

We come now to the final question before us, namely, whether the minimum net scale volumes found in section A2 of the contracts in question apply to the whole log as presented or only to the segments into which the scaling personnel mentally divided those logs longer than 20 feet for scaling purposes?

fn. 2 (continued)

of contract responsibility. The Act of September 21, 1972, dictates that the Secretary of the Interior administer the lands affected in this appeal in discharge of his trust responsibility. The Act delineates certain functions to be retained by the Department of Agriculture, such as use of a right-of-way on the Pacific Crest Trail and maintenance of improvements at the Bear Springs Ranger Station. In this regard the 1972 Act is only one of several elements which we believe distinguishes this appeal from those cases argued by the appellant, viz., New York Shipbuilding Corp. v. United States, 385 F.2d 427 (Ct. Cl. 1967), S & E Contractors, Inc. v. United States, 406 U.S. 1 (1972).

3/ By letter dated December 1, 1976, appellant informed this Board that it did not desire a fact-finding hearing. Appellee agreed in its answer brief that "there are no material differences between the appellant and the Area Director with respect to the facts of the controversy * * *." Based upon the foregoing representations and in order to expedite appellant's exhaustion of administrative remedies the Board has decided this case on the basis of the administrative record unaided by a hearing, and in consideration of the briefs of the parties.

From a reading of the wording of the contracts and an examination of the record, we are unable to ascertain the intention of the parties. We therefore find that an ambiguity exists, and are constrained to look to custom and usage to ascertain how logs were intended to be scaled here. It appears from custom and usage that logs have always been scaled by the piece regardless of whether the net volume was a composite of one, two, three, or, four segments. The Forest Service has also consistently scaled logs by the piece. We find it was intended that the logs be scaled by the piece regardless of whether the net volume was a composite of one, two, three, or four segments. 4/

We find no merit to any of the other contentions raised by the appellant.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), the decision of the Acting Assistant Area Director, Bureau of Indian Affairs, Portland Area Office, dated August 27, 1976, is AFFIRMED, and the appeal is DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed
Mitchell J. Sabagh
Administrative Judge

We concur:

//original signed
Alexander H. Wilson
Chief Administrative Judge

//original signed
Wm. Philip Horton
Administrative Judge

4/ Our decision therefore is the same as that of the Forest Supervisor, Department of Agriculture, whose July 19, 1973, ruling in a related controversy denied appellant's claim. See fn. 2, supra.