



INTERIOR BOARD OF INDIAN APPEALS

Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director,
Bureau of Indian Affairs

28 IBIA 210 (10/04/1995)



United States Department of the Interior

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

THE PITTSBURG & MIDWAY	:	Order Docketing Appeal, Dismissing
COAL MINING CO.,	:	Appeal in Part, and Vacating Area
Appellant	:	Director's Decision in Part
	:	
v.	:	
	:	Docket No. IBIA 95-146-A
ACTING NAVAJO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	October 4, 1995

This is an appeal from a June 19, 1995, decision of the Acting Navajo Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning appellant's operation of the McKinley Mine under a mining lease with the Navajo Nation (Nation). The Area Director's decision served a notice of noncompliance under 25 CFR 216.10 and Article X of the lease for failure to follow the approved mining plan. It also imposed, under 25 CFR 211.22, a penalty of \$500 per day commencing September 4, 1991. The decision stated that failure to pay the penalty or to "comply satisfactorily with previous requests to mine all recoverable coal per the approved mining plan" might result in suspension of operations, a recommendation to the Office of Surface Mining to revoke appellant's SMCRA (Surface Mining Control and Reclamation Act) permit, cancellation of the lease, and/or forfeiture of the surety bond required by 25 CFR 216.8. Finally, the decision stated that it could be appealed to this Board in accordance with 25 CFR Part 2.

Appellant filed a notice of appeal with the Board, stating, however, that it believed the proper appeal procedure was the procedure set out in 25 CFR 211.22, which provides for a hearing before the "supervisor." ^{1/} Appellant further stated that, in accordance with its belief as to the proper procedure, it had filed a request for hearing with BLM's Farmington District Office.

Noting that its jurisdiction over this appeal was unclear, the Board ordered appellant and the Area Director to file jurisdictional briefs. It also invited the Nation to file a brief. Briefs were filed by appellant, the Area Director, and the Nation. Appellant sought an opportunity to respond to the briefs filed by the other parties, and the Board therefore allowed the parties to file reply briefs. All parties did so.

^{1/} The "supervisor" or "mining supervisor," under the regulations at issue here and the Department's current organizational structure, is a Bureau of Land Management (BLM) official. 25 CFR 211.1(b); 25 CFR 216.3(b); Secretarial Order No. 3087 (Dec. 3, 1982). The "superintendent," under these regulations, is a BIA official. 25 CFR 211.1(a); 25 CFR 216.3(a).

As noted in the Board's order for briefs, this appeal involves a potential jurisdictional conflict, because the two regulatory provisions cited by the Area Director contain different appeal provisions.

25 CFR Part 211 is titled "Leasing of Tribal Lands for Mining." 25 CFR 211.22 provides:

Failure of the lessee to comply with any provisions of the lease, of the operating regulations, of the regulations in this part, order of the superintendent or his representative, or of the orders of the supervisor or his representative, shall subject the lease to cancellation by the Secretary of the Interior or the lessee to a penalty of not more than \$500 per day for each and every day the terms of the lease, the regulations, or such orders are violated; or to both such penalty and cancellation: Provided, That the lessee shall be entitled to notice and hearing, within 30 days after such notice, with respect to the terms of the lease, regulations, or orders violated, which hearing shall be held by the supervisor, whose findings shall be conclusive unless an appeal be taken to the Secretary of the Interior within 30 days after notice of the supervisor's decision.

25 CFR Part 216 is titled "Surface Exploration, Mining, and Reclamation of Lands." 25 CFR 216.10 provides, in relevant part:

(b) If the mining supervisor determines that an operator has failed to comply with the terms and conditions of a permit or lease, or with the requirements of an exploration or mining plan, or with the provisions of applicable regulations, the superintendent shall serve a notice of noncompliance upon the operator * * *.

(c) A notice of noncompliance shall specify in what respects the operator has failed to comply with the terms and conditions of a permit or lease or the requirements of an exploration or mining plan, or the provisions of applicable regulations, and shall specify the action which must be taken to correct the noncompliance and the time limits within which such action must be taken.

(d) Failure of the operator to take action in accordance with the notice of noncompliance shall be grounds for suspension by the mining supervisor of operations or for the initiation of action for the cancellation of the permit or lease and for forfeiture of the surety bond required under § 216.8.

25 CFR 216.11 provides:

An applicant, permittee, lessee, or lessor aggrieved by a decision or order of a mining supervisor or superintendent may appeal such decision or order. An appeal from a decision or order of a superintendent shall be made pursuant to 25 CFR part 2. An appeal from a decision or order of a mining supervisor shall be made pursuant to 30 CFR parts 211 and 231.

Appellant contends that 25 CFR Part 211 is the relevant regulatory authority in this case. The Area Director agrees that Part 211 is applicable here but contends that appellant failed to file a timely request for hearing before the supervisor under section 211.22. The Area Director contends that appellant should have filed a request for hearing following receipt of certain notices from BLM, concerning BLM's intent to recommend to BIA that it issue a notice of noncompliance. Because appellant failed to file a timely request for hearing prior to issuance of the June 19, 1995, decision, the Area Director further contends, appellant's only available remedy is under 25 CFR Part 2.

The Board rejects the Area Director's contention that appellant should have requested a hearing upon receipt of the preliminary notices from BLM. Nothing in 25 CFR 211.22 indicates that a lessee is required to request a hearing prior to issuance of a decision cancelling the lease and/or imposing a penalty. It is clear that no decision was issued in this matter until the Area Director issued his June 19, 1995, decision.

It is possible that the Area Director is contending that only BLM decisions or actions, and not BIA decisions, are subject to hearings before the supervisor. While it is certainly unusual for the decision of a BIA Area Director to be subject to review by a BLM official, section 211.22 indicates that any decision made under that section is subject to a hearing before the supervisor, regardless of the Bureau affiliation of the deciding official.

Appellant further contends that 25 CFR Part 216 does not apply in this case. Citing 25 CFR 216.2(a), 2/ appellant contends that Part 216 governs only the protection of nonmineral resources, whereas the issue addressed in the Area Director's decision was "wholly and solely related to the conservation of the mineral resources, namely, those coal and related mineral resources leased to [appellant] by the Navajo Nation * * * in the North McKinley Mine lease [emphasis in original]" (Appellant's Jurisdictional Brief at 4). The Area Director disputes this contention, arguing that, by virtue of the exception in section 216.2(b), Part 216 applies in this case because the Nation owns both the minerals and the surface.

2/ 25 CFR 216.2 provides:

"(a) Except as provided in paragraph (b) of this section, the regulations in this part provide for the protection and conservation of nonmineral resources during operations for the discovery, development, surface mining, and onsite processing of minerals under permits or leases issued pursuant to statutes pertaining to Indian lands including but not limited to the following statutes or amendments thereto:

[list of statutes].

"(b) The regulations in this part do not cover the exploration for oil and gas or the issuance of leases, or operations thereunder, nor minerals underlying lands, the surface of which is not owned by the owner of the minerals.

"(c) The regulations in this part shall apply only to permits and leases issued subsequent to the date on which these regulations become effective and which are subject to the approval of the Secretary of the Interior or his designated representative."

Appellant also cites 25 CFR 216.2(c), contending that Part 216 does not apply here because the lease at issue was executed on May 22, 1964, and approved by the Area Director on September 18, 1964, prior to promulgation of the present Part 216 (then Part 177) on January 18, 1969. The Area Director does not respond to this contention.

The Nation, although initially contending that section 216.10 was correctly cited by the Area Director, has come to concur with appellant that Part 216 is inapplicable here. The Area Director's decision, it now contends, "concerned, not 'non-mineral resources,' but rather a failure to proceed with the mining of coal required to be recovered under [appellant's] approved mining plan" (Nation's Reply Brief at 2).

In light of the Nation's change of position concerning Part 216, and the Area Director's apparent concession that Part 216 is inapplicable here under the term of subsection 216.2(c), the Board finds that there is no dispute among the parties concerning the effect of subsection 216.2(c) in this matter. Because it clearly appears that the lease was executed prior to promulgation of the regulations in Part 216, the Board holds that Part 216 is inapplicable here. ^{3/}

For the first time in their reply briefs, both the Area Director and the Nation contend that certain other regulatory provisions--25 CFR 225.36 and 225.37--should have been cited by the Area Director in his decision. The Area Director presents this contention as an alternative to his contention that 25 CFR 211.22 and 216.10 were correctly cited in his decision. He states, however, that 25 CFR 225.36 and 225.37 "more accurately pertain to the matter of noncompliance and the assessed penalty" (Area Director's Reply Brief at 3). The Nation contends that the Area Director's citations to sections 211.22 and 216.10 were both in error. It asks the Board either to retain jurisdiction over this appeal, because appeals under sections 225.36 and 225.37 are within the jurisdiction of this Board, or to vacate the Area Director's decision and allow him to reissue it under sections 225.36 and 225.37. The Area Director appears to join in the Nation's second request, suggesting remand to him for issuance of a new decision.

25 CFR Part 225, titled "Oil and Gas, Geothermal, and Solid Minerals Agreements," implements the Indian Mineral Development Act of 1982, 25 U.S.C. § 2101 (1994). 25 CFR 225.36 pertains to notices of noncompliance, cancellation, and other remedies for noncompliance. 25 CFR 225.37 pertains to penalties. 25 CFR 225.38 provides: "Appeals from decisions of Officials of the Bureau of Indian Affairs under this part may be taken pursuant to 25 CFR part 2."

^{3/} Even if Part 216 were applicable here, it appears that, insofar as the Area Director's June 19, 1995, decision constituted a notice of noncompliance, this matter would be before the Board prematurely. As section 216.10 is structured, the issuance of a notice of noncompliance is the first step in the remedial procedure. Following issuance of the notice, the operator must be given an opportunity to correct the noncompliance. It is only upon the operator's failure to correct the noncompliance that a "decision or order" is issued and becomes appealable.

The Area Director and the Nation both contend that Part 225 is applicable here because of a 1985 amendment to the lease. Both submit copies of the first page of the 1985 amendment, which states, inter alia, that “the parties both seek to make various amendments and modifications to the Lease, and to have this Lease, as amended, * * * approved pursuant to the authority of the Indian Mineral Development Act of 1982.”

Because this argument was not raised until reply briefs were filed, appellant has not had an opportunity to respond to it. For this reason alone, the Board might decline to address it. However, there are also other reasons why the Board finds it inappropriate to decide the question of the applicability of Part 225 at this time. The Nation requests that the Board retain jurisdiction over this appeal in light of the jurisdictional provisions of Part 225. This request invites the Board to rewrite the Area Director's decision in order to vest the Board with jurisdiction which it might otherwise lack. While the Board has authority to modify Area Directors' decisions over which it has appellate jurisdiction, it has no authority to modify decisions over which it lacks jurisdiction. Therefore, before it can undertake to modify the Area Director's June 19, 1995, decision, the Board must first decide that it has jurisdiction over that decision as it was issued.

The Nation's alternate request--that the Board remand this case to the Area Director for issuance of a new decision--presents the same problem. In order to remand the case, the Board must first have jurisdiction over it.

Because 25 CFR Part 211 vests jurisdiction over actions taken under section 211.22 in the BLM supervisor, the Board lacks jurisdiction over that portion of the Area Director's decision which imposed a penalty under section 211.22. Therefore, it must dismiss this appeal in part for lack of jurisdiction. The Area Director and the Nation must make their request for remand, with respect to the penalty portion of the Area Director's June 19, 1995, decision, to the BLM supervisor holding the hearing in this matter.

Appellant argues that the Board lacks jurisdiction over this appeal in its entirety even if the Area Director's decision was properly grounded in part upon 25 CFR Part 216. This is so, appellant contends, because 25 CFR 216.11 provides for appeals to be taken under 25 CFR Part 2; 25 CFR 2.3(b) provides that Part 2 "does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision;" and 25 CFR 211.22 provides a different administrative appeal procedure.

To the extent appellant is contending that a BIA decision or order properly issued under 25 CFR 216.10 is, by virtue of 25 CFR 2.3(b), subject to the hearing procedure in 25 CFR 211.22, the Board rejects that contention. There is no reason to believe that the drafters of Part 216, in providing explicitly for appeals to be taken under 25 CFR Part 2, had any such convoluted procedure in mind. Part 211 had been in existence for several years at the time Part 216 was promulgated. It is reasonable to assume that, had the drafters of Part 216 intended for the section 211.22 hearing procedure to apply to Part 216 appeals, they would have said so, either by cross-referencing or copying that provision into section 216.11.

The Board holds that appeals from BIA decisions properly made under section 216.10 are subject to the appeal procedures in 25 CFR Part 2, including appeals to this Board.

Because it has jurisdiction to hear appeals from BIA decisions made under 25 CFR Part 216, the Board necessarily has authority to vacate a decision purportedly made under Part 216. Therefore, the Board vacates that part of the Area Director's decision which he purported to issue under Part 216.

The Area Director may intend to reissue the vacated part of his June 19, 1995, decision under 25 CFR 225.36, as is suggested in his reply brief. For the reasons discussed above, the Board expresses no opinion as to whether Part 225 is applicable here. It notes, however, that if the Area Director issues an appealable decision under section 225.36 4/ without obtaining a remand of the penalty portion of his June 19, 1995, decision from the BLM supervisor, the same potential for jurisdictional conflict will exist as existed in this appeal. The Board strongly urges the Area Director to attempt to avoid such conflicts.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is docketed; it is dismissed for lack of jurisdiction insofar as it concerns the penalty imposed under 25 CFR 211.22; and the Area Director's decision is vacated insofar as it served a notice of noncompliance under 25 CFR 216.10.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge

4/ 25 CFR 225.36, like 25 CFR 216.10, provides that the issuance of a notice of noncompliance is the first in a series of steps leading to an appealable decision.