



INTERIOR BOARD OF INDIAN APPEALS

Baldy & Baldy, Inc. v. Deputy Assistant Secretary - Indian Affairs (Operations)

13 IBIA 322 (11/14/1985)



United States Department of the Interior

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

BALDY & BALDY, INC.

v.

DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-7-A

Decided November 14, 1985

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) finding a breach of timber sales contracts for timber on the Hoopa Valley Indian Reservation, California.

Dismissed.

1. Board of Indian Appeals: Jurisdiction

The Board of Indian Appeals does not have jurisdiction to review a decision of the Bureau of Indian Affairs that is based on the exercise of discretion.

2. Indians: Contracts: Generally

The Bureau of Indian Affairs has discretion to determine whether an existing Indian contract should be modified, unless a legal right to modification is granted, e.g., by Federal statute, regulations, or the contract itself.

APPEARANCES: William R. Bragg, Esq., Eureka, California, for appellant; Colleen Kelley, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for appellee; P. Timothy Murphy, Esq., Eureka, California, for the Hoopa Valley Business Council. Counsel to the Board: Kathryn A. Lynn.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

On December 12, 1984, the Board of Indian Appeals (Board) received a notice of appeal from Baldly & Baldy, Inc. (appellant). Appellant sought review of an October 16, 1984, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) (appellee) concerning an alleged default on Hoopa Valley Indian Reservation Timber Contracts J52C14205341, Bull Creek M Logging Unit, and J52C14205342, Hopkins Creek H Logging Unit. For the reasons discussed below, the Board dismisses this appeal for lack of jurisdiction.

Background

The two timber contracts at issue in this appeal were approved by the Bureau of Indian Affairs (BIA) on June 24, 1982. At least 7 modifications of these contracts have been made since initial approval. The present appeal concerns appellant's alleged default as to the requirements established in paragraph 7 of Modification #7, approved February 14, 1984. ^{1/} By letter dated February 28, 1984, the Superintendent, Northern California Agency, BIA, (Superintendent) informed appellant that it had failed to meet the requirements of Modification #7 by failing to post an Irrevocable Letter of Credit and make the advance deposit. The Superintendent ordered appellant to cease all operations immediately.

Appellant filed an appeal with the Sacramento Area Director (Area Director). On May 24, 1984, the Area Director affirmed the Superintendent's order to cease operations.

Appellant sought further review by appellee, who, on October 16, 1984, affirmed the Area Director. ^{2/} That decision letter states at pages 1-2:

In its appeal B&B does not deny that it has failed to comply with the requirements of Modification No. 7. Rather, it argues that these circumstances should not result in a default of the contracts. It contends that a greater good will result if it is allowed to modify further certain requirements of the contracts. It maintains that if the changes are made revenues for the Indians will be guaranteed at a higher rate in this depressed market, employment will rise, and development of long term export markets will occur.

^{1/} Paragraph 7 of Modification #7 reads:

“In addition to any existing advance stumpage deposit balance in effect on the date of approval of this modification by the Approving Officer, Baldy and Baldy, Inc. will deposit one hundred seventy five thousand dollars (\$175,000) for advance stumpage deposit within seven calendar days of approval of this modification by the Area Director. Further Baldy and Baldy, Inc. agree to deposit to the advance stumpage receipts account one hundred seventy five thousand dollars (\$175,000) on the first business day of each month. Baldy and Baldy, Inc. further agree to have the full value of the estimated sale volumes secured with advance stumpage deposits no later than the last working day of July 1984.

“Subsection A10. Performance Bonds modified to read as follows:

“The purchaser will establish an acceptable Irrevocable Letter of Credit with the Bureau of Indian Affairs in an aggregate amount of \$2,300,000.00 by close of business February 24, 1984.’

“The Letter of Credit will be readjusted to \$300,000.00 upon payment of the advance stumpage based on the estimated sale volume. The Letter of Credit will be cancelled upon satisfactory performance of all the terms of the contract.”

^{2/} The Area Director had noted that appellant's appeal appeared to be untimely. However, appellee decided to consider the appeal on the merits, rather than to dismiss on this possible procedural ground.

While these goals are certainly worth achieving, and while we are sympathetic to the serious difficulties B&B finds itself in this market, we do not believe it is in the best interest of the Indians to continue to modify the contracts to keep B&B's interest alive. There have been numerous modifications to these contracts beginning as early as two months after the contracts were executed. * * * Thus, B&B was released from some of its earlier commitments in the hope that satisfactory performance under the contracts would occur in the future. Unfortunately, it has not.

B&B has submitted information which indicates that it may have negotiated another sales contract. This contract, however, requires an adjustment to the stumpage rate which would make it significantly less than the bid rate. I cannot agree to such a change not only because paragraph A9(a) of the contracts prohibits it, but because such a reduction would not be in the best interests of the Indians.

Appellant's appeal of this decision was received by the Board on December 12, 1984. Briefs have been filed before the Board by appellant, appellee, and the Hoopa Valley Business Council.

Discussion and Conclusions

Since appellant does not dispute the alleged breach of Modification #7 by its failure to provide the required Letter of Credit and advance payments, the Board finds that appellant breached Modification #7.

The next question is whether appellant's breach was excused. Appellant contends that BIA improperly determined that paragraph A9(a) of the contracts 3/ prohibited it from negotiating a stumpage rate lower than the bid rate. Because of this allegedly incorrect legal interpretation of the contract, appellant asserts that BIA failed to enter into good faith negotiations for the modification of the contract provisions when appellant produced a third party willing to accept assignment of the contracts at a lower stumpage rate. Appellant contends that its breach thus resulted from BIA's failure to negotiate in good faith, and asks the Board to order BIA to enter into modification negotiations.

[1] Appellee refused to negotiate a lower stumpage rate on two grounds: (1) a stumpage rate lower than the bid rate was prohibited by paragraph A9(a) of the contracts, and (2) a reduction of the stumpage rate and further modifications to the contract merely to continue appellant's interests in them would not be in the best interest of the Indians. The first reason constitutes a legal determination based upon interpretation of the contract language. The Board has authority to review BIA's interpretations of law. See

3/ Paragraph A9(a) reads in pertinent part: "The stumpage rates to be paid for timber specified in section A7(a) during the quarterly period in which this contract is approved shall be the bid rates shown below. * * * In no event shall the stumpage rates be reduced below the minimum rate shown below:"

25 CFR 2.19(c)(2); 43 CFR 4.330(a); Wray v. Deputy Assistant Secretary--Indian Affairs (Operations), 12 IBIA 146, 91 I.D. 43 (1984). The second reason, however, may constitute a decision within the discretion of the Secretary. The Board does not have authority to review discretionary decisions. See 25 CFR 2.19(c)(1); 43 CFR 4.330(b)(2); Billings American Indian Council v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 142 (1983).

[2] Either of the grounds given for appellee's decision not to modify the contracts would be sufficient to support his decision. Therefore, if either is proper, the decision must be affirmed. With respect to the second reason, BIA in general has discretionary authority and responsibility to determine what contracts are in the best interests of an Indian tribe or person. Like the initial decision to enter into a contract, the decision to modify an existing contract is generally discretionary, unless modification is based upon a legal right granted, e.g., by Federal statute, regulations, or the contract itself. See Wray, *supra*, n.4 at 12 IBIA 154, 91 I.D. 48. Here, no such right of modification has been cited and the Board finds none. Therefore, appellee's decision not to enter into further modification negotiations was a discretionary action. Furthermore, the justifications given for appellee's decision were well-reasoned exercises of the Secretary's authority to approve or disapprove contract modifications and were not arbitrary, capricious, or an abuse of discretion. Cf. United States v. Acting Aberdeen Area Director and Celina Young Bear Mossette, 9 IBIA 151 (1982) (affirming refusal to allow set-off against individual Indian money account). Thus, even if the Board were to find that appellee incorrectly interpreted the legal effect of paragraph A9(a) of the contracts, appellee was still within his authority to refuse to modify the contracts based on his discretionary determination that modification was not in the best interests of the Indians. The Board lacks jurisdiction to review such a decision. 4/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the October 16, 1984, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is dismissed for lack of jurisdiction.

 //original signed
 Bernard V. Parrette
 Chief Administrative Judge

I concur:

 //original signed
 Jerry Muskrat
 Administrative Judge

4/ Because of this holding the Board offers no opinion on appellee's interpretation of paragraph A9(a), and does not comment on appellant's contention that modification of the contracts as requested is actually in the best interest of the Indians.