



INTERIOR BOARD OF INDIAN APPEALS

Sampsel J. Bitz v. Acting Billings Area Director, Bureau of Indian Affairs

23 IBIA 286 (04/06/1993)

Reconsideration denied:

24 IBIA 10

Related Board case:

38 IBIA 1



United States Department of the Interior

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

SAMPSEL J. BITZ

v.

ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-214-A

Decided April 6, 1993

Appeal from a determination that title to certain gravel is in the United States in trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation.

Affirmed.

1. Indians: Mineral Resources: Gravel--Patents of Public Lands:
Reservations--Stock-Raising Homesteads

Under Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), gravel is a mineral reserved to the United States by sec. 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1988). When an Indian tribe receives title to minerals reserved under this provision, it receives title to the reserved gravel.

APPEARANCES: Ted J. Doney, Esq., Helena, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Sampsel J. Bitz seeks review of a July 17, 1992, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the ownership of gravel underlying a tract of land on the Rocky Boy's Reservation. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Appellant is present surface owner of the S $\frac{1}{2}$, SW $\frac{1}{4}$, sec. 17, T. 29 N., R. 13 E., Montana Principal Meridian, Choteau County, Montana. The tract was patented to Frank E. Blake on January 5, 1939, under the Stock-Raising Homestead Act of 1916 (SRHA), 39 Stat. 862, 43 U.S.C. § 291 (1988). As required by section 9 of the Act, 43 U.S.C. § 299 (1988), the patent reserved to the United States "all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of [the Act]."

By the Act of March 28, 1939, 53 Stat. 552, Congress withdrew "from the public domain and added to the Rocky Boy Reservation, in Montana, subject to all valid existing rights and claims, all public domain land in the

following described area: * * * sections 8 to 17, inclusive, * * * township 29 north, range 13, east; * * * Montana principal meridian." By the Act of May 21, 1974, 88 Stat. 142, Congress provided that

all right, title, and interest of the United States in minerals, including coal, oil, and gas, underlying * * * lands located within the legal subdivision described in the Act of March 28, 1939 (53 Stat. 552), are hereby declared to be held in trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation, Montana.

Thus, the minerals underlying appellant's surface estate are held in trust for the Chippewa Cree Tribe of the Rocky Boy's Reservation (Tribe).

Prior to 1990, there was uncertainty within BIA as to whether gravel on Indian lands should be considered a mineral. However, in February 1990, in Cochran v. United States, 19 Cl. Ct. 455 (1990), the Claims Court held that gravel was subject to a reservation of minerals in a conveyance of Indian land on the Fort Belknap Reservation. 1/ Possibly relying in part upon the Claims Court decision, 2/ the Deputy to the Assistant Secretary - Indian Affairs (Trust and Economic Development) issued a memorandum to BIA Area Directors on September 13, 1990, stating:

We are aware of the confusion that now exists in the status of sand and gravel, and of the many forms of contracts that have been used to approve their development.

The upcoming 25 CFR Part 216 Solid Minerals Regulations acknowledge sand and gravel as mineral commodities for the purpose of leasing and permitting. 3/ * * *

In anticipation of these new regulations, we are sending advanced notice of our intentions and advising you that sand and gravel are to be treated as mineral commodities from this day forward, if you are not now treating them as such.

1/ As explained in the Claims Court decision, "plaintiffs [members of the Fort Belknap Indian Community] executed certain 'Deeds to Restricted Indian Lands' which transferred the surface estate of these lands to purchasers, also Indians, but reserved 'all minerals, including coal, oil and gas, together with the right to lease, extract and retain the same' to Indian plaintiffs." 19 Cl. Ct. at 456. BIA removed gravel from the property pursuant to an agreement with the surface owners, and the mineral owners sued.

2/ Although the Deputy does not cite Cochran in his memorandum, the administrative record for this appeal indicates that BIA was well aware of the decision and considered it sufficiently definitive to support a clarification of BIA policy concerning gravel.

3/ In BIA's 1991 proposed revision of its mineral leasing regulations, the term "minerals" is defined to include sand and gravel. See 58 FR 58734, 58738, 58745, 58749 (Nov. 21, 1991).

In June 1990, after learning that gravel was being excavated and removed from the property at issue here, the Superintendent, Rocky Boy's Agency, BIA, directed the operator, Riverside Contracting, Inc., to cease operations until a permit was issued by the Tribe. On June 18, 1990, the Tribe issued a permit to Riverside for the period ending June 1, 1991. The permit was approved by the Superintendent on July 11, 1990. Proceeds were paid to the agency and placed in an escrow account, evidently because appellant had challenged the Tribe's right to the gravel. ^{4/} On December 20, 1990, the Area Director directed the Superintendent to release the escrowed funds to the Tribe. The Superintendent did so on January 23, 1991.

The permit to Riverside expired on June 1, 1991, and was not renewed. In August 1991, after BIA learned that gravel was again being removed from the property, an agency employee investigated and "was confronted by the surface owner who state[d] that under state law trespassers may be shot" (Superintendent's Feb. 7, 1992, Letter at 3).

In periodic communications with BIA and the Tribe, appellant continued to claim ownership of the gravel. On January 29, 1992, he met with agency officials. At that meeting, BIA evidently agreed to issue a decision which could be appealed. The Superintendent issued a decision on February 7, 1992, informing appellant of his right to appeal to the Area Director. ^{5/} Appellant did so. On July 17, 1992, the Area Director held that the Tribe, rather than appellant, owned the gravel.

Appellant's notice of appeal from the Area Director's decision was received by the Board on August 24, 1992. No briefs were filed. Appellant, however, submitted copies of three affidavits.

Discussion and Conclusions

In Watt v. Western Nuclear, Inc., 462 U.S. 36 (1983), the Supreme Court held that gravel found on lands patented under the SRHA is a mineral reserved to the United States under section 9 of the Act. Because the land at issue here was patented under that Act, the Supreme Court decision controls, and there is no need to reach the later Claims Court decision in Cochran or any of the ensuing BIA policy decisions.

^{4/} It appears, however, that sand and gravel proceeds from other tracts in the Billings Area had also been placed in escrow, presumably because of the uncertainties noted above. In a Sept. 27, 1990, memorandum, the Area Director instructed all Billings Area Superintendents that "[a]ll escrowed funds relating to sand and gravel on split ownership tracts shall be released to the mineral owners" except in cases where the chain of title indicated a possibility that title to sand and gravel was vested in the surface owner.

^{5/} The Superintendent issued a revised decision on Mar. 17, 1992, in order to correct an erroneous land description.

Although appellant did not file a brief before the Board, he made a number of arguments before the Area Director. Most of his arguments, however, are actually challenges to the decision in Western Nuclear, Inc., although not so identified. It goes without saying that the Board is bound by the Supreme Court decision.

Appellant argues that it was the intent of Frank Blake, the original patentee, to use the gravel on his homestead. To support this argument, appellant submits copies of affidavits from three individuals, stating that Blake hauled gravel. Under Western Nuclear, Inc., Blake's intent is irrelevant. Rather, it is the intent of Congress in enacting the SRHA which controls. The Court found that Congress intended to reserve gravel to the United States.

Appellant argues that the decision that gravel is a mineral is an unconstitutional taking of appellant's property. Under Western Nuclear, Inc., the gravel underlying appellant's surface estate was never appellant's property and therefore could not have been taken from him. In any event, the Board lacks jurisdiction to consider appellant's constitutional challenge, especially when that challenge is directed to a Supreme Court decision. Cf. Redleaf v. Muskogee Area Director, 18 IBIA 268 (1990).

Appellant argues that BIA is estopped from claiming that the Tribe owns the minerals. Clearly, BIA is not estopped from complying with a decision of the Supreme Court of the United States.

Appellant argues that the 1939 Act adding certain lands to the Rocky Boy's Reservation did not apply to sec. 17 of T. 29 N., R. 13 E., and therefore the 1974 Act could not have given the minerals in that section to the Tribe. Appellant bases this argument upon the phrase "sections 8 to 17, inclusive," as used in the 1939 Act. In appellant's view, this phrase does not include sec. 17 because it uses the word "to" rather than the word "through." The Board rejects this contention. The presence of the word "inclusive," in the phrase makes the meaning abundantly clear. The Board notes that, even if appellant were correct in his interpretation, and the Tribe did not receive title to the minerals in sec. 17, appellant still would not have title to them. Rather, title would have remained in the United States.

Finally, appellant argues that ownership of gravel by the surface owner was a valid existing right under the 1939 Act and so did not pass to the Tribe under the 1974 Act. The right to gravel could not have been a valid existing right of the surface owner in 1939 because the gravel had earlier been reserved to the United States.

One point remains to be addressed. Appellant stated in his appeal to the Area Director that he "has also appealed any and all decisions relating to the disposition of gravel piles remaining on the said property" (Appellant's Statement of Reasons before the Area Director at 2). Despite this statement, appellant makes no arguments explicitly addressing the status of

the piles, and the Board therefore assumes that he intended to incorporate his claim to these piles into his claim of ownership of all gravel from the property.

In his February 7, 1992, decision, the Superintendent stated:

You have asserted ownership of gravel piles remaining on site which is probably correct if the permittee, Riverside Contracting, Inc., has paid royalties for the material to the Tribe. If the material has been extracted, processed, and left on site without payment of royalties, then you may be entitled to some compensation for storage but you would not be able to claim ownership. We are working with the permittee to obtain documented verification of all the materials removed.

(Superintendent's Feb. 7, 1992, Decision at 1). It is clear from this statement that the Superintendent made no actual determination as to ownership of the gravel piles and not did contemplate doing so without further information. The Area Director likewise did not address this question. Therefore, the Board also refrains from addressing it.

[1] It is beyond dispute that title to minerals reserved to the United States in the patent issued to Frank Blake has vested in the Tribe pursuant to the 1939 and 1974 Acts. It is also beyond dispute, in light of Western Nuclear, Inc., that gravel is included among those minerals.

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 July 17, 1992, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge