



INTERIOR BOARD OF INDIAN APPEALS

Bernell Kombol, d.b.a. Grass Mountain Logging Co.
v. Acting Assistant Portland Area Director, Bureau of Indian Affairs

21 IBIA 116 (12/19/1991)

Related Board case:
19 IBIA 123



United States Department of the Interior

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

BERNELL KOMBOL, d.b.a. GRASS MOUNTAIN LOGGING CO.

v.

ASSISTANT PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-45-A

Decided December 19, 1991

Appeal from a determination of damages resulting from the anticipatory breach of a timber sale contract.

Affirmed as modified.

1. Administrative Procedure: Administrative Review--Indians:
Timber Resources: Generally

Decisions made by officials of the Bureau of Indian Affairs as supervisors of Indian timber leases will be upheld when they are reasonable and based upon substantial evidence in the record.

2. Administrative Procedure: Burden of Proof--Indians: Contracts:
Generally

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

3. Contracts: Disputes and Remedies: Damages: Measurement--
Indians: Contracts: Generally

In general, the measure of damages for the breach of a contract relating to Indian trust or restricted lands is that amount of money which will place the owner in as good a position as he would have been in had the contract been fully performed.

4. Contracts: Disputes and Remedies: Damages: Measurement--
Indians: Contracts: Generally

Under the doctrine of avoidable consequences, damages for breach of contract are normally not awarded to the nonbreaching party for those expenses which could have been avoided through the exercise of reasonable care.

The doctrine does not, however, create enforceable rights in the breaching party.

5. Indians: Contracts: Generally

Absent a specific provision in a contract entered into after a prior contract was breached, the Bureau of Indian Affairs has no duty to obtain the consent of the party that breached the original contract before approving modifications to the resale contract.

APPEARANCES: Jan D. Sokol, Esq., Portland, Oregon, for appellant; Michael E. Drais, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director; Frank R. Jozwiak, Esq., Seattle, Washington, for the Makah Indian Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Bernell Kombol, d.b.a. Grass Mountain Logging Company, seeks review of a December 14, 1989, decision of the Assistant Portland Area Director, Bureau of Indian Affairs (BIA; Area Director), determining the amount of damages due for appellant's breach of the Blow Down 79 Logging Unit Contract No. P10C14200363, with the Makah Indian Tribe (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision as modified.

Background

This matter was previously before the Board for a determination of whether appellant breached the Blow Down 79 timber sale contract. In Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123 (1990) (Kombol I), the Board held that appellant had breached the contract. The background of this matter is fully set forth in Kombol I and will be repeated here only to the extent that it is necessary for an understanding of the present appeal. See 19 IBIA at 124-28.

Following BIA's determination that appellant had breached its contract, the timber covered by appellant's contract was readvertised. A new contract was awarded to Mayr Brothers Logging Company (Mayr Bros.).

On December 14, 1989, the Area Director informed appellant that damages had been assessed in the amount of \$120,594.74. This amount was calculated by beginning with anticipated proceeds under the contract, i.e., \$798,492.23, from which the Area Director subtracted \$19,000 (forfeited bid deposit) and \$689,668.62 (actual amount received from resale of the timber to Mayr Bros.), and to which he added \$27,861.24 (loss of growth resulting from delay in establishing a new stand of timber) and \$2,909.89

(administrative costs incurred by the Tribe and BIA in reselling the timber after appellant's breach). ^{1/}

The Board received appellant's notice of appeal from this decision on January 17, 1990. Briefing on the amount of damages was stayed pending a decision on whether or not appellant had breached the contract. After the issuance of the Board's decision in Kombol I, briefing on the amount of damages was resumed. Briefs were received from appellant, the Area Director, and the Tribe. In addition, several motions are pending.

Discussion and Conclusions

[1] All parties to this proceeding agree that the Area Director's decision should be reviewed under the standard set forth in the Board's decision in Walch Logging Co. v. Assistant Portland Area Director (Economic Development), 11 IBIA 85, 101, 90 I.D. 88, 96-97 (1983). The Board there stated that BIA's actions as supervisor of Indian leases would be upheld if they were reasonable and based upon substantial evidence in the record.

[2] Appellant bears the burden of proving that the Area Director's decision was erroneous or not based upon substantial evidence. See, e.g., Pima Country Club, Inc. v. Acting Phoenix Area Director, 21 IBIA 33, recon. denied, 21 IBIA 70 (1991). Failure to carry this burden of proof will result in an affirmance of the Area Director's decision.

The Board will first consider an argument raised by appellant in footnote 4 of his opening brief, because, if this argument were accepted, the Area Director's decision would be rendered moot. Appellant contends that his \$19,000 bid deposit, which BIA applied against the damages it determined appellant owed, constituted liquidated damages under the terms of the sale prospectus. Appellant enlarges upon this argument in his reply brief. He cites Stone, Sand & Gravel Co. v. United States, 234 U.S. 270 (1914), in support of his contention that an agreement for liquidated damages is binding upon the parties and precludes the nonbreaching party from recovering actual damages.

The sale prospectus stated:

Deposits in the form of either certified check[,], cashier's check, bank draft, or postal money order, drawn payable to the order of the Bureau of Indian Affairs, or cash, in the amount of Nineteen-Thousand Dollars (\$19,000.00) must accompany each sealed bid. * * * The deposit of the successful bidder will be applied as part of the purchase price against timber cut on this unit only, or retained as liquidated damages if the bidder

^{1/} In his answer brief, the Area Director withdrew his request for damages for loss of timber growth. Accordingly, the Area Director's decision is modified to delete this item of damages.

does not execute the contract and furnish satisfactory bond in the amount of Thirty-Two Thousand Dollars (\$32,000.00) within thirty days (30) of acceptance of his bid.

The sale prospectus thus provided that the bid deposit would be retained as liquidated damages if the successful bidder failed timely to execute the contract and furnish a satisfactory bond. Otherwise, the bid deposit would be applied against the purchase price of timber cut under the contract.

As found in Kombol I, 19 IBIA at 125:

Appellant signed the contract on October 11, 1979. Because of problems with the performance bond appellant submitted, the contract was not signed by the Area Director until January 14, 1980. x/ Two copies of the approved contract and bond agreement were returned to appellant by the Agency Forest Manager by letter dated January 18, 1980. The letter stated: "It is requested that you arrange with this office prior to the end of January 1980, a formal logging conference to discuss the contract obligations of this sale."

x/ Section A10 of the contract required a performance bond in the amount of \$32,000. Although appellant submitted a bond, it was not of a type acceptable to BIA. Appellant furnished a bond in the required amount * * *.

It is clear from the actions of the parties that appellant was considered to have timely executed the contract and furnished a satisfactory bond. Therefore, the liquidated damages provision in the sale prospectus had no further application to appellant's contract.

[3] Because of this holding, the Board must examine BIA's calculation of damages. The parties agree that, under the facts of this case, the general measure of damages for breach of this contract is that amount of money which will put the Tribe in as good a position as it would have been in had the breached contract been fully performed. See also Walch, 11 IBIA at 109, 90 I.D. at 101.

The first item of damages assessed by BIA relates to the depreciated value of the timber. BIA calculated that the anticipated proceeds from appellant's contract, measured in terms of the sale price, were \$798,492.23. From this amount, BIA subtracted appellant's \$19,000 bid deposit and the \$689,668.62 actually received under the Mayr Bros. contract. BIA thus found that appellant owed the Tribe \$89,823.61 as damages for depreciation in the value of the timber.

Appellant objects to the use of this method of calculating damages, contending that in Walch the Board held that the proper method for calculating damages was to determine the difference between the sale price of the original contract and that of any resale contract. Appellant argues

that because, in this case, the price of the resale contract was actually higher than the price of his contract, he should not owe anything as damages for depreciation in the value of the timber. He contends that the only reason the actual proceeds under the resale contract were less than the sale price of his contract was because BIA granted relief to Mayr Bros. from certain contract provisions, thus reducing the amount received for certain species of timber and lengthening the time for performance when the timber market was declining. Appellant argues that any depreciation in the value of the timber was the direct result of BIA's granting of concessions to Mayr Bros., and not the direct result of his breach. 2/

The Area Director responds that he is entitled to use the best information available to him at the time he calculates the amount of damages. Here, because of delays caused by judicial review proceedings, the Area Director states that the best available information was the amount actually received under the resale contract, an amount which had been determined by the date he calculated damages, because the resale contract had been fully performed. 3/

The Board's decision in Walch was based in part on an October 23, 1933, memorandum of the Solicitor of the Department of the Interior entitled "Memorandum to Mr. Collier Re: Defiance Plateau Unit Timber Sale Contract." I Op. Sol. at 376. This Solicitor's Opinion was in turn based upon the Supreme Court's decision in Roehm v. Horst, 178 U.S. 1 (1900). In Roehm, the Court recognized anticipatory breach of contract and held that an action could be brought at the time one party repudiated a contract; *i.e.*, that the nonbreaching party was not required to wait until the date set for performance in order to learn whether the repudiating party would actually perform despite the repudiation. As to damages, the Court stated:

[T]he rule is applicable that [the nonbreaching party] is entitled to compensation based, as far as possible, on the ascertainment of what he would have suffered by the continued breach of the other party down to the time of complete performance, less any abatement

2/ Appellant also notes that he had requested and been denied the same relief that was granted to Mayr Bros. In Kombol I, the Board found that appellant was already in breach of his contract when he requested modifications. In contrast, Mayr Bros. was performing its contract in good faith when it requested and was granted contract modifications.

3/ Appellant notes that BIA calculated damages using the price of the resale contract throughout the judicial review proceedings. He states that it was not until after this matter had been remanded to the Department by the court that damages were recalculated using the actual proceeds received under the resale contract.

In remanding this matter to the Department, the court held that no final determination of damages had been made. Accordingly, the Area Director was required to issue a final determination of damages, which he did in the Dec. 14, 1989, decision under review. The appropriateness of the methodology used in that decision is the subject of this appeal.

by reason of circumstances of which he ought reasonably to have availed himself.

178 U.S. at 20-21.

In his Defiance Plateau opinion, the Solicitor stated that the majority rule in Federal courts in regard to the determination of damages in cases of anticipatory breach "in view of the general purpose of damages, placing the damaged party in the same position he would have enjoyed in event of performance, would be that the market value should be determined as of the date or dates set for performance. Roehm v. Horst." I Op. Sol. at 380. The Solicitor further stated that if this majority rule were adopted, in order "to establish the market value at the various future times set for performance, evidence of market values existing between the date of breach and the date of trial would be admissible." I Op. Sol. at 380-81.

In following these earlier opinions, the Board held that anticipatory breach of contract is recognized in regard to contracts relating to trust or restricted property; administrative proceedings can begin immediately upon a repudiation by a contracting party; damages are to be measured as of the date set for performance; and information relating to the amount of damages that is obtained after the anticipatory breach, but before the conclusion of administrative proceedings, can be used in calculating damages. It further held that, under the circumstances of the Walch case, it was reasonable to use the resale contract price in calculating damages.

The Board did not hold in Walch that the difference between the sale price of the breached contract and the sale price of any resale contract was the only reasonable or acceptable method of calculating damages. The fact that BIA used a different method of calculating damages in this case does not automatically mean that the method used was not acceptable. As previously noted, appellant bears the burden of proving that the Area Director's decision was not reasonable or was not based upon substantial evidence in the record.

Although not stated in precisely this way, appellant's arguments against the use of actual proceeds received under the Mayr Bros. contract to calculate damages are based upon the contention that this methodology was unreasonable because it violated the duty to mitigate damages. Thus, appellant argues:

By accepting the Mayr Brothers bid, the Bureau was placed in a better position than it had been before the breach by Kombol. The Bureau has a continuing duty to Kombol to use every reasonable effort to recover the full bid price * * *. The Bureau should not be allowed to release Mayr Brothers from liability and still expect to recover loss from Kombol. Therefore, the Bureau's

attempt to recover from Kombol damages caused by the Bureau's own intentional acts is clearly unjustified and should be denied.

(Opening Brief at 9). Specifically, appellant argues that BIA violated its duty to him by modifying the Mayr Bros. contract without his approval. Appellant cites no support for this contention other than the duty to mitigate damages.

The Area Director contends that the phrase "duty to mitigate damages" is actually a misnomer and that the principle should be referred to as the "doctrine of avoidable consequences." The principle that a nonbreaching party will not be awarded damages for those expenses which he could have avoided through the exercise of reasonable care has been termed both a "duty to mitigate damages" and the "doctrine of avoidable consequences" by the courts. Because of the apparent confusion arising from the term "duty," the Board will refer to this principle as the doctrine of avoidable consequences.

[4] Whatever the principle has been called, it clearly does not create enforceable rights in the breaching party. Rather, it concerns only the amount of damages that will be awarded to the nonbreaching party. Thus, if the nonbreaching party could have avoided certain expenses through the exercise of reasonable care, it will not be awarded those expenses as damages from the breaching party. However, the breaching party has no enforceable right to require the nonbreaching party to take any action to avoid the expenses. Neither is the nonbreaching party required to recoup all losses, so long as his actions are, under the circumstances existing at the time, reasonable attempts to minimize the breaching party's damages. Cf., e.g., Iverson v. Marine Bancorporation, 86 Wash.2d 562, 546 P.2d 454 (1976); Kubista v. Romaine, 14 Wash.App. 58, 538 P.2d 812 (1975), aff'd, 87 Wash.2d 62, 549 P.2d 491 (1976). 4/

[5] The resale contract specifically states that it is between the Tribe and Mayr Bros., that it is subject to BIA approval, and that it may be modified with the agreement of the parties and the approval of BIA. Nowhere does the resale contract state that appellant's approval must be obtained before it can be modified. As previously mentioned, appellant cites no authority other than his interpretation of the "duty to mitigate damages" for the proposition that his approval had to be obtained before the resale contract could be modified. The Board finds that appellant's approval was not required in order to modify the resale contract and that BIA and the Tribe owed appellant no duty not to modify the contract.

4/ See United States v. Humboldt Fir, Inc., 426 F. Supp. 292, 297 (N.D. Cal. 1977), aff'd mem. 625 F.2d 330 (9th Cir. 1980): "In the absence of federal cases on point, state statutory and decisional law may furnish a convenient source for the general law of contracts to the extent that it does not conflict with the Federal interest in developing and protecting the use of Indian resources."

Appellant also requests an evidentiary hearing to show that the modifications to the Mayr Bros. contract were not reasonable. Appellant's intent is clearly to "second-guess" every decision made by the Tribe and BIA in administering the resale contract, and perhaps in administering the contract which appellant breached. Under ordinary circumstances, appellant would lack standing to challenge actions taken by BIA as supervisor of the Mayr Bros. contract, because appellant was not a party to that contract. See 25 CFR 2.1 (1981), 25 CFR 2.2. ^{5/} Under his interpretation of the "duty to mitigate damages," appellant attempts to claim an interest in the resale contract sufficient to allow him to raise questions concerning the management of that contract. In effect, appellant attempts to place himself in the position of a "third-party beneficiary" of the resale contract.

The doctrine of avoidable consequences does not reach this far. The doctrine neither requires the nonbreaching party to be perfect in all actions taken after a breach of contract, nor makes the nonbreaching party a guarantor for the breaching party. It merely requires the nonbreaching party to exercise reasonable care in attempting to minimize the damages resulting from breach. If reasonable care is exercised, any remaining damages will be awarded. Cf. Iverson, supra; Kubista, supra. ^{6/}

^{5/} The Board notes that even if appellant had been a party to the resale contract, the time for challenging BIA's actions as supervisor of that contract has long since expired. 25 CFR 2.10 (1981), 25 CFR 2.9(a); 43 CFR 4.332(a) (1981), 43 CFR 4.332(a).

^{6/} In Kubista, the Washington Court of Appeals stated at 14 Wash. App. at 63, 538 P.2d at 815-16:

"t has long been the law in this state and elsewhere that an injured party must, whenever possible, attempt to mitigate his damages, and cannot be compensated for damages which he might have prevented by reasonable efforts and expenditures. * * * The obvious corollary to this rule is that an injured party is generally entitled to all legitimate and reasonable expenses necessarily incurred by him in an honest and good faith effort to reduce the damages from or following the wrongful act. * * * Although prudent action and ordinary diligence is of course required, the following statement of the applicable principles of law has been approved by the [Washington] Supreme Court:

"While it is economically desirable that personal injuries and business losses be avoided or minimized as far as possible by persons against whom wrongs have been committed, yet we must not in the application of the present doctrine lose sight of the fact that it is always a conceded wrong-doer who seeks its protection. Obviously, there must be strict limits to the doctrine. A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen.' Hogland v. Klein, 49 Wash.2d 216, 221, 298 P.2d 1099, 1102 (1956), citing C. McCormick, Law of Damages § 35, 133 (1935)."

(Citations omitted; emphasis in original).

Here, BIA, on behalf of the Tribe, entered into a resale contract. It administered that contract in accordance with its understanding of the timber market as it existed at the time actions needed to be taken, and in accordance with its understanding of the state of the law. In fact, Mayr Bros. was granted only part of the relief it requested. The Board finds that BIA's actions were reasonable attempts, at the time and under the circumstances, to minimize the damages to the Tribe resulting from appellant's breach of contract, and therefore declines to look further behind BIA's administration of the resale contract. Appellant's request for an evidentiary hearing on the reasonableness of the modifications is denied.

Because the reasonableness of the modifications to the contract was the only basis upon which appellant challenged the use of actual proceeds in calculating damages, he has failed to carry his burden of proof. Therefore, the Area Director's determination of damages as to depreciation in the value of the timber is upheld.

Appellant also challenges the Area Director's determination that he owes \$2,909.89 for administrative expenses associated with the readvertisement of the contract. Appellant argues:

The [Area Director] seeks to recover \$1,339.10 for expenses from advertising and phone calls. * * * The balance of \$1,570.79 is largely for labor associated with rebidding the contract for Mayr Brothers. The time spent on this task by various staff members amounts to 114 hours. Considering the rebid contract is almost identical to the initial contract, the additional labor spent in conducting the rebid is clearly excessive and should be reduced by half.

(Opening Brief at 12). In his reply brief, appellant specifically attacks costs incurred in computing damages against him and the number of hours spent in preparing and typing the rebid contract. Appellant does not, however, attempt to show how these charges are incorrect or improper. Rather, he contends that an evidentiary hearing is necessary for BIA to explain the basis for the expenses.

The Area Director responds that an itemized breakdown of the costs and expenses claimed has previously been supplied to appellant, and that the items claimed are conservative based upon the facts that some items were not claimed because documentation was deemed inadequate and the full time spent on this matter by government and Tribal attorneys was not claimed.

The Area Director has provided initial support for these expenses. Appellant bears the burden of proving that the amounts claimed were unreasonable or not supported by substantial evidence in the record. Unsupported allegations that the costs are excessive or improper are not sufficient to carry appellant's burden of proof. Furthermore, appellant needs to make

some showing of error in order for the Board to order an evidentiary hearing. 7/ Accordingly, the administrative costs are upheld.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 14, 1989 decision of the Assistant Portland Area Director is affirmed as modified. 8/

//original signed

Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed

Anita Vogt
Administrative Judge

7/ Even if the Board had ordered an evidentiary hearing on this issue, appellant would have been required to show that the costs were excessive, rather than BIA being required to justify them.

8/ All motions not previously addressed are hereby denied.