



INTERIOR BOARD OF INDIAN APPEALS

Matilda Arviso, et al. v. Assistant Navajo Area Director, Bureau of Indian Affairs

18 IBIA 118 (01/18/1989)



# United States Department of the Interior

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

MATILDA ARVISO, ET AL.

v.

ASSISTANT NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-60-A

Decided January 18, 1990

Appeal from the denial of a request for cancellation of a business lease.

Dismissed.

1. Indians: Leases and Permits: Commercial Leases

A lease of the surface of an Indian allotment for uses incidental to the extraction of underlying Federal coal is a lease for business purposes within the meaning of 25 U.S.C. § 415 (1982).

2. Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

A notice of appeal from a decision of a Bureau of Indian Affairs official that is not timely filed will be dismissed.

APPEARANCES: Louis Denetsosie, Esq., Window Rock, Arizona, for appellants; Thomas O'Hare, Esq., U.S. Department of the Interior, Office of the Solicitor, Window Rock, Arizona, for appellee; Ray D. Gardner, Esq., Englewood, Colorado, for intervenor Pittsburg & Midway Coal Mining Company.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellants Matilda Arviso, Emma R. Bighumb, Robert Dale Bradley, Patricia Payne, Dan Begay, Sadie Begay, Matilda Begay Van Winkle, Gilbert Begay, Gilroy Begay, Lavina Begay, Joneson Begay, and Dorothy Mae Begay seek review of a March 4, 1988, decision of the Assistant Navajo Area Director, Bureau of Indian Affairs (BIA; appellee 1/), denying their request for cancellation of Business Lease 14-20-0603-6163 (lease), covering 160 acres, more or less, in Navajo Allotment 1613, NW<sup>1</sup>/<sub>4</sub>, sec. 8, T. 16 N., R. 20 W.,

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1/ The term "appellee" is used for both the Assistant Navajo Area Director and the Navajo Area Director.

New Mexico Principal Meridian, McKinley County, New Mexico. 2/ For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal as being untimely filed.

### Background

Navajo Allotment 1613 was allotted to Es zon e chee on February 16, 1921, by President Woodrow Wilson. The trust patent states:

[T]here is reserved from the lands hereby allotted, a right of way thereon for ditches or canals constructed by the authority of the United States; reserving, also, to the United States all coal in the lands so granted, and to it, or persons authorized by it, the right to prospect for, mine, and remove coal from the same upon compliance with the conditions of and subject to the limitations of the Act of June 22, 1910 (36 Stat. 583).

The lease at issue here was entered into on December 23, 1960, between The Pittsburg & Midway Coal Mining Company (intervenor) and "the heirs of Es zon e chee." The lease was signed by Joe Gay, a.k.a. Ash Key, C#59600, on his own behalf as the owner of a 1/2 undivided interest in the allotment, and the Acting General Superintendent, Navajo Agency (Superintendent), on behalf of the undetermined heirs of Dorothy White, a.k.a. Dorothy Marie White Bradley, C#61307 (White). It was approved on March 31, 1961, by the Acting Assistant Area Director. The lease, which took effect on December 23, 1960, and ran for an initial term of 25 years, granted intervenor

[t]he exclusive right to occupy and use so much of the surface of the leased premises as may be required, necessary, or convenient for any and all purposes incidental to or connected with prospecting, mining (by strip, auger, underground, or other approved methods), removal, preparation, storing, and selling of coal and transportation of coal on, under, or from the leased premises, subject to valid outstanding existing rights thereon.

The lease rental of \$2,400 was to be paid in one lump sum when the lease was approved by the Secretary of the Interior or his delegate. According to a February 6, 1961, memorandum from the Superintendent to the Area Director, the full rental for this and several associated leases was properly paid. 3/

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2/ Appellants' notice of appeal also challenged appellee's denial of cancellation of Business Lease 14-20-0603-6165. Although they have not explicitly withdrawn their appeal as to this lease, appellants raise no arguments concerning it. The Board finds that appellants have withdrawn this aspect of their appeal by failing to address it.

3/ The record shows that as of Apr. 5, 1961, \$1,200 had been credited to the Individual Indian Money (IIM) account of Joe Gay and an additional \$1,200 had been credited to the IIM account for White's estate. The record further shows that the \$1,200 plus interest in White's estate account was

Appellee states, and appellants do not dispute, that this rental amount represented the full fair market value of the allotment at the time the lease was executed.

On February 20, 1961, a hearing to probate White's trust estate was held before Hearing Examiner Walter W. Andre. Based on evidence presented at that hearing, Examiner Andre determined in an order issued on February 23, 1961, that decedent had died without executing a will and that her heirs were Leo Arviso, Emma Rose Big Thumb, Mrs. Patricia Ann Vivian (Payne), and Robert Dale Bradley. As relevant here, each of these individuals received a 1/8 interest in allotment 1613. <sup>4/</sup> On May 2, 1961, after the expiration of the 60-day period established in 25 CFR 15.17 (1961) for the filing of a petition for rehearing, Examiner Andre issued a memorandum allowing the distribution of White's estate.

On April 1, 1961, coal lease NM-057349, was entered into between the Bureau of Land Management (BLM), New Mexico State Office, and the Spencer Chemical Company. The lease granted Spencer "the exclusive right and privilege to mine and dispose of all the coal" underlying, inter alia, Allotment 1613, for an initial 20-year term. The lease was approved by the Chief of the Mining Unit, New Mexico BLM State Director's Office, on May 5, 1961. The lease was later assigned to Gulf Oil Corporation, of which intervenor is a wholly owned subsidiary, and was extended for an additional 10 years, to expire April 1, 1991, subject to further readjustments. The mining operation of which Allotment 1613 is a part is commonly known as the McKinley Mine.

By letter dated July 19, 1985, intervenor notified appellee that it was exercising its right under section 17 of the lease to renew the lease at the end of the initial 25-year period. The letter to appellee states: "Copies of this letter with the enclosure are being mailed or delivered to all ascertainable heirs of Es zon e chee. We would also appreciate your office notifying all heirs of the Lessor, Es zon e chee, of our intention to renew the lease, in the event we are unable to locate them." (Letter at 1). <sup>5/</sup>

By letter dated February 17, 1988, appellants filed a formal request with appellee to cancel this lease. Appellee denied the request by letter

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fn. 3 (continued)

distributed equally to Leo Arviso, Emma Rose Big Thumb, Patricia Ann Vivian (Payne), and Robert Dale Bradley on May 24, 1961. In both cases, the relevant journal entry shows the source of the funds to be the surface lease at issue here.

<sup>4/</sup> Appellant Matilda Arviso now owns a 1/8 interest in the allotment as the heir of Leo Arviso. The Begay appellants own either a 1/42 or 7/42 interest in the allotment as the heirs of Joe Gay.

<sup>5/</sup> The rental amount for the extended 25-year term was disputed between BIA and intervenor. The appropriate rental amount and the means for determining it are not at issue in this appeal.

dated March 4, 1988. Appellants, notice of appeal from this decision to the Washington, D.C., BIA office was apparently dated March 31, 1988.

The appeal was still pending on March 13, 1989, the date new appeals regulations for BIA and the Board took effect. See 54 FR 6478 and 6483 (Feb. 10, 1989). It was transferred to the Board on May 16, 1989, for consideration under the new procedures. Briefs on appeal were filed by appellants, appellee, and intervenor.

### Discussion and Conclusions

Intervenor challenges the Board's jurisdiction to hear this appeal based upon its argument that the request for cancellation was not timely filed under 25 CFR 131.27 (1960). 6/ Normally, the Board considers such jurisdictional challenges before reaching any other issue. Here, however, the parties dispute what law governs this case, and, in particular, whether 25 CFR Part 131 (1960) applies. Therefore, before it can address any of the other arguments raised by the parties, the Board must first determine whether 25 CFR Part 131 (1960) applies to this case.

Appellants contend that the lease is a lease for "mining purposes" within the meaning of 25 U.S.C. § 396 (1958 and 1982), which provides:

All lands allotted to Indians in severalty \* \* \* may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this section into full force and effect: Provided, That if the said allottee is deceased and the heirs to or devisees of any interest in the allotment have not been determined, or, if determined, some or all of them cannot be located, the Secretary of the Interior may offer for sale leases for mining purposes to the highest responsible qualified bidder, at public auction, or on sealed bids, after notice and advertisement, upon such terms and conditions as the Secretary of the Interior may prescribe. The Secretary of the Interior shall have the right to reject all bids whenever in his judgment the interests of the Indians will be served by so doing, and to readvertise such lease for sale.

Appellants thus argue that the lease should have been governed by 25 U.S.C. § 396 and 25 CFR Part 172 (1960), 7/ which regulates the leasing of allotted lands for mining purposes.

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6/ Part 131 was redesignated as Part 162 by notice published in 47 FR 13327 (Mar. 30, 1982).

7/ Part 172 was redesignated as Part 212 by notice published in 47 FR 13327 (Mar. 30, 1982).

In contrast, appellee and intervenor contend that the lease was properly issued under 25 U.S.C. §§ 415 and 380 (1958 and 1982) and the regulations in 25 CFR Part 131 (1960). 25 U.S.C. § 415 provides:

Any restricted Indian lands, whether tribally or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of specialized crops as determined by said Secretary. All leases so granted shall be for a term not to exceed twenty-five years \* \* \*. Leases for \* \* \* business purposes with the consent of both parties may include provisions authorizing their renewal for one additional term of not to exceed twenty-five years \* \* \*.

25 U.S.C. § 380 provides that "[r]estricted allotments of deceased Indians may be leased, except for oil and gas mining purposes, by the superintendents of the reservation within which the lands are located (1) when the heirs or devisees of such decedents have not been determined." The regulations in 25 CFR Part 131 (1960) governed the leasing and permitting of the surface estate of tribally and individually owned trust or restricted Indian lands.

[1] By the terms of the trust patent to Es zon e chee, the coal underlying this allotment was reserved to the United States. <sup>8/</sup> Accordingly, any lease of this allotment for the benefit of the Indian owner(s) could not have included a lease of rights to mine that coal. Instead, the lease that was entered into constituted a lease of the surface estate for business purposes as provided in 25 U.S.C. § 415. In this particular case the business lease contemplates the use of the entire surface for purposes resulting from the surface mining of the underlying coal. The Board rejects appellants' argument that this is a mining lease within the meaning of 25 U.S.C. § 396 and holds that this case is governed by 25 U.S.C. §§ 415 and 380 and 25 CFR Part 131 (1960).

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<sup>8/</sup> In their reply brief appellants state that although they had not previously raised the issue of the ownership of the coal in this proceeding, they are plaintiffs in a class action suit in the United States District Court for the District of New Mexico in which they argue that they own the coal underlying their allotments. Etcitty v. United States of America, No. CIV-83-1408-SC (D.N.M.). Even if the court were to find as a result of that litigation that appellants owned the coal, such a determination would not control the result in this appeal. At the time this lease was executed, the United States had concluded that it owned the coal. The Board has no authority in this or any other administrative proceeding to review the United States' legal conclusion that it owns the coal. If a court of competent jurisdiction determines that this legal conclusion is incorrect, appellants' remedy for any damages they may have sustained lies with that court, not in this administrative action.

Having found that 25 CFR Part 131 (1960) applies here, the Board addresses intervenor's jurisdictional argument. Intervenor contends that appellants' request for cancellation/notice of appeal was not timely filed under 25 CFR 131.27 (1960), which provided that:

(a) Any heir or devisee who feels aggrieved by the action taken by the superintendent on leasing the restricted lands of deceased Indians may, within 10 days after the date of execution of the lease, file with the superintendent a notice of appeal to the Secretary. The notice of appeal shall be in writing and shall set forth the reasons for the appeal. Copies of the notice shall be furnished by the appellant to the superintendent, the lessee, and to all parties who share in the estate.

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(c) The appellant and any other interested party may, within 30 days from the date on which a notice of appeal is filed, submit written arguments to the Secretary. [9/]

[2] The Board has frequently held that notices of appeal not timely filed with BIA must be dismissed. See, e.g., Baker v. Anadarko Area Director, 17 IBIA 218 (1989); Cahoon v. Portland Area Director, 17 IBIA 187 (1989), and cases cited therein.

In this case, no owner of an interest in allotment 1613 raised any objection concerning the lease until appellants filed their February 17, 1988, request that appellee cancel the lease. The request for cancellation did not cite any breach of the lease that would subject the lease to cancellation under 25 CFR 162.14, which was in effect when the request for cancellation was made. Instead, the request was strictly a challenge to the initial approval of the lease, 10/ and was made some 27 years after the lease was approved and almost 3 years after intervenor exercised its contractual right to renew the lease.

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9/ The appeals provisions in 25 CFR 131.27 (1960) conflicted with new general regulations for appeals from administrative actions of BIA officials that were added to 25 CFR Part 2 in 1960. Section 131.27 was deleted when Part 131 was revised in November 1961. Under the regulations in 25 CFR Part 2, a notice of appeal was required to be received in the office of the official whose decision was being appealed within 20 days after the mailing of that decision. 25 CFR 2.10(a) (1961).

10/ Appellants' arguments in their request for cancellation, continued in the present appeal, are that the lease could not have been validly executed by the Superintendent because White's heirs were determined prior to the issuance of the lease and their unanimous consent was not obtained, BIA was required to advertise the lease for competitive bidding, and the Superintendent could not have executed the lease for more than 1 year.

Under the appeals regulations in 25 CFR 131.27 (1960), any challenge to the Superintendent's action of approving the lease on behalf of White's undetermined heirs should have been filed within 10 days after the lease was executed. For purposes of this discussion, the Board will assume that: (1) White's heirs did not have actual or constructive notice of the Superintendent's action until after White's estate and/or the initial rental payment was distributed to them, *i.e.*, until after May 24, 1961; (2) a valid administrative appeal could have been taken under 25 CFR Part 2 from the decision of the Area Director to approve the Superintendent's granting of the lease on behalf of White's undetermined heirs, as well as under 25 CFR 131.27 from the Superintendent's action.

Even making these assumptions and giving appellants the benefit of every conceivable doubt, any appeal from the action of the Superintendent in approving the lease on behalf of White's undetermined heirs, or of the Area Director in approving the Superintendent's decision, should have been filed in early 1962 at the extreme latest. A 1988 request for cancellation of the lease, raising as its reasons the erroneous action of the Superintendent in approving the lease, is simply not timely filed. *See Baker, supra. 11/*

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 Assistant Navajo Area Director's March 4, 1988, decision is dismissed on the grounds that the Board lacks jurisdiction over a request for administrative review that was not timely filed.

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*//original signed*  
Kathryn A. Lynn  
Chief Administrative Judge

I concur:

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*//original signed*  
Anita Vogt  
Administrative Judge

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*11/* Even if the Board were to somehow excuse the failure to contest the approval of the lease during its initial term, appellants have also not explained the passage of almost three years between the time intervenor exercised its right to renew the lease, the only other point at which a right of appeal even arguably may have arisen, and their filing of the request for cancellation.