



INTERIOR BOARD OF INDIAN APPEALS

Cherokee Nation of Oklahoma, Chickasaw Nation and Choctaw Nation of Oklahoma v.
Muskogee Area Director, Bureau of Indian Affairs

22 IBIA 240 (08/24/1992)



United States Department of the Interior

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

CHEROKEE NATION OF OKLAHOMA, CHICKASAW NATION
AND CHOCTAW NATION OF OKLAHOMA

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-1-A

Decided August 24, 1992

Appeal from a decision to escrow lease income from certain Arkansas Riverbed tracts pending judicial determination of title to the tracts.

Affirmed as modified.

1. Appeals: Jurisdiction--Board of Indian Appeals: Jurisdiction--
Bureau of Indian Affairs: Administrative Appeals: Generally

Once an appeal is filed with the Board of Indian Appeals from a decision issued by a Bureau of Indian Affairs official, the Bureau loses jurisdiction over the matter except to participate in the appeal as a party.

2. Administrative Procedure: Administrative Review--Board of
Indian Appeals: Generally

The Board of Indian Appeals will consider the merits of an arguably moot appeal when the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review.

3. Federal Oil and Gas Royalty Management Act of 1982:
Royalties--Indians: Mineral Resources: Oil and Gas: Royalties

Under 30 U.S.C. § 1714 (1988), the Department of the Interior lacks authority to escrow oil and gas royalties derived from production on Indian lands, or allocated thereto, beyond the last business day of the month in which they are received.

APPEARANCES: Joe R. Reeder, Esq., and E. Scott Polikov, Esq., Washington, D.C., for appellants; Emmett M. Rice, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Cherokee Nation of Oklahoma, Chickasaw Nation, and Choctaw Nation of Oklahoma seek review of an August 19, 1991, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), to escrow lease income from certain Arkansas Riverbed tracts pending final judicial determination of title to the tracts. For the reasons discussed below, the Board affirms the Area Director's decision as modified herein.

Background

In 1970, the Supreme Court held that appellants, rather than the State of Oklahoma, had received title to the land underlying the navigable portion of the Arkansas River from its confluence with the Grand River to the Oklahoma-Arkansas border, a 96-mile segment of the river. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). ^{1/} The Cherokee Nation was found to own the entire riverbed between the Grand River and the Canadian River. Appellants were found to share interests in the riverbed between the Canadian River and the Oklahoma border. In 1973, Congress authorized a quiet title action among the three tribes to determine their respective rights in this portion of the riverbed. Act of December 20, 1973, P.L. 93-195, 87 Stat. 769. In 1975, judgment was entered in the litigation authorized by this statute; the court retained jurisdiction to hear any further questions that might arise in the matter. Choctaw Nation v. Cherokee Nation, 393 F.2d 224 (E.D. Ok. 1975). Neither the Supreme Court nor the district court made findings with respect to specific tracts within the riverbed.

In 1974, BIA contracted with W. R. Holway and Associates, a Tulsa-based engineering firm, to prepare a study of river movement and identify tribal land in the riverbed. Because no accurate survey of the riverbed existed, tribal oil and gas leases were issued, beginning in 1974, on the basis of the Holway study. ^{2/} On April 29, 1976, appellants entered into a revenue-sharing agreement, providing for, inter alia, distribution of the lease proceeds among them. ^{3/}

^{1/} In Cherokee Nation v. Oklahoma, 416 F. Supp. 838 (E.D. Ok. 1976), title to the riverbed was held to be in the United States in trust for appellants.

^{2/} According to appellants, the riverbed boundaries were last comprehensively surveyed in the 1890's by the U.S. Geological Survey, and the river itself was last surveyed in the 1930's by the Army Corps of Engineers. Significant shifts in the river channel have occurred over the years (Appellants' Opening Brief at 2-3).

^{3/} Section 4 of the 1973 act provided in part:

"[T]he parties [i.e., appellants here] are hereby authorized to enter into a settlement agreement in which provision may be made for a recognition in perpetuity of their relative rights to use and to enjoy the surface and the subsurface of the lands [below the Canadian Fork and to the eastern boundary of Oklahoma], including the division of any and all of such bonus sums, rentals, and royalties, or other moneys paid or received on account of the leasing of any portion of said lands for any purpose or purposes. Such

For reasons not entirely clear, BIA did not request the Bureau of Land Management (BLM) to survey the riverbed until 1986 or 1987. By that time, it had become apparent that a number of trespassers were on the riverbed lands and that litigation would be necessary to oust them and quiet title to the lands.

In 1989, appellants filed claims against the United States for breach of trust and mismanagement of the riverbed lands. Cherokee Nation v. United States, No. 218-89-L (Cl. Ct. filed Apr. 21, 1989); Choctaw & Chickasaw Nations v. United States, No. 630-89-L (Cl. Ct. filed Nov. 30, 1989). These claims are still pending.

Also in 1989, appellants' leaders testified before the Special Committee on Investigations of the Senate Select Committee on Indian Affairs concerning the trespassers, the need to take legal action against them, and the need for a survey of the lands in connection with the expected litigation. Federal Government Protection of Natural Resources at the Arkansas Riverbed in Oklahoma & the Hopi Reservation in Arizona: Hearings Before the Special Committee on Investigations of the Senate Select Committee on Indian Affairs, 101st Cong., 1st Sess. 1-14 (1989). As a result of Congressional interest in the matter, specific appropriations were made for a BLM survey, beginning in FY 1990.

When the survey of the first three linear miles was completed, sometime prior to June 1991, it was discovered that there were significant differences between the BLM survey and the Holway study. Some lands shown in the Holway study as tribal lands were, according to the BLM survey, not tribal lands. Conversely, the BLM survey identified other tracts as tribal lands for the first time. ^{4/} Some of the lands now identified as non-tribal lands had been included in tribal oil and gas leases pursuant to the Holway study. Royalties were being collected on these leases by the Minerals Management Service and paid to appellants.

At a July 11, 1991, meeting, the Area Director informed appellants of the problem and discussed the possibility that lease proceeds would be escrowed. On August 19, 1991, he wrote to appellants, stating:

You [have] been furnished maps of the first three linear miles of the river prepared by [BLM] that depicted tracts of land subject to tribal claims under applicable riparian law. The tracts in question are presently under oil and gas leases pursuant to the recommendations pertaining to claimable tracts

fn. 3 (continued)

settlement agreement may be embodied in and be made a part of any decree of the court, which thereupon shall be final and conclusive with respect to the rights and interests of the parties."

Apparently, the revenue-sharing agreement has not been incorporated into a court decree.

^{4/} No issue concerning these "new" tribal lands is presented by this appeal.

presented by the 1974 Holway Study. The more complete BLM river study excludes some of those tracts from anticipated tribal claim. It is not anticipated that the proposed third party suits to quiet titles to tribal lands in the riverbed's area will include any of those tracts that were pointed out to you at the meeting.

It follows that the United States could conceivably become liable to the lessees of those tracts for all payments erroneously made and disbursed to the three tribes. This office has made the decision to place such funds in escrow pending final judicial resolutions of tribal titles.

A full accounting of all receipts and escrowed amounts will be maintained. The procedure was initiated for July 1991 receipts. Enclosed is a copy of the format to be utilized. Reports with cumulative totals will be furnished to you each month.

(Area Director's Aug. 19, 1991, Decision at 1). Enclosed with the decision was a report listing six leases and showing that the total proceeds from those leases for July 1991 was \$4,400.28. ^{5/} Although not entirely clear from the Area Director's decision, it appears from later events that the entire proceeds from these six leases were escrowed, although some of the lands within the leases had been confirmed as tribal lands by the BLM survey.

Appellants' appeal from this decision was received by the Board on September 17, 1991. Briefs were filed by appellants and the Area Director. Appellants filed a motion for oral argument, which was opposed by the Area Director.

During the course of this appeal, the parties engaged in settlement discussions, which ultimately proved unsuccessful. On June 8, 1992, the Board received a copy of a June 5, 1992, memorandum from the Regional Solicitor to the Area Director stating, inter alia, that appellants had entered into a new revenue-sharing agreement. ^{6/} The Regional Solicitor advised the Area Director that, based on the new agreement, some of the escrowed funds could be released, i.e., that portion of the funds attributable to lands identified as tribal lands in both the BLM survey and the

^{5/} The leases were Nos. 503-7127, 503-7128, 503-7129, 503-7132, 503-7192, and 503-7272.

^{6/} Apparently, the agreement supersedes the Apr. 29, 1976, agreement and is intended to resolve a problem concerning whether or not tribal shares would change based upon movements of the river. No copy of the agreement was included with the copy of the Regional Solicitor's memorandum received by the Board.

Holway study. The Regional Solicitor also stated that he believed the partial release of funds would render part of this appeal moot. ^{7/} Appellants filed a response to the memorandum arguing that none of the issues in the appeal are moot.

Discussion and Conclusions

Before proceeding to the merits, the Board must address a question raised by the Regional Solicitor's June 5, 1992, memorandum. The memorandum advised the Area Director to release some of the funds subject to his August 19, 1991, decision. In following that advice, assuming that he did so, the Area Director in effect modified his decision by narrowing its scope. No permission was sought from the Board for a partial release of funds or for a modification of the August 19 decision.

[1] As the Board has stated on a number of occasions, an Area Director loses jurisdiction over a matter once an appeal has been filed with the Board. Therefore, the Area Director had no authority to release funds or to take any other action in the matter on appeal, even one that benefitted appellants, without the Board's permission. Five Sandoval Indian Pueblos, Inc. v. Deputy Commissioner of Indian Affairs, 21 IBIA 17 (1991), and cases cited therein. The reasons for this rule were explained at length in Five Sandoval Indian Pueblos and will not be repeated here. However, it is worth noting here that several options are available to BIA if it concludes, after an appeal has been filed with the Board, that its original decision requires correction:

If, during the course of appeal, BIA determines that the original decision was incorrect, it can: (1) request that the decision be vacated and the matter remanded to BIA in order to grant the relief the appellant requests, (2) confess error and ask the Board

^{7/} The Regional Solicitor's memorandum stated in part:

"You may therefore proceed to release funds that have been escrowed that derive from parcels of land that are common to both the Holway Study and the BLM Study and Survey. You should continue to hold funds in escrow that the official BLM Study and Survey does not identify as deriving from land parcels lawfully claimable by the three Tribes. Those funds presumably will belong to third parties once the quiet title suits against third parties are resolved. Several oil companies who have already been notified of the suits to be filed have already advised that they will claim offsets and damages against the United States. * * * The issue as to whether you acted lawfully in escrowing income derived from BLM/Holway-commonly-identified lands for the first three linear miles of the river should now be moot in view of the Tribes' amendment to their revenue-sharing agreement which resolves the issue of respective entitlements, and in view of your release of those funds. It would appear that the sole remaining issue to be decided by the IBIA is whether your escrow of funds that ostensibly belong to third parties pursuant to the official BLM survey is lawful and proper."

to reverse the decision, or (3) enter into a settlement with the appellant. Each of these actions [is] taken through the filing of an appropriate document with the Board.

21 IBIA at 19, quoting Raymond v. Acting Aberdeen Area Director, 19 IBIA 41, 43 (1990). In the case of a partial correction, as was apparently intended here, a simple application to the Board would suffice. The Board can be expected to act expeditiously on such a request where, as here, prompt action is important. 8/

[2] Appellants' arguments are addressed to an escrow of tribal proceeds from tribal leases. The parties disagree as to whether issues concerning the escrow of tribal funds are moot. The Board assumes, for purposes of this discussion, that the Area Director has released funds derived from lands identified as tribal lands by both the Holway study and the BLM survey. Given such an assumption, the Board finds that issues concerning the escrow of these specific tribal funds are moot at this time. However, even though the Board normally does not consider moot issues, it recognizes the well-established exception to the mootness doctrine which allows consideration of moot issues where the matter concerns a potentially recurring question raised by a short-term order capable of repetition, yet evading review. E.g., Estate of Peshlakai v. Navajo Area Director, 15 IBIA 24, 32-34, 93 I.D. 409, 413-14 (1986). In this case, the parties agree that problems similar to those already encountered are likely to arise as the remaining 93 miles of the river are surveyed. There clearly appears to be a possibility that tribal funds will again be escrowed, at least temporarily, as the survey proceeds. Therefore, the Board will consider this issue.

[3] Appellants argue that BIA has no authority to escrow tribal royalties, citing 30 U.S.C. § 1714 (1988), which provides:

Deposits of any royalty funds derived from the production of oil or gas from, or allocated to, Indian lands shall be made by the Secretary to the appropriate Indian account at the earliest practicable date after such funds are received by the Secretary but in no case later than the last business day of the month in which such funds are received.

Appellants point to the contrast between this provision and the analogous provision in 30 U.S.C. § 191 (1988) concerning payments to states. That

8/ A second problem hinted at in the Regional Solicitor's memorandum, and to some extent in the Area Director's brief, is the possibility that the Area Director's decision may have been based on reasons not stated in the decision. The Regional Solicitor's memorandum suggests that the funds were escrowed, at least in part, because of the failure of appellants to reach a new revenue-sharing agreement. There is no mention of this reason in the Area Director's decision. The Board has held that it is a violation of due process to base a decision on grounds not communicated to the affected parties. Price v. Portland Area Director, 18 IBIA 272 (1990).

provision, unlike section 1714, allows challenged payments to be placed in a suspense fund pending resolution of a dispute. ^{9/} Both of these provisions derive from section 104 of the Federal Oil and Gas Royalty Management Act of 1982, 96 Stat. 2447, 2451-52. It seems beyond dispute, especially given the enactment of these dissimilar provisions, that Congress did not intend to authorize BIA to escrow tribal oil and gas royalties, except, perhaps, for a brief period terminating on the last business day of the month in which the royalties are received. See, e.g., Richerson v. Jones, 551 F.2d 918, 928 (3rd Cir. 1977) ("where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed"). See, generally, with respect to the conclusions to be drawn from Congress's different treatment of public and Indian lands, e.g., Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 323-26, 97 I.D. 215, 219-21 (1990); Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 237-38, 94 I.D. 353, 362 (1987), aff'd, Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103 (D.D.C. 1990), aff'd without opinion, 925 F.2d 490 (D.C. Cir. 1991).

The Board holds that BIA is not authorized to escrow royalties from Indian lands beyond the last business day of the month in which they are received.

Appellants further contend that all lands identified as tribal lands in the Holway study must be considered tribal lands until titles are resolved judicially or at least until the Department of Justice accepts the validity of the BLM survey by authorizing the filing of lawsuits to quiet title. In the interim, appellants contend, all proceeds from these lands must continue to be paid to appellants.

The Board cannot accept this argument. Under 25 U.S.C. § 176 (1988), BLM is vested with the authority and responsibility to survey Indian lands:

Whenever it becomes necessary to survey any Indian or other reservation, or any lands, the same shall be surveyed under the direction and control of the Bureau of Land Management, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

^{9/} 30 U.S.C. § 191 (1988) provides in part:

"Payments to States under this section with respect to any moneys received by the United States, shall be made not later than the last business day of the month in which such moneys are warranted by the United States Treasury to the Secretary as having been received, except for any portion of such moneys which is under challenge and placed in a suspense account pending resolution of a dispute. * * * Moneys placed in a suspense account which are determined to be payable to a State shall be made not later than the last business day of the month in which such dispute is resolved. Any such amount placed in a suspense account pending resolution shall bear interest until the dispute is resolved."

The Board finds that the results of the BLM survey are binding on Departmental officials unless and until the survey is altered by a subsequent BLM survey or by a court of competent jurisdiction. Cf. Pueblo of Taos v. Andrus, 475 F. Supp. 359 (D.D.C. 1979). The Board finds, therefore, that the Area Director's escrow of funds was proper insofar as it concerned funds derived from lands shown by the BLM survey not to be Indian lands.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's August 19, 1991, decision is affirmed as modified to limit its reach to funds derived from lands shown by the BLM survey not to belong to appellants. 10/

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge

10/ Appellants' motion for oral argument is denied.