



INTERIOR BOARD OF INDIAN APPEALS

All Materials of Montana, Inc. v. Billings Area Director, Bureau of Indian Affairs

21 IBIA 202 (02/27/1992)



United States Department of the Interior

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

ALL MATERIALS OF MONTANA, INC.
v.
BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-25-A

Decided February 27, 1992

Appeal from the termination of a timber harvest agreement and logging contract.

Affirmed and remanded.

1. Indians: Leases and Permits: Generally--Regulations: Publication

All persons dealing with the Federal Government are presumed to have knowledge of duly promulgated regulations.

2. Administrative Procedure: Hearings--Constitutional Law: Due Process--Indians: Leases and Permits: Cancellation or Revocation

Due process does not require that an evidentiary hearing be provided prior to cancellation of a lease of Indian land.

3. Administrative Procedure: Hearings--Board of Indian Appeals: Generally

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact. The party requesting that the Board order an evidentiary hearing must affirmatively show the existence of a controversy concerning a genuine issue of material fact, the resolution of which is necessary for a decision in the appeal.

4. Appeals: Generally--Indians: Generally

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

5. Administrative Procedure: Burden of Proof--Indians: Timber Resources: 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.

APPEARANCES: Rodney T. Hartman, Esq., Billings, Montana, for appellant; Gerald R. Moore, Esq., Office of the Solicitor, U.S. Department of the Interior, Billings, Montana, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant All Materials of Montana, Inc., seeks review of decisions issued by the Billings Area Director, Bureau of Indian Affairs (BIA; Area Director), which terminated a General Timber Harvest Agreement (harvest agreement) and the Corral Creek Logging Unit Contract No. 14-20-0C52-9001 (logging contract), both on the Crow Indian Reservation. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the decisions and remands this case to the Area Director for a determination of the damages sustained as a result of appellant's breach of contract.

Background

On January 14, 1989, the Crow Tribal Council adopted a resolution authorizing the negotiation of a long-term contract with appellant to harvest tribal timber. Pursuant to this resolution and with BIA assistance, a harvest agreement was executed by the parties on June 7, 1989, and was approved by the Area Director on July 10, 1989. 1/

By memorandum dated August 29, 1989, the Crow Agency Superintendent, BIA (Superintendent), wrote the Area Director requesting reconsideration of the decision to approve the harvest agreement based upon three concerns expressed in the memorandum. The Area Director informed the Superintendent that the harvest agreement had already been approved and that the concerns expressed were not relevant to the decision of whether or not to approve it.

Appellant was awarded the contract for the Corral Creek Logging Unit. 2/ On September 29, 1989, the Superintendent sent appellant a

1/ Approval of the harvest agreement required the waiver of regulations in 25 CFR Part 163. 25 CFR 1.2 provides that "the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I of title 25 CFR in all cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians." A waiver was granted by the Deputy to the Assistant Secretary--Indian Affairs (Operations) on June 28, 1989.

2/ Appellant had been awarded a contract for the West Pryor Blow Down Logging Unit prior to approval of the harvest agreement. The Blow Down contract was apparently completed and is not at issue in this appeal.

copy of the logging contract. He reminded appellant that, as provided in the harvest agreement, it was required to execute and return the logging contract within 30 days from its receipt. See harvest agreement, section III.E. The Superintendent also enclosed Bill for Collection No. 12822991 for a \$10,000 advance deposit on the timber in accordance with section A8 of the logging contract.

Appellant did not execute and return the logging contract and did not submit the advance deposit. Appellant was reminded of these obligations in a letter dated November 3, 1989.

BIA brought appellant's failure to execute the logging contract and make payment to the attention of tribal officials. On November 16, 1989, Andrew Old Elk, Director of the tribal Natural Resource Department, informed BIA that he had been unable to locate Donald Dapont, appellant's president, and that the tribe was considering beginning termination proceedings. Based upon further tribal representations, BIA began preparing a termination letter. Dapont contacted BIA and indicated that the money was arranged and he would bring it to Montana on November 27, 1989. When this information was conveyed to tribal officials, they decided to give appellant until November 27 to make payment. If payment was not made by that date, the tribal officials indicated that the termination proceedings should be initiated.

Dapont did not appear in Montana, and did not otherwise make payment. BIA telephoned Dapont at his home in Connecticut to inform him that termination proceedings had been initiated. Dapont contacted his attorney, who contacted BIA. The attorney asked for an additional extension until the next week. BIA told him that the termination recommendation was going to the Area Director that day, but that if payment were made, the Area Director would be informed. By memorandum dated December 1, 1989, the Superintendent recommended to the Area Director that termination proceedings be initiated. The Superintendent noted that "[w]e have received no explanation for the late payments nor have we received any documented request for an extension. We were told on November 20 by Mr. Dapont that he has the money, yet we have received nothing."

In a December 11, 1989, memorandum to the Superintendent, the Area Director stated: "This office concurs with your recommendation to terminate this agreement for failure to fulfill the terms of the agreement. The Corral Creek Logging Unit contract is also void and tribal direction should be obtained on how to proceed."

The Area Director notified appellant of this decision by letter dated December 12, 1989:

This is to inform you that the General Timber Harvest Agreement between the Crow Tribe and All Materials of Montana, Incorporated, is terminated effective December 8, 1989. The agreement is being terminated because of your failure to comply

with the terms of the agreement. The Corral Creek Timber Sale which you failed to execute within the required time frames is also considered void.

By letter dated December 15, 1989, Old Elk wrote BIA asking that the harvest agreement not be terminated. He suggested the possible addition of stipulations requiring more timely compliance with the terms of the harvest agreement.

Because the tribe had reversed its position, BIA resumed efforts to bring appellant into compliance with the harvest agreement's provisions and to have appellant execute the logging contract. The logging contract was signed by Dapont on December 28, 1989, and by the Tribal Chairman, Richard Real Bird, on January 8, 1990. It was approved by the Area Director on January 19, 1990. The Superintendent had written Dapont on January 3, 1990, explaining the actions that would be necessary to cure the breaches then in existence. Based upon appellant's actions, the Area Director reinstated the contracts in a January 23, 1990, memorandum to the Superintendent.

Appellant began logging operations on the Corral Creek Unit. Based upon site inspections conducted during the spring and summer of 1990, BIA determined that there were continued, multiple violations of the contracts. Operations were suspended on several occasions because appellant failed to maintain the minimum advance deposit required by section A8 of the logging contract. By letter dated July 19, 1990, the Superintendent informed appellant:

All cutting of green trees on the Corral Creek Logging Unit * * * is suspended until further notice. All slash reduction and piling must be concurrent with all other phases of logging by August 31, 1990, or further administrative action as allowed by the contract will be taken. The fire hazard from slash is serious and we do not want it laying on the ground through next winter because it is extremely difficult to fight fire in slash.

Before cutting can continue or resume:

1. Slash cleanup must be concurrent with logging including the removal of dirt and slash from the base of leave-trees.
2. A privately owned pickup truck must be removed from Indian lands plus other disassembled machinery.
3. Bill for Collection No. 12925778 for \$10,000 must be paid.
4. All sale area roads must be bladed to remove berms and fill wheel ruts and holes.
5. Scattered logs at the various landings and along the roads must be shipped to the mill.

6. All garbage must be picked up and the garbage pit covered.

In June 1990, Clara Nomee was elected Tribal Chairperson, replacing Real Bird. By letter dated July 24, 1990, Nomee wrote the Superintendent, stating:

On July 11th 1990, our office sent a letter to your office demanding cancellation of the contracts between [appellant] and the Crow Tribe.

At this time we wish to again ask for cancellation of * * * the long term timber contract. Your compliance with our wishes would be appreciated.

The Superintendent responded to this letter on August 3, 1990, stating that he had not received the July 11, 1990, letter, and setting out the current status of all contracts with appellant.

On September 10, 1990, the Superintendent again wrote appellant. He stated at page 1:

This is to advise you that, with respect to the General Timber Harvest Agreement between [appellant] and the Crow Tribe of Montana, the Crow Tribe, through its duly elected officials, requests cancellation of the above-mentioned contract agreement. A copy of the Tribe's correspondence to us, dated July 24, 1990, is enclosed for your information.

As stated in our July 19, 1990, letter to you regarding the Corral Creek Logging Unit contract No. 14-20-0C52-9001, we requested that slash reduction and piling must be brought current with other phases of logging operations by August 31, 1990. Our inspection of the logging unit indicates that virtually no work on slash cleanup was accomplished during July or August as had been requested.

The lack of progress on slash piling and cleanup constitutes a significant and material breach of contract. Therefore, as specified in the termination section (XV.) of the General Harvest Agreement, [3/] we interpret the Tribe's July 24 letter

3/ Section XV provides:

"A. The failure of [appellant] to substantially perform its obligation under Sections III, VI, X, and XII of the Agreement shall constitute a material breach of contract.

"B. In the event of any such breach, the Tribe may, at its option, elect to terminate the Agreement and any Logging Unit Contracts. Should the Tribe so elect, the Tribe shall notify [appellant] by written notice made through the Superintendent which shall specify the precise nature of

to us as an election to terminate said Agreement. Under terms of the Agreement you have forty-five (45) days from the date of this letter to cure this material breach of contract. If the claimed material breach is not cured within the forty-five (45) day period, then the Tribe may elect to terminate the Agreement and any logging unit contracts.

We appreciate your interest in continuing to work with the Crow Tribe. However, we have submitted documented requests on numerous occasions to you so that you might take necessary steps to carry out your obligation under the Agreement. If you are unable to perform, the Bureau of Indian Affairs will take action regarding slash cleanup and charge the costs associated with this effort against the performance bond deposited at this Agency in connection with the Agreement.

Dapont wrote the agency on October 8, 1990, stating that he would be in Billings, Montana, on October 22, 1990, at which time he would make arrangements for piling of slash and would discuss other contract matters. By letter dated October 12, 1990, the agency Supervisory Forester informed Dapont that he would not be available to meet with him from October 19-26, 1990.

The record does not reveal whether Dapont appeared in Billings on October 22, 1990. However, by letter dated October 23, 1990, the Area Director informed appellant:

This is to advise you that the Corral Creek Logging Unit Contract No. 14-20-0C52-9001 is terminated and proceedings have been initiated to terminate the General Harvest Agreement you have with the Crow Tribe. The reasons for terminating the Corral Creek Logging Unit Contract are failure to complete slash cleanup and failure to provide advance deposit.

You had been given until August 31, 1990, to bring the slash cleanup concurrent with logging. You failed to make a good faith

fn. 3 (continued)

the claimed material breach, and that the same must be cured within 45 days of the date of the written notice. If the claimed material breach is not cured within the 45 day period, then the Tribe shall give [appellant] a further written notice advising [appellant] of the continued existence of the breach and its intention to terminate the Agreement in the event the breach is not cured within an additional period, 30 days from the date of that notice. If the breach is not so cured, then at the option of the Tribe, the Agreement and the Logging unit contracts may be terminated and the Tribe shall be entitled to the immediate payment of all payments then due and owing. The Tribe and/or allottees shall also be entitled to damages for lack of performance resulting in sale work not completed and lost revenue from timber not harvested."

effort to complete this cleanup by this deadline or even begin cleanup activities as of this date.

Bill for Collection No. 12925780, received by you on September 10, 1990, was due, immediately, but no response has been received nor other arrangement have been made as of this date. This outstanding bill is overdue and is part of the reason for termination of the contract.

The Performance Bond will be used for stumpage owed to the Crow Tribe, liquidated damages to leave trees, and slash cleanup. Any remaining funds will be held until the remainder of the sale can be sold to offset any losses the tribe may suffer either due to reduced stumpage or delay of income.

On October 26, 1990, in a follow-up to the Area Director's letter, the Superintendent informed appellant:

You were advised by our letter dated September 10, 1990, that your failure to pile and cleanup slash on the Corral Creek Logging Unit contract No. 14-20-0C52-9001 constitutes a significant and material breach of contract. Under the terms of the General Harvest Agreement with the Crow Tribe, you were given forty-five (45) days to cure this material breach of contract. Our inspection of the logging unit indicates you have not cured this material breach.

Under the terms of the Agreement, you have an additional thirty (30) days from the date of this letter to cure this material breach of contract. If the claimed material breach is not cured within the thirty (30) days period, then the Tribe may terminate the Agreement and the Tribe shall be entitled to the immediate payment of all payments due and owing. The Tribe shall also be entitled to damages for lack of performance resulting in sale work not completed and lost revenue from timber not harvested.

The Superintendent told appellant that this decision could be appealed to the Area Director.

Appellant filed a notice of appeal from the Area Director's October 23, 1990, decision with the Board, and a notice of appeal from the Superintendent's October 26, 1990, decision with the Area Director. The Area Director apparently responded to the notice of appeal from the Superintendent's decision in a letter the record copy of which is undated and unsigned. The Area Director stated:

Your "Notice of Appeal" of the decision made by the Superintendent, Crow Agency, claiming material breach of contract for failing to complete slash work on the Corral Creek Logging Unit Contract No. 14-20-0C52-9001 has been received. You had been given until August 31, 1990, to complete this work. You failed

to complete it or to make arrangements, so on September 10, 1990, you were informed that under the terms of "The Crow Tribe/All Materials of Montana Incorporated, General Timber Harvest Agreement, (CT/AMMI GTHA), you had an additional 45 days to cure this breach of contract. You failed to complete this work or make arrangements, so, on October 26, 1990, the Superintendent informed you that the 45 day period was up, and, under the terms of the CT/AMMI GTHA, you had an additional 30 days to complete the required slash work or make arrangements to have it completed. This 30 day period has passed, and you have failed to complete this slash work and cure the breach of contract.

You were informed by this office, on October 23, 1990, that the Corral Creek Logging Unit Contract No. 14-20-0C52-9001 was terminated and that proceedings were being made to terminate the General Timber Harvest Agreement you have with the Crow Tribe due to noncompliance in your failure to complete slash cleanup and failure to provide the requested advance deposit. This October 23, 1990, letter was considered the initial notification of AMMI's failure to perform its obligations under the terms of the Agreement, thereby constituting a material breach of contract, after which you were given 45 days to comply. This letter is considered the second step in this termination process in which you are given an additional 30 days to complete the slash work and provide the advance deposits required. As noted by the enclosed correspondence from the Crow Tribe, they would like to terminate this Agreement and all Logging Unit contracts.

As stated above, your "Notice of Appeal" of the Superintendent's decision, and the "Notice of Appeal" of the October 23, 1990, decision made by my office have been received and are being considered as one Appeal which will be covered under the Interior Board of Indian Appeals (IBIA) docket. It is felt that my decision, as Approving Officer, outlined in the October 23, 1990, letter to you, agrees with the Superintendent's decision, and your next level of appeal would be the IBIA.

The Board received appellant's notice of appeal from the Area Director's October 23, 1990, decision on November 26, 1990. Although appellant did not file a separate notice of appeal with respect to the Area Director's second letter, its opening brief refers to both decisions. The Area Director's brief also treats the two decisions as being before the Board. Because the two decisions are so intertwined, the Board considers both as being covered by appellant's appeal.

Discussion and Conclusions

Appellant contends that it "has utterly been denied any due process in this case * * * [and that] the precipitous and surprising cancellation of contracts wholly deprived [it] of any opportunity to have a 'day in Court' or to have made a record to be used in this appeal" (Opening Brief at 3-4). Appellant argues that if it had been given an opportunity to present its

side of the story, it would have been able to prove that any alleged breach resulted from bad weather and vandalism, and/or was excused because the Nomee administration prevented and delayed performance.

Appellant does not attempt to prove either of its factual allegations in this appeal. Instead, it contends that because it has been denied due process, it should be granted an evidentiary hearing at which it can develop a record. Appellant states that "[a]t the very least, providing [it] a genuine forum in which to present evidence would obviate the necessity of future litigation if the two cancellations are merely rubber-stamped." Id. at 4.

The Board first addresses appellant's contention that it was denied due process. Most parties before the Board who allege they have not received due process base their argument on the fact that they did not receive an evidentiary hearing. This is also appellant's argument.

Appellate procedures are addressed in both the harvest agreement and the logging contract. Section XIV.B of the harvest agreement provides that "[t]he parties to this contract may appeal, in accordance with the regulations set forth in 25 CFR Part 2, any BIA action or decision related to this Agreement." Section B2.11 of the logging contract similarly states that "[t]he parties to this contract may appeal, in accordance with the regulations set forth in 25 CFR Part 2, any action or decision taken by the Approving Officer or his superior officers."

[1] Appellant was on notice that appeals from decisions made under both the harvest agreement and the logging contract would be processed under 25 CFR Part 2. It was appellant's responsibility to familiarize itself with these administrative review provisions as well as with other regulations governing its conduct as a lessee of Indian lands. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Citation Oil & Gas, Ltd. v. Acting Billings Area Director, 21 IBIA 75 (1991); Hays v. Muskogee Area Director, 18 IBIA 380 (1990). Because 25 CFR Part 2 does not provide for evidentiary hearings, appellant had no reasonable expectation that he would be given such a hearing before either the Superintendent or the Area Director. Part 2 indicates the right to appeal to this Board under 43 CFR Part 4, Subpart D. See, e.g., 25 CFR 2.4(e). Although 43 CFR 4.337(a) provides that the Board may order an evidentiary hearing under appropriate circumstances, there is clearly no right to an evidentiary hearing in all cases.

[2] The first issue is whether appellant is entitled to an evidentiary hearing as an aspect of due process. The Board has previously considered whether administrative review proceedings which do not include evidentiary hearings meet the requirements of due process. In Dawn Mining Co. v. Portland Area Director, 20 IBIA 50, 58-65 (1991), the Board held that due process does not require that an evidentiary hearing be provided prior to cancellation of a lease of Indian land. See also Coomes v. Adkinson, 414 F. Supp. 975, 987 (1976); Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 194-95, 90 I.D. 243, 248 (1983); Santa Fe Pacific Railroad Co., 90 IBLA 200, 219-20 (1986).

This holding is supported by the Supreme Court's unequivocal ruling in Matthews v. Eldridge, 424 U.S. 319, 348-49 (1976):

The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." * * * All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard." [Citations omitted.]

The Department's regulations provide an administrative review process which meets the requirements of due process. Under 25 CFR Part 2, parties have the opportunity to present to the Area Director evidence and arguments against the decision of a subordinate BIA official. The Area Director has full authority to reverse the subordinate's decision.

Furthermore, an aggrieved party has an additional right to appeal under the procedures established in 43 CFR Part 4, Subpart D, which provide for review of an Area Director's decision by the Board, an entity independent from BIA. As was stated in the preamble to the last revision of the Board's procedural regulations at 54 FR 6484 (Feb. 10, 1989):

The Office of Hearings and Appeals was created as a separate office within the Office of the Secretary of the Interior in 1970 to provide independent, objective administrative review of decisions issued by the Department's various program Bureaus and Offices. In promulgating the initial regulations providing for review of administrative decisions of the Bureau of Indian Affairs, the Department stated: "Exercise of the Secretary's review authority by the Board of Indian Appeals will ensure impartial review free from organizational conflict in that the Board is part of the Office of Hearings and Appeals in the Office of the Secretary and as such is independent of the Bureau of Indian Affairs." 40 FR 20819 (May 13, 1975).

Appellant was afforded an opportunity to present evidence and arguments to the Area Director. It had an additional chance to have the matter reviewed by this Board. Appellant was not deprived of due process merely because it did not receive an evidentiary hearing.

[3] The second issue is whether the Board should nevertheless grant an evidentiary hearing under 43 CFR 4.337(a), which provides that "where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing." This regulation was addressed in Pima Country Club, Inc. v. Acting Phoenix Area Director, 21 IBIA 33, 36, recon. denied, 21 IBIA 70 (1991):

The Board has extensively discussed the circumstances under which it will order an evidentiary hearing pursuant to its authority in 43 CFR 4.337(a). In particular, it has held that

it will not order such a hearing when there is no issue of material fact in question. See Dawn Mining Co. v. Portland Area Director, 20 IBIA 50, 64 (1991); Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 331-32, 97 I.D. 215, 223-24 (1990); Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 247, 94 I.D. 353, 367, aff'd sub nom., Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103, 110 (D.D.C. 1990) ("No evidentiary hearing is required when there is no issue of material fact in dispute."), aff'd, 925 F.2d 490 (D.C. Cir. 1991).

The party requesting an evidentiary hearing must affirmatively show the existence of a controversy concerning a genuine issue of material fact, the resolution of which is necessary for a decision in the appeal.

[4] On appeal, appellant raises two alleged factual issues: interference with its performance by the Nomee administration, and inability to perform because of bad weather and vandalism. Neither of these issues was raised to either the Superintendent or the Area Director. The Board is not required to consider arguments raised for the first time on appeal. See Begay v. Acting Phoenix Area Director, 20 IBIA 248 (1991); Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123, 129 (1990). For this reason alone, the Board could sustain the Area Director's decision. Nevertheless, in an effort to give appellant the benefit of every doubt, the Board will consider whether by raising these new arguments appellant has demonstrated a need for an evidentiary hearing.

Appellant first contends that all of the difficulties surrounding these contracts arose in July 1990 when the Nomee administration began attempts to have the contracts cancelled for no apparent reason. In support of this contention, appellant cites the July 24, 1990, letter from Nomee to the Superintendent. Appellant states that the Real Bird administration had previously been able to work through any problems to the parties' mutual benefit.

The evidence of record is contrary to appellant's contention. Appellant very early established a pattern of not making timely payments and being unresponsive to concerns raised to it by BIA. In fact, appellant failed even to execute the logging contract when the contract was first sent to it. The tribe, under the Real Bird administration, was ready to terminate the harvest agreement in December 1989, until appellant made the first efforts toward fulfilling its obligations.

Furthermore, BIA began cancellation proceedings in July 1990 before learning that the Nomee administration was interested in terminating the contracts. There is no evidence whatsoever in the record to suggest that the Nomee administration interfered in any way with appellant's performance, and appellant has presented none during the course of its appeal. See Star Lake Railroad Co., supra, 15 IBIA at 245-47.

In light of the evidence of record, appellant's unsupported statements are not sufficient to show the existence of a controversy concerning interference in its performance under the contracts by the Nomee administration.

Appellant's second factual issue is its contention that Dapont attempted to meet with BIA and tribal officials to work out problems that had arisen, which included bad weather and vandalism of equipment. In support of this allegation, appellant refers to the October 8, 1990, letter from Dapont to the agency Supervisory Forester, and states that "[t]he Timber Sale Inspection Reports are full of evidence regarding weather and vandalism problems" (Opening Brief at 3).

The record does not support appellant's contention that Dapont attempted to meet with BIA and tribal officials. Instead, it shows that not only was Dapont unresponsive to inquiries from BIA concerning problems under the contracts, but on several occasions, without notifying BIA, he broke promises to travel to Montana to discuss and/or resolve those problem. The record even shows difficulties with obtaining the name and address of a Montana representative for appellant.

Appellant cites no instance of vandalism. Contrary to appellant's assertions, the inspection reports contain no evidence whatsoever that the logging sites, equipment, or any other property had been vandalized.

As to weather conditions, appellant cites no specific instance of bad weather. In his answer brief, the Area Director concedes that the weather was not conducive to slash cleanup operations during the spring of 1990. He states, however, that the weather was not a factor during the summer of 1990, the period during which appellant had been required to bring cleanup operations concurrent with logging. This contention is fully supported by the inspection reports, which show that, although the area had almost dried out by the end of April 1990, June was wet. However, by July 11, 1990, the inspector was able to comment that "weather conditions are ideal for loping and slash piling."

Furthermore, if weather conditions had been a problem, appellant could have requested an extension of time for completing its contractual obligations under Section III.D.2 of the harvest agreement, which provides: "If a catastrophic event occurs during actual logging operations, [appellant] shall be granted additional time to complete contract requirements on a day for day basis." (Emphasis in original.) Section II.H of the agreement defines "catastrophic event" as "includ[ing] fire, formal or informal labor strikes, epidemics, explosion, and acts of God such as flood, drought and unusually severe weather conditions." Appellant made no request for an extension.

Again, appellant's unsupported assertions do not show the existence of a controversy over vandalism and weather conditions, especially in light of the contrary evidence in the record. Accordingly, the Board holds that appellant has not justified the referral of this matter for an evidentiary hearing under 43 CFR 4.337(a).

[5] Therefore, the Board considers this case under its normal review procedures. In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency decision complained of was erroneous

or not supported by substantial evidence. See Farmers & Merchants Bank of Tryon, Oklahoma v. Muskogee Area Director, 21 IBIA 106 (1991); Pima Country Club, Inc., supra; Peall v. Acting Portland Area Director, 16 IBIA 163 (1988). Appellant chose not to participate in the administrative review process before BIA, or to present any evidence in support of its contentions to the Board. Instead, it chose to raise new, but unsupported factual allegations, and to rely on an argument that it should be given an evidentiary hearing. Under these circumstances, appellant has not sustained its burden of proof. The Area Director's decisions terminating the harvest agreement and logging contract are affirmed.

Appellant also contends that "[c]onfiscation of performance bonds is and was unnecessary by reason of Appellant not getting an accounting of the same or by being prevented from mitigating or eliminating any so-called damages" (Opening Brief at 3). Presumably appellant is referring to the Area Director's statement at page 1 of the October 23, 1990, letter:

The Performance Bond will be used for stumpage owed to the Crow Tribe, liquidated damages to leave trees, and slash cleanup. Any remaining funds will be held until the remainder of the sale can be sold to offset any losses the tribe may suffer either due to reduced stumpage or delay of income.

In his answer brief, the Area Director indicates that damages have not yet been finally calculated.

Appellant has not shown error in BIA's retention of appellant's performance bond or its equivalent. However, appellant is entitled to a final determination of the damages sustained as a result of its breach of contract. For that reason, this matter must be remanded to the Area Director for issuance of such a decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Billings Area Director are affirmed, and this case is remanded to him for a determination of damages.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge