



INTERIOR BOARD OF INDIAN APPEALS

Navajo Nation and Arizona Silica Sand Company v. Navajo Area Director,
Bureau of Indian Affairs

41 IBIA 142 (08/05/2005)



United States Department of the Interior

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

NAVAJO NATION,	:	Order Adopting Recommended
Appellant,	:	Decision
	:	
and	:	
	:	
ARIZONA SILICA SAND COMPANY,	:	Docket Nos. IBIA 96-14-A
Appellant,	:	IBIA 96-15-A
	:	IBIA 96-20-A
v.	:	
	:	
NAVAJO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	August 5, 2005

This matter involves two appeals from a September 29, 1995, decision by the Acting Navajo Area Director of the Bureau of Indian Affairs (Area Director; BIA) imposing a 5 percent royalty on gross sales from the operation of a silica sand mine by the Arizona Silica Sand Company (ASSC) on Navajo Nation (Nation) land. It also involves an appeal from an October 4, 1995, decision by the Area Director requiring ASSC to post a performance bond in the amount of \$150,000. The Board of Indian Appeals (Board) referred the matter to the Hearings Division of the Office of Hearings and Appeals. On June 30, 2003, Administrative Law Judge Andrew S. Pearlstein (ALJ) issued a Recommended Decision upholding the decision of the Area Director regarding the royalty rate and vacating as moot the decision regarding the performance bond. The Board adopts the Recommended Decision, which is attached.

Background

The background of this case is recounted in detail in the Recommended Decision. Briefly, the facts are as follows. In 1966, the Nation and ASSC executed Contract No. 14-20-0603-8992, which was approved by the Area Director, allowing ASSC to remove silica sand from tribal land near Houck, Arizona, and providing that ASSC would pay the Nation a royalty

of \$0.30 per ton for all sand removed and sold from the premises. The contract further provided:

The royalty provision of the permit shall be subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of the first and each successive 5 year period, such adjustment being based upon market conditions as supported by evidence from the field.

In 1977, the Area Director increased the royalty rate to \$0.44 per ton. On April 2, 1981, the BIA Superintendent of the Fort Defiance Agency (Superintendent) notified ASSC that the next review of the royalty rate would be initiated on April 7, 1981, and directed ASSC to begin negotiating with the Nation regarding the rate. Negotiations were unsuccessful and, on March 8, 1983, the Superintendent adjusted the royalty rate to 10 percent of the gross selling price of the sand mined by ASSC. ASSC appealed to the Area Director who, on March 4, 1987, withdrew the Superintendent's decision and requested a new evaluation. The Nation appealed the Area Director's decision and, on September 10, 1987, the Acting Assistant Secretary - Indian Affairs vacated that decision and remanded to the Area Director for reconsideration. On October 5, 1988, the Assistant Area Director issued a decision to adjust the rate to 10 percent of gross sales. This decision also converted the mining contract, characterized as a permit, to a lease. ASSC appealed the Assistant Area Director's decision, and the Nation responded as an intervening party.

On September 29, 1995, the Area Director issued a decision adjusting the royalty rate to 5 percent of gross sales, which the decision determined was "reasonable and based on market value." The Area Director found that ASSC had been on notice since April 7, 1981, that the Nation and BIA believed that an adjustment was necessary and made the adjustment retroactive to that date. The Area Director determined that the issue of converting the mining permit to a lease was moot, because ASSC was required to comply with all laws concerning mining or minerals on Indian land regardless of how the contract was characterized. On October 4, 1995, the Area Director issued a separate decision requiring ASSC to post a \$150,000 performance bond.

Recommended Decision

ASSC and the Nation both appealed the September 29, 1995, decision of the Area Director regarding the royalty rate. See Docket Nos. IBIA 96-14-A and IBIA 96-15-A. ASSC also appealed the October 4, 1995, decision of the Area Director regarding the performance bond. See Docket No. IBIA 96-20-A. The Board consolidated the appeals and, on May 20, 1997, referred them to the Hearings Division of the Office of Hearings and Appeals "for an evidentiary hearing and recommended decision by an Administrative Law Judge (ALJ) to develop the record and to resolve the questions of fact and law involved." The parties attempted unsuccessfully to settle the appeals and declined to pursue opportunities for an

evidentiary hearing proposed by the ALJ but did submit exhibits to supplement the record. On June 30, 2003, the ALJ issued a Recommended Decision that reached the following conclusions:

— It concluded that the Hearings Division had jurisdiction to issue a recommended decision despite the fact that the ALJ did not hold an evidentiary hearing. It concluded that the broad language of the Board’s referral order, which directed the ALJ to “develop an administrative record and resolve the questions of fact and law involved” indicated that such issues were to be derived through development of the administrative record, which was compiled and essentially stipulated to by the parties. Recommended Decision at 8.

— It upheld the decision of the Area Director to impose a 5 percent royalty rate on ASSC’s gross sales, concluding that neither party met its burden of proof to show that the decision was not supported by substantial evidence or was legally incorrect. Id. at 8-10. It also upheld the Area Director’s decision to make the adjustment retroactive to April 7, 1981, finding that ASSC was on notice since that time that there would be a royalty adjustment. Id. at 11-12.

— It upheld the Area Director’s determination that the issue of the conversion of the permit to a lease is moot. The Nation argued that once the contract was converted to a lease, BIA was required to impose a minimum royalty rate of 10 percent pursuant to regulations implementing the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. § 396a et seq. See 25 C.F.R. § 211.15 (1995). The Recommended Decision concluded that ASSC’s mining activity was governed by the IMLA regardless of whether it was characterized as a permit or lease, but that the Area Director here had properly exercised the agency’s discretion under the regulations to require a rate lower than 10 percent. Id. at 10-11.

— It vacated as moot the Area Director’s decision to impose the \$150,000 bond because ASSC has ceased operation of the subject silica sand mine. Id. at 12.

The Recommended Decision notified the parties that, pursuant to 43 C.F.R. § 4.339, any party could file exceptions or other comments with the Board within 30 days of receipt of the decision. Id. at 13.

Discussion

On July 23, 2004, the Nation filed comments arguing that the ALJ erred in ruling that the 5 percent royalty rate applies prospectively from 1996 forward. ^{1/} This was the only exception or comment filed by any of the parties. ASSC filed a response to the Nation's comments. ^{2/}

The Nation states that it "disagrees with the ALJ's attempt to apply the 5% royalty rate beyond 1995 to 2002." Specifically, the Nation objects to language that followed the Recommended Decision's determination to uphold the BIA's decision to impose the 5 percent royalty adjustment retroactively to April 7, 1981, in which the ALJ stated:

I note that, under the terms of the contract, the September 29, 1995, Decision is effective from April 7, 1981, to the cessation of ASSC's silica sand production in 2002. The BIA has not attempted to readjust the royalty rate for the five-year periods 1996-2001 and after 2001. Without some further proceedings, the rate will therefore remain unchanged for the periods after the decision as well.

The Nation argues that the Board's jurisdiction is limited to appeals of decisions or orders of the Area Director and that the Area Director's 1995 decision applies only through 1995. Thus, the Nation contends that the Board cannot issue a decision applying BIA's decision prospectively. Navajo Nation Comments at 2-3.

We do not read the Recommended Decision to hold that the 5 percent royalty rate must apply prospectively. Rather, the Recommended Decision merely makes the practical observation that, without further action by BIA, the 5 percent royalty rate remains unchanged. The Nation argues that, under the terms of the 1966 contract with the ASSC, "the BIA *must* still undertake a review and adjustment for the five year periods 1996-2001 and after 2001."

^{1/} On March 10, 2004, the Board ordered the parties to submit certain exhibits that had been identified by the parties during the ALJ proceedings, but which were not in the record forwarded to the Board. ASSC and BIA submitted the requested documents. The Nation did not respond. Given the limited scope of the Nation's exception to the Recommended Decision, review of these exhibits was not necessary.

^{2/} In its Response, ASSC notes that it "does not agree with that portion of the Recommended Decision upholding the BIA's retroactive royalty rate adjustment of five percent (5%) of ASSC's gross sales," and "reserves its right to appeal that conclusion should the Recommended Decision be adopted by the [Board] in a final decision." Response to Navajo Nation Comments at 1-2. ASSC did not, however, file exceptions or comments to the Recommended Decision or provide any argument to support its purported disagreement with the Decision.

Navajo Nation Comments at 3 (emphasis added). The contract, however, imposes no such mandatory burden on the BIA but rather provides that the royalty rate paid by ASSC “*shall be subject to* reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of the first and each successive five year period.” Recommended Decision at 4 (emphasis added). Thus, the Recommended Decision is correct that, absent further BIA proceedings, the 5 percent royalty rate applies. 3/

Because the parties have provided no exceptions or comments to the substantive rulings of the Recommended Decision, and because the Board has determined that the Recommended Decision is supported by the record, the Board adopts the Recommended Decision.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board adopts the Recommended Decision. The decision of the Area Director, adjusting the royalty rate to 5 percent of ASSC’s gross sales, retroactive to April 7, 1981, is affirmed. The decision of the Area Director to require a performance bond in the amount of \$150,000 is vacated as moot.

I concur:

// original signed
Katherine J. Barton
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

3/ We do not address the question whether BIA, in future proceedings, could properly impose a royalty increase on ASSC that would be retroactive to 1996.



United States Department of the Interior

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NAVAJO NATION and)	IBIA 96-14-A
ARIZONA SILICA SAND COMPANY,)	IBIA 96-15-A
Appellants)	
)	Appeals of a September 29, 1995
v.)	decision imposing a 5% retroactive
)	royalty on ASSC's gross sales of
ACTING AREA DIRECTOR, BUREAU OF)	silica sand extracted from Navajo
INDIAN AFFAIRS,)	Nation lands.
Appellee)	
-----))	
)	
ARIZONA SILICA SAND COMPANY,)	IBIA 96-20-A
Appellant)	
)	Appeal of an October 4, 1995
v.)	decision imposing a \$150,000
)	performance bond on ASSC.
NAVAJO AREA DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee)	
-----))	

RECOMMENDED DECISION

Syllabus

On this referral by the Interior Board of Indian Appeals to an Administrative Law Judge, no evidentiary hearing was held. However, the Administrative Law Judge has proceeded to issue a recommended decision based on the documentary record and briefs submitted by the parties.

With respect to Docket Nos. IBIA 96-14-A and IBIA 96-15-A, neither Appellant has met their burden of proof to show that the BIA's decision to impose a 5% royalty rate on ASSC's gross sales of sand mined from Navajo Land (f.o.b. plant), applied retroactively to 1981, was not supported by substantial evidence or was legally incorrect. Therefore it is recommended that the subject BIA decisions be upheld and ordered to take effect.

With respect to Docket No. IBIA 96-20-A, the BIA decision to impose a \$150,000 performance bond on Arizona Silica Sand Company's operations is now moot, since ASSC has ceased operation of the subject silica sand mine, and the decision on royalty adjustment supersedes the need for a bond. Therefore, it is recommended that the decision to impose a bond be vacated.

Proceedings

The Navajo Nation (the "Nation") and the Arizona Silica Sand Company ("ASSC") have each appealed from a September 29, 1995 decision issued by the Acting Navajo Area Director of the Bureau of Indian Affairs ("BIA") (Docket Nos. IBIA 96-14-A and IBIA 96-15-A, respectively). The decision at issue imposed a 5% royalty, retroactive to 1981, on ASSC's gross sales of silica sand mined from Nation lands near Houck, Arizona. ASSC has also appealed from another decision by the BIA, dated October 4, 1995, requiring a performance bond in the amount of \$150,000 for the operation of ASSC's subject silica sand mine. These matters have been consolidated for the purposes of this Recommended Decision.

This core issue in this matter - the appropriate royalty that ASSC must pay to the Nation on the sand mined by ASSC - has resisted resolution through numerous attempts at both the administrative and appellate level, by both negotiation and litigation, since at least 1981. In an order dated May 20, 1997, the Interior Board of Indian Appeals (the "Board" or "IBIA") referred this dispute to an Administrative Law Judge ("ALJ") for an evidentiary hearing and recommended decision. These cases were initially assigned to an ALJ in the Salt Lake City field office within the Department's Office of Hearings and Appeals ("OHA"). After attempts at settlement and scheduling the hearing were unsuccessful, on May 4, 2001 they were transferred to the undersigned ALJ in OHA's Phoenix field office.

An initial conference call was held with the parties on May 11, 2001. As a result, the parties were directed to submit updated position statements, focusing mainly on the procedural issues. The parties generally agreed at that time that these matters could be resolved on the basis of the existing written record, without the need for an evidentiary hearing. In that vein, the parties also filed proposed exhibit lists citing all relevant documents in the administrative record, as acknowledged in my Procedural Notice dated January 22, 2002.

In an Interim Order dated June 11, 2002, I informed the parties, that, upon further review of the record, I agreed with the

IBIA that a hearing was necessary to resolve certain issues involving the appropriate royalty rate, past findings by the BIA, the legal effect of the Indian Mineral Leasing Act, as well as other subsidiary issues. In that order, the parties were also advised of the option to pursue alternative dispute resolution ("ADR") with a neutral mediator appointed by the Department. The parties did not agree to pursue the ADR option, and another conference call was held on August 20, 2002. The parties remained reluctant to schedule a hearing. As a result, the parties were directed to file updated status reports and position statements on the proper scope of review and jurisdiction of the Hearings Division in the circumstances of this matter.

In an Order Granting Extension dated September 27, 2002, I further informed the parties that a hearing would appear to be necessary for either appellant to meet its burden of proof to show that the BIA decision of September 29, 1995 should not be upheld. The parties each submitted such updated status reports and position statements. In a notice dated December 19, 2002, I offered the parties a final opportunity to supplement the record or request an evidentiary hearing. ASSC took that opportunity to file a Supplemental Brief, with exhibits, on January 14, 2003. For the purposes of this Recommended Decision, the record closed on that date.

The administrative record consists of all documents in the files of these three appeals, including the subject BIA decisions, the parties' appeals; the opposing parties' answers and responses; exhibits attached to those documents; and correspondence, memoranda, and other documents included in the appeals' files. In addition, attached to this Recommended Decision is an Exhibit List, consisting of 13 numbered primary exhibits, of those key documents most relevant to the factual chronology, or that are otherwise significantly relevant to the issues addressed in this decision. All numbered exhibits were included in the parties' proposed exhibit lists.

Chronological Summary of Facts

- Royalty Rate - Docket Nos. IBIA-96-14-A and IBIA-96-15-A

On April 7, 1966, the Navajo Nation, Arizona Silica Sand Company, and the BIA's Navajo Area Director, executed Contract No. 14-20-0603-8992. (Ex. 1). The contract was on a pre-printed BIA form, entitled "Sand, Gravel, Pumice, Building Stone Permit" ("1966 permit or contract"). The "Navajo Tribe" was entered as the "Permitter," and Arizona Silica Sand Company as the "Permittee." The agreement was signed by ASSC and the Chairman of the Navajo

Tribal Council on April 7, 1966, and approved by the BIA Navajo Area Director on August 8, 1966, effective April 7, 1966. The 1966 permit provided that ASSC would pay the Navajo Nation a royalty of \$0.30 per ton for all sand removed and sold from the premises. The contract further provided:

"The royalty provision of the permit shall be subject to reasonable adjustment by the Secretary of the Interior or his authorized representative at the end of the first and each successive 5 year period, such adjustment being based upon market conditions as supported by evidence from the field." (Ex. 1, unnumbered paragraph at bottom of p. 3).

The term of the permit was for "5 years from date of approval and as long thereafter as sand is produced in paying quantities." (Ex. 1, ¶1[a]). The contract also included provisions for a \$15,000 surety bond; Navajo employment preference; monthly accounting; as well as other standard pre-printed provisions governing due diligence, prevention of damage, inspections, termination, and similar contract items.

The sand mined by ASSC is a specialty product, processed into several grades of fine grained material that is sold for use primarily as a packing medium to fill rock fractures in oil wells. ASSC operates a processing plant on nearby allotted Navajo lands. The company processes the silica sand on this site before it is transported for shipment to the railhead at Houck, Arizona.

On July 1, 1974 the BIA determined that the royalty rate should not be adjusted for the 5-year period beginning in 1971. (Ex. 2). On March 29, 1977, the BIA increased the royalty to \$0.44 per ton for the period 1976-1980, effective April 1, 1977. This increase was based on a 46% increase in the Consumer Price Index during that period. (Ex. 3). The March 29, 1977 letter also noted that the sand from ASSC's mine sold for \$13.20 per ton in Farmington, New Mexico. ASSC has paid the Navajo Nation a royalty of \$0.44 per ton on sand mined from the premises from 1977 to the present.

The royalty rate was next due to be considered for adjustment in April 1981. In 1981 and 1982, representatives of ASSC and the Navajo Nation attempted to negotiate a mutually acceptable royalty agreement. Negotiations were unsuccessful. On March 8, 1983, the BIA Superintendent of the Fort Defiance Agency adjusted the royalty rate to 10% of the gross selling price of the sand mined by ASSC, at the shipping point of Houck, Arizona ("FOB Houck, Arizona"). (Ex. 4).

ASSC appealed this decision on June 3, 1983. In support of its appeal, ASSC submitted a report from the Colorado School of Mines that stated that the adjustment in the royalty rate to 10% of gross sales was unreasonable. (Ex. 5). On March 4, 1987 the BIA Area Director withdrew the Superintendent's March 8, 1983 decision, and requested a new evaluation, finding that there was an "inadequate factual basis upon which to sustain [it]." (Ex. 6). The Navajo Nation appealed the BIA's withdrawal of the earlier Superintendent's decision.

On September 10, 1987 the Acting Assistant Secretary vacated the Area Director's March 4, 1987 withdrawing the prior Superintendent's decision, and remanded the matter to the Area Director for reconsideration. (Ex. 7). On October 5, 1988 the Area Director issued a decision again adjusting the royalty rate to 10% of gross sales at Houck, Arizona, retroactive to April 7, 1981, and converting the contract to a lease. (Ex. 8). After several extensions granted while the parties negotiated, ASSC appealed this decision on January 24, 1990. Included in ASSC's appeal was a report from the International Process Research Corporation ("Interpro") that found that the prevailing royalty rate in the industry was between 3% and 6%, and an average royalty for specialty sands is about 5%. (Ex. 9). The Navajo Nation responded to ASSC's appeal as an intervening party. On June 28, 1995 the Nation filed an appeal from BIA's inaction.

The BIA Acting Area Director, Eloise Chicharella, then issued a decision on September 29, 1995, which adjusted the royalty rate to 5% of gross sales (f.o.b. plant), and applied it retroactively to April 7, 1981. (Ex. 10). The decision also held that the issue of whether to convert the 1966 permit to a lease is moot. In this proceeding, both ASSC and the Navajo Nation have appealed this decision, and filed supporting briefs and reply briefs in support of their positions.

In its position statement dated October 11, 2002, ASSC stated it had ceased operation of its sand mine on the Navajo Reservation. With its supplemental brief filed on January 14, 2003, ASSC also submitted financial statements indicating that it could not afford to pay the adjusted 5% royalty and retain a reasonable profit for most of its years of operation.

- Performance Bond - Docket No. IBIA-96-20-A

As noted above, the 1966 sand mining contract or permit required ASSC to post a surety bond in the amount of \$15,000. On October 12, 1990, the BIA Navajo Area Acting Director sent ASSC a letter stating that its bond would be increased to \$150,000 based

on projected costs of reclamation of surface disturbance. (Ex. 11). However, a few days later, on October 19, 1990, the BIA verbally informed ASSC to ignore that letter pending an inspection of the mine site. (handwritten notation on Ex. 11).

The BIA Acting Area Director next sent ASSC a decision on December 8, 1993 to increase its bond to \$60,000. (Ex. 12). ASSC appealed that decision on December 23, 1993. The BIA did not directly respond to that appeal, but issued another decision on October 4, 1995 increasing the bond to \$150,000. (Ex. 13). The Area Director, citing the authority of 25 CFR §211.6(c),¹ listed as reasons for the bond increase the pending appeals over the royalty adjustment, alleged archaeological disturbance on the site, and alleged past due rental adjustments due on leases on allotted lands for ASSC's plant site. In this proceeding, ASSC has appealed the October 4, 1995 decision, and the Navajo Nation has answered in opposition, as an interested party.

One of the reasons given by the Area Director for the bond increase was an alleged archaeological disturbance on the site. On April 18, 1994, the BIA issued a notice of violation to ASSC for destruction of an archaeological site in violation of the Archaeological Resources Protection Act, 16 U.S.C. §470aa et seq., ("ARPA"). After a hearing, Administrative Law Judge S. N. Willett upheld the violation in a decision dated October 21, 1996, and assessed the requested civil penalty of \$70,672 against ASSC. ASSC has paid that penalty in full, thus resolving the ARPA matter.

As indicated above, ASSC ceased operations of its silica sand mine in 2002. No action has been taken, over the years of ASSC's operation, against the initial bond of \$15,000. ASSC has represented that it has diligently undertaken all required reclamation activities. There is nothing in the record of these proceedings to the contrary. In addition, there is nothing in the record to contradict ASSC's assertions that it has timely made all rental payments on its allotted leases, and that the adjustments of those leases have been delayed by BIA's failure to supply and process the necessary forms.

The other reason cited for the bond increase by the area director involved the ongoing litigation over the royalty adjustment, which is the subject of Docket Nos. IBIA 96-14-A and IBIA 96-15-A in these consolidated proceedings. In a "Pre-Docketing Notice and Decision Denying Request for Bond" in this

¹ The regulation governing bonds in Indian mineral leases is now found at 25 CFR §211.24.

proceeding, dated November 6, 1995, the IBIA denied the Navajo Nation's request that ASSC post bond pending these appeals pursuant to 43 CFR §4.332(d).

Discussion

- Jurisdiction of the Hearings Division

In its order of May 20, 1997 the IBIA referred this matter "to the Hearings Division of the Office of Hearings and Appeals for an evidentiary hearing and recommended decision by an Administrative Law Judge to develop an administrative record and to resolve the questions of fact and law involved." This referral was made pursuant to the regulations governing appeals to the Interior Board of Indian Appeals from administrative actions of officials of the Bureau of Indian Affairs, 43 CFR §4.330 et seq. Specifically, 43 CFR §4.337(a) provides:

"The Board may make a final decision, or where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing. All hearings shall be conducted by an administrative law judge of the Office of Hearings and Appeals."

In turn, 43 CFR §4.338(a) provides that "[w]hen an evidentiary hearing pursuant to §4.337(a) of this part is concluded, the administrative law judge shall recommend findings of fact and conclusions of law, stating the reasons for such recommendations."

The problem here, as indicated above (in the Proceedings section), is that the ALJ did not hold an evidentiary hearing. From the beginning of my contacts with the parties, they agreed that an evidentiary hearing was not necessary or appropriate in the circumstances. Although at several points (see Interim Order of June 11, 2002), I attempted to prod the parties to undertake an evidentiary hearing, they remained opposed. The parties pointed out that, at this point some 7 years after the subject BIA decisions, it would be difficult to meaningfully supplement the record that was before the Area Director at the time of his or her 1995 decisions. An administrative law judge cannot, as a practical matter, force parties to undertake an evidentiary hearing in these circumstances. As a result, if factual issues are therefore not fully developed, the proponent of such factual propositions will simply ultimately not meet its burden of proof.

The parties have also taken divergent positions (and in some cases changed their positions) on whether I now have the

jurisdiction or power to issue a recommended decision on the substantive issues involved in these appeals. The Navajo Nation takes the position that, now that the administrative record available to the BIA for its 1995 decisions is assembled, the appeals should be resubmitted to the Board for decision. (Navajo Nation's Status Report and Position on Scope of Review, October 11, 2002, pp. 7-8). The Nation asserts that the purpose of the referral was limited to determine genuine issues of material fact, and no such issues have been identified. The Nation therefore urges that the ultimate legal issues be referred back to the Board for decision on the appeals.

ASSC initially pointed out that the language of §4.338(a) seems to require an evidentiary hearing be held before an ALJ can issue a recommended decision. (ASSC's Position Statement, June 5, 2001, p. 5). However, ASSC has also stated that I have authority to determine whether the BIA's adjustment of the royalty rate to 5% on ASSC's gross sales was proper under the terms of the contract (Id., p. 3), and that the ALJ should now render a recommended decision using a *de novo* standard of review. (ASSC's Status Report and Position Statement, October 11, 2002, p. 3). The BIA takes the position that the ALJ "has proper jurisdiction to rule on the appropriateness and correctness of the two decisions appealed." (Agency's Position on the Extent of Jurisdiction of the Hearings Division to Address the Issues in this Proceeding, September 27, 2002, p. 3).

The Board's referral of May 20, 1997 was framed broadly for the ALJ to "develop an administrative record and resolve the questions of fact and law involved." Although the referral did not specifically identify any genuine issues of material fact to be resolved, it may be inferred that such issues were to be derived through development of the administrative record. Although the referral also was to hold an evidentiary hearing, it is common procedure in administrative and judicial practice for disputes to be resolved through substitute procedural devices, such as motions for summary judgment. In this case, the parties were given the opportunity for an evidentiary hearing, but declined. Instead, the administrative record was compiled and essentially stipulated to by the parties. In view of the broad language of the Board's referral to the Hearings Division, I will proceed to issue a recommended decision.

- Royalty Rate

The Interior Board of Indian Appeals "has frequently and consistently held that an appellant bears the burden of proving that a BIA decision was not supported by substantial evidence or

was legally incorrect." *Kosechata v. Acting Anadarko Area Director*, 33 IBIA 198, 201 (March 11, 1999). With respect to the BIA's decision to impose a 5% royalty rate on gross sales of ASSC's silica sand, neither appellant has met its burden of proof. Hence, that portion of the September 29, 1995 decision is upheld.

The Acting Area Director ("Director") articulated the reasons for determining the appropriate royalty rate of 5%, as consistent with the 1966 contract's clause that the royalty be "based on market conditions as supported by evidence from the field." After considering the parties' various offers of such evidence, the Director cited the 1989 Interpro Report, submitted by ASSC, as most relevant to the issues at hand. (Ex. 10, p. 2). According to the Interpro Report, an average royalty paid by specialty sand producers is 5% of the gross value (f.o.b. plant site). (Ex. 9, p. 2). A royalty at this rate would have resulted in ASSC paying approximately 2 to 3 times the royalty it paid the Navajo Nation, based on the average selling price of its sand products in 1987-1988. (Id.). In a sample lease attached to the Interpro Report from the State of Utah, a 4-8% royalty is set, and the lessee may not deduct any costs for mining, processing, transportation, or other production costs, in establishing the sales price for computing the royalty. The Director thus relied primarily on the Interpro report as substantial evidence to support her September 29, 1995 decision.

The Navajo Nation contends that the ASSC royalty rate should be set at 10%, as the minimum required by the Indian mineral leasing regulations (former 25 CFR §171.15, present 25 CFR §211.43), as well as due to evidence on market conditions. ASSC argues that the rate should remain tied to a fixed royalty per ton produced, and at a lower rate than the equivalent of 5% on gross sales. The parties submissions frame the issue of the appropriate royalty rate based on market conditions as a genuine issue of material fact. However, neither the Nation nor ASSC elected to follow through to challenge the 1995 royalty rate decision by presenting evidence on this issue at a hearing, although given the opportunity to do so. Only by doing so could they have supported their positions that the evidence supported determination of a different royalty rate.

ASSC did submit additional financial statements with its supplemental brief dated January 14, 2003, indicating that it had a low profit margin and could not afford to pay such an increased royalty. However, that evidence is of little probative value without the opportunity for further explication and testing through cross-examination and rebuttal as would occur at an evidentiary hearing. The same could be said for the Navajo Nation's offers of

evidence on royalty rates for sand producers in the area. Therefore, neither appellant met its burden of proof to show that the Acting Area Director's decision to adjust the royalty rate to 5% of gross sales (f.o.b. plant) was not supported by substantial evidence. Therefore, I recommend that the BIA's decision of September 29, 1995 to impose a 5% royalty on ASSC's gross sales, f.o.b. plant, be upheld.

- Conversion to a Lease

The September 29, 1995 decision also found that the issue of conversion of the permit to a lease was moot at that time. (Ex. 10, p. 2). The decision noted that, whether the agreement was termed a contract, a permit, or a lease, ASSC is nevertheless required to comply with the statutory and regulatory requirements of the Indian Mineral Leasing Act, 25 U.S.C. §396 et seq ("IMLA"). The Navajo Nation contends that the permit should be converted to a lease, rendering it subject to the 10% minimum royalty rate required by the regulations.

At the time the 1966 contract was executed, the parties did not apparently expressly consider the requirements of the IMLA, particularly 25 U.S.C. §396(a), which provides:

"On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction, . . . , may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities."

Also in 1966, the IMLA regulations then in effect, at 25 CFR §171.15(a) (subsequently recodified as §211.15), provided for a royalty rate, "[u]nless otherwise authorized by the Commissioner of Indian Affairs . . . of not less than 10 percent of the value, at the nearest shipping point, of all ores, metals, or minerals marketed." The current rule, 25 CFR §211.43(a)(1) also provides for a minimum royalty rate of "10 percent of the value of production produced and sold from the lease at the nearest shipping point." However, under §211.43(b), the area director may allow a lower royalty rate "if it is determined to be in the best interest of the Indian mineral owner."

Thus, under the IMLA and its implementing regulations, a royalty rate of lower than 10% could be allowed upon an appropriate

determination by the authorized representative of the Secretary or the BIA. The Acting Area Director's September 29, 1995 decision recognized that the BIA did at least impliedly make such a finding by entering into the initial contract and by making the subsequent reviews and adjustments in the royalty rate. The record thus indicates that the parties entered into this agreement with the expectation that the royalty rate would be less than 10%. At all relevant times, a royalty of less than 10% could be authorized by the BIA. The record of this proceeding, on its face, indicates that the BIA did authorize a royalty of less than 10% on ASSC's product, and may continue to do so.

I further find no reason to disturb the BIA's determination, in its decision of September 29, 1995, that it is not necessary to convert the 1966 permit to a lease. That would be a change in name only, with no substantive effect. The same terms with respect to royalty and all other contractual provisions would apply in the same manner whether the 1966 contract is termed a permit or a lease.

- Retroactivity

The Acting Area Director's September 29, 1995 decision imposed the 5% royalty rate on ASSC's sand sold at its plant site retroactively to April 7, 1981, the date of the next readjustment of the royalty under the contract. The decision notes that ASSC was on notice that a readjustment was due on that date, and that "the equities of the situation demand that the readjusted royalty be applied retroactively." (Ex. 10, p. 4). As the Navajo Nation points out, the only issue from 1981 on was the amount of the adjustment.

ASSC contends that imposing the 5% royalty adjustment retroactively is patently unfair and financially burdensome. In its supplemental brief, ASSC provides financial statements which it argues show it cannot afford to pay the large retroactive royalty payments that would be required by the decision. However, without an evidentiary hearing that could further examine the company's financial condition and the ramifications of the retroactive royalty adjustment, no definitive finding of fact can be made on this issue.

ASSC also cites *California Portland Cement Co.*, 40 IBLA 339 (May 10, 1979) for the proposition that the retroactive application of a royalty adjustment would unfairly place the producer in an untenable business situation. If the company had known the royalty could be adjusted retroactively, rendering mining potentially unprofitable, it could have surrendered the lease or taken some

other measure to protect its position. (*Id.*, 40 IBLA 349).

However, unlike in *California Portland Cement Co.*, ASSC here was on notice since 1981 that there would be a royalty adjustment from that date under the contract. Although it is true that the initial adjustment of the royalty to 10% on March 14, 1983 (Ex. 4) was later vacated due to an inadequate factual basis (Ex. 6), ASSC still knew some substantial adjustment was coming. The BIA again proposed a 10% royalty on October 5, 1988, retroactive to 1981. (Ex. 8). Certainly based on its own 1989 Interpro report (Ex. 9), ASSC was apprised that a 5% royalty adjustment was a reasonable possibility. Therefore, based on this record, the BIA's decision to impose the royalty adjustment retroactively to April 7, 1981 was based on substantial evidence and legally supportable.

I note that, under the terms of the contract, the September 29, 1995 decision is effective from April 7, 1981, to the cessation of ASSC's silica sand production in 2002. The BIA has not attempted to readjust the royalty rate for the five-year periods 1996-2001 and after 2001. Without some further proceedings, the rate will therefore remain unchanged for the periods after the decision as well. As directed in the decision, ASSC must provide sales records from 1981 to the Agency Superintendent in order that the royalty due may be calculated after giving credit for the \$0.44 per ton already paid to the Navajo Nation.

- Performance Bond, Docket No. 96-IBIA-20-A

The BIA's October 4, 1995 decision imposing a "performance bond" on ASSC in the amount of \$150,000 cited several reasons: the royalty adjustment appeals; alleged archaeological disturbance; past due rental adjustments; and a general review of lease operations. ASSC ceased operation in 2002. The only one of those reasons supported by the record is the amount potentially due from the royalty adjustment appeals. By this Recommended Decision, ASSC will owe the Navajo Nation a large payment for the 5% royalty rate applied retroactively to April 7, 1981.

However, at this time, no meaningful relief can be afforded the parties by requiring ASSC to post a bond. This proceeding and Recommended Decision itself has superseded the need for a bond. If this recommended decision is appealed to the IBLA, the Board may impose an appeal bond pursuant to 43 CFR §4.332(d). Therefore, the BIA's October 4, 1995 decision to impose a \$150,000 performance bond on ASSC is recommended to be vacated as moot.

Summary Conclusions and Recommendations

Neither ASSC nor the Navajo Nation has met their burden of proof to show that the Acting Area Director's decision of September 29, 1995 adjusting the royalty rate under the parties' 1996 contract to 5% of gross sales of ASSC's sand mined from Navajo lands (f.o.b. plant), applied retroactively to April 7, 1981, was not supported by substantial evidence or was legally incorrect. Therefore I recommend that this decision be upheld and ordered to take effect.

The BIA's October 4, 1995 decision to impose a \$150,000 performance bond on ASSC under its 1966 permit is now moot. Therefore I recommend that this decision be vacated.

Exceptions

Pursuant to 43 CFR §4.339, any party may file exceptions or other comments with the Board within 30 days from receipt of this Recommended Decision. The Board will then inform the parties of any further proceedings in the appeal, or issue a final decision.

// original signed
Andrew S. Pearlstein
Administrative Law Judge

Dated: June 30, 2003
Phoenix, Arizona