INTERIOR BOARD OF INDIAN APPEALS

Enapay Alliance, LLC v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs

62 IBIA 17 (11/20/2015)

United States Department of the Interior

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

ENAPAY ALLIANCE, LLC, Appellant,	)	Order Vacating Decision and Remanding
v.	)	Docket No. IBIA 14-046
EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	November 20, 2015

Enapay Alliance, LLC (Appellant) appealed to the Board of Indian Appeals (Board) from a December 4, 2013, decision (Decision) of the Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director upheld a "Notice of Invalidity of Deed" filed by BIA's Miami Agency Superintendent (Superintendent) on May 31, 2012, which states that an April 25, 2011, quitclaim deed from Benjamin Leat McNeely (McNeely) to Appellant for chat is void.[1] The Regional Director concluded that McNeely's attempt to convey his ownership interest in the "Western Co-Mingled Chat Pile" (Western) to Appellant was invalid and ineffective because McNeely's chat interest is restricted against alienation and BIA had not approved the conveyance. Appellant argues that the chat itself is free from any restriction against alienation that may be applicable to the lands from which it was mined or on which it is now situated. Appellant also argues that, at a minimum, the Regional Director's reasoning is not adequately explained and the Decision is not supported by substantial evidence in the administrative record, and thus the Decision must be vacated and the matter remanded for additional consideration.

We agree that the Decision cannot be sustained based on the Regional Director's rationale and the record as now constituted. Therefore, we vacate the Decision and remand the matter for development of an adequate record and issuance of a new decision.

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[1] "Chat" refers to the gravel-like waste material generated from milling operations to recover lead and zinc from metal-bearing ore in the Tri-State Mining District of Southwest Missouri, Southeast Kansas, and Northeast Oklahoma. *See* 40 C.F.R. § 278.1(b); Final Rule, 72 Fed. Reg. 39331, 39334 (July 18, 2007) (Criteria for the Safe and Environmentally Protective Use of Granular Mine Tailings Known as "Chat").

Background

According to the Regional Director's decision, the Western Co-Mingled Chat Pile is located on land that was originally allotted to John Beaver, Quapaw Allotment No. 150, and Anna Beaver, Quapaw Allotment No. 151, in Section 19, Township 29 North, Range 23 East, Ottawa County, Oklahoma. Decision, Dec. 4, 2013, at 1-2 (unnumbered) (Administrative Record (AR) No. 36). At one time the Western was estimated to contain approximately 6.6 million tons of residual chat. *See id.* at 2 (unnumbered) (citing 2005 estimate). The Western, and other similar chat piles in the area, are designated part of the U.S. Environmental Protection Agency's (EPA) Tar Creek Superfund Site. Although chat contains hazardous substances, it has value as a non-residential road construction material or aggregate, and as part of the remedy for the cleanup, EPA selected commercial chat sales for such purposes. *See* EPA's Record of Decision, Operable Unit 4, Chat Piles, Other Mine and Mill Waste, and Smelter Waste, Feb. 20, 2008 (OU4 ROD), at 47-48 (AR No. 1). EPA regulations restrict the use of chat in Federally funded transportation projects. *See* 40 C.F.R. Part 278.

The Western is referred to as "co-mingled," in part because it is derived (mined) from several Quapaw Indian allotments and co-located in one pile on the John Beaver and Anna Beaver allotments. In addition, the chat itself is owned by multiple Indian and non-Indian owners in undivided fractional interests, with some chat interests considered by BIA to be restricted and some considered unrestricted. According to BIA, McNeely is a successor-in-interest to undivided ownership interests in chat derived from the John Beaver allotment, Anna Beaver allotment, and TonGahHah Beaver allotment (Quapaw Allotment No. 152), and now located on the Western. *See* Letter from Acting Superintendent to McNeely, May 27, 2011 (AR No. 10).[2]

McNeely apparently sought to convey all of his ownership interest in the Western to Appellant, as shown in a quitclaim deed executed on April 25, 2011, and filed in the office of the Ottawa County Clerk on April 29, 2011.[3] *See* Quit-Claim Deed (AR No. 8). At the same time, McNeely apparently requested that the Superintendent remove his chat interest

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[2] The Western also contains chat derived from the Little Greenback allotment (Quapaw Allotment No. 163). *See* Letter from Superintendent to Downum, July 14, 2011, at 1 (unnumbered) (Letter from Appellant to Acting Regional Director, July 8, 2013, Exhibit (Ex.) 2) (AR No. 26).

[3] Appellant also relies on a Purchase Agreement that was allegedly signed by McNeely, and notarized, on April 25, 2011. *See* Purchase Agreement (Letter from Appellant to Acting Regional Director, July 8, 2013, Ex. 3) (AR No. 26).

from restricted status, while also contending that the chat is unrestricted personal property.[4] *See* Letter from McNeely to Superintendent, Apr. 25, 2011 (AR No. 7). On May 27, 2011, in response to a telephone inquiry from McNeely, the Superintendent requested written clarification on what McNeeley wished to do with his chat interest. AR No. 10. McNeely replied that he wished to keep his chat interest in restricted status, did not want to sell to Appellant, and instead wanted to convey all of his interest to another Indian owner of chat. Letter from Appellant to Superintendent, June 9, 2011 (AR No. 11). Appellant subsequently sent a letter to the Superintendent stating that it had acquired McNeely's ownership interest in the Western and filed the quitclaim deed, and that it appeared BIA was improperly offering Appellant's property for sale to third parties. Letter from Appellant to Superintendent, June 20, 2011 (AR No. 12).

On May 31, 2012, the Superintendent filed in the office of the Ottawa County Clerk a Notice of Invalidity of Deed (Notice of Invalidity), which states that Appellant's quitclaim deed is "void on its face and wholly ineffective" to convey McNeely's ownership interest in the Western. *See* Notice of Invalidity (Letter from Superintendent to Appellant, June 1, 2012, Enclosure) (AR No. 18). In explanation, the Superintendent stated that: (1) McNeely's chat interest is "subject to restrictions against alienation imposed by the Act of March 2, 1895 (28 Stat. 907) and subsequent congressional Acts extending the restrictions thereto"; (2) the quitclaim deed was not approved by BIA "in accordance with federal laws and regulations governing the sale of restricted or trust property"; and (3) BIA had not removed the restrictions to allow an unsupervised and unapproved sale. *Id.*

Appellant appealed to the Regional Director. The Regional Director initially affirmed the Notice of Invalidity in a decision issued on September 9, 2013, and amended on September 17, 2013. Appellant appealed that decision to the Board. Before briefing, and based on a request by the Regional Director, we vacated the decision and remanded the matter for further consideration and issuance of a new decision. 58 IBIA 107 (2013).

On December 4, 2013, the Regional Director issued the Decision that is the subject of this appeal, reaching the same conclusion as his prior decision. In this appeal, after resolution of certain disputes concerning the administrative record, Appellant filed an opening brief, the Regional Director filed an answer brief, and Appellant filed a reply brief.[5]

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[4] Appellant and BIA agree that the chat is personalty.

[5] In addition, before Appellant filed its opening brief, the Regional Director and McNeely submitted several letters that McNeely had sent to the Miami Agency instead of the Board, in which he alleges that he did not agree to sell his chat interest to Appellant, and makes other allegations concerning Appellant or its representatives. Appellant disputes McNeely's allegations and requests, to the extent the Board would consider the allegations, an

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Standard of Review

As relevant to this appeal, the Board reviews questions of law and the sufficiency of evidence to support a BIA decision *de novo*. *Aitson v. Southern Plains Regional Director*, 59 IBIA 240, 246 (2014). The Board has held that "where the administrative record furnished to the Board does not support the decision appealed, the decision must be vacated and the case remanded for development of an adequate record and issuance of a new decision." *ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director*, 23 IBIA 228, 240 (1993), and cases cited therein. An appellant bears the burden to demonstrate that BIA abused its discretion or committed error, or that BIA's decision is not supported by substantial evidence. *Aitson*, 59 IBIA at 246.

Discussion

The threshold, and dispositive, issue for the Board is whether the Regional Director has identified a legal and factual basis to support his conclusion that McNeely's ownership interest in the Western is restricted against alienation. It is well-established that if McNeely's chat interest is restricted, as a matter of Federal law, it may not be alienated without approval of the Secretary of the Interior (Secretary). *See Dumbeck v. Acting Great Plains Regional Director*, 47 IBIA 39, 45 (2008); *Bernard v. Acting Great Plains Regional Director*, 46 IBIA 28, 36 (2007) (citing *Bowling v. United States*, 233 U.S. 528 (1914)); *see also Quapaw Tribal Remediation Authority v. Acting Eastern Oklahoma Regional Director*, 61 IBIA 55, 56 (2015). If McNeely's chat interest is restricted, as BIA contends, McNeely's purported deed to Appellant is void, because it is undisputed that the deed was not approved by BIA.[6] If McNeely's chat interest is unrestricted, as Appellant contends, BIA would have no authority to declare the sale to Appellant void, and the Board would lack jurisdiction over McNeely's ancillary arguments. In that situation, any relief available to McNeely must be obtained in a forum other than the Department of the Interior (Department). We conclude that the Regional Director's rationale and the administrative

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evidentiary hearing before an administrative law judge. For reasons discussed below, the Board need not at this time determine whether McNeely's allegations, which are not addressed in the Decision, are properly before the Board or have any merit.

[6] In that scenario, to the extent Appellant challenges the Regional Director's reasoning and the sufficiency of the record for his decision not to approve the conveyance, the question arises whether Appellant would have standing to challenge that portion of the decision, in light of McNeely's change of mind regarding the sale to Appellant. At this time, we do not address Appellant's standing or arguments with respect to BIA's decision not to approve the conveyance.

record are not sufficient to sustain his determination that McNeely's chat interest is restricted against alienation, and we therefore vacate the Decision and remand the case.

The Regional Director's leading reason for affirming the Notice of Invalidity is that a program for the sale of Indian owned chat was developed through a cooperative agreement between the Department and the EPA, and that McNeely's conveyance to Appellant was not approved by BIA under the chat sales program. *See* Decision at 2-3 (unnumbered); *see also* Answer Brief (Br.), Jan. 9, 2015, at 3-4.[7] The Regional Director discusses the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, the OU4 ROD, and the chat sales program with respect to BIA's authority to approve chat sales under the program and benefits that may accrue to parties from such approval—such as protection from potential environmental liability under CERCLA. But as to the threshold question of whether or not Federal law restricts McNeely's chat interest against alienation, it is not clear to us what, if anything, the Regional Director is claiming in his discussion of CERCLA and the OU4 ROD.

Appellant argues that there is a distinction between the CERCLA and the OU4 ROD requirements for obtaining liability protection for chat sales on one hand, and a "specific expressed statutory mandate that [BIA] must approve all chat sales" on the other hand. Opening Br., Dec. 12, 2014, at 9 (unnumbered). According to Appellant, "[a]ny restrictions to the chat applies to what the chat can be used for and the accounting/reporting requirements . . . that must be used when the chat is sold and removed." Reply Br., Feb. 9, 2015, at 3-4 (unnumbered). Appellant argues that BIA has not shown that it has a statutory obligation to review and approve or disapprove chat sales, and asserts that "if and when Appellant removes the chat . . . Appellant will be in compliance with EPA requirements." Opening Br. at 9 (unnumbered). We agree that the Regional Director has identified nothing in CERCLA or the OU4 ROD that restricts chat against alienation, as a matter of Federal law, or makes a sale of chat void *ab initio* for lack of BIA approval.

The Regional Director secondarily asserts reliance on a purported "long-standing legal position of the Department of the Interior that chat mined from restricted allotments is subject to restrictions against alienation imposed by the Act of March 2, 1895 (28 Stat. 907), and subsequent Acts extending the restrictions thereto." Answer Br. at 5; *see* Decision at 3 (unnumbered). In support of this position, the Regional Director cites a September 24, 1974, opinion of the Assistant Solicitor, Indian Affairs. Decision at 3

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[7] The Regional Director cites, *inter alia*, a February 3, 2005, "Agreement Regarding Sales of Indian-owned Chat and Re-use or Disposal of Fines," *see* Answer Br. at 3; Decision at 2 (unnumbered) n.1, which is not contained in the administrative record.

(unnumbered). According to Departmental counsel on behalf of the Regional Director, the cited opinion "affirmed the restricted nature of chat mined from restricted allotments." Answer Br. at 5. The opinion is not contained in the record, and neither the Decision nor the answer brief provides further information on its supposed contents.[8] Nor does the Decision incorporate any legal analysis, e.g., of statutes, regulations, or mining contracts in support of this position. For the first time on appeal, Departmental counsel cites 25 C.F.R. Part 215 (Lead and Zinc Mining Operations and Leases, Quapaw Agency), but does not explain the relevance, if any, of those regulations to this appeal. *See* Answer Br. at 5. It is not clear to us that those particular mining regulations, which make no mention of chat, are relevant to the threshold issue of whether McNeely's chat interest is restricted.

Appellant contends that in the mining process the chat became personalty and is free from any restrictions against alienation applicable to the lands from which the chat was mined or on which the chat is now located. Opening Br. at 7 (unnumbered); Reply Br. at 2-3 (unnumbered). Appellant also contends that, at the very least, the Regional Director's reasoning and the record are insufficient support for the Decision. Opening Br. at 6-7 (unnumbered); Reply Br. at 2-3 (unnumbered). Specifically, Appellant argues that the lone statute cited by the Regional Director, the Act of March 2, 1895, expressly pertains to real property and that he failed to demonstrate its applicability to McNeely's chat interest. Opening Br. at 6 (unnumbered); Reply Br. at 2-3 (unnumbered). Appellant avers that BIA "cannot generically state [it has] authority and not provide proof, especially when a party questions the[] purported authority." Opening Br. at 6 (unnumbered).

Without expressing any opinion on the merits of the parties' shared stance that McNeely's chat interest is personalty and not realty, or the merits of their respective arguments regarding whether the chat interest is restricted or unrestricted, we conclude that the Decision cannot be sustained based on the Regional Director's expressed rationale and the current record. The Act of March 2, 1895, ratified and confirmed "allotments of land" made to the Quapaw Indians, and authorized the Secretary to issue patents to the allottees, with the proviso that "said allotments shall be inalienable for a period of twenty-five years from and after the date of said patents." 28 Stat. at 907. It is not evident that McNeely's chat interest is restricted against alienation under the 1895 Act or unspecified, later-enacted laws. Nor does the Regional Director refer to any mining regulations, specific leases, or contracts that might be relevant to the issue of whether—and if so on what basis—Indian owned chat is restricted against alienation without BIA approval. We agree that the Regional Director failed to provide reasoning and a factual basis for his conclusion that the 1895 Act—or any other legal authority on which the Regional Director apparently relies

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[8] The Board, and apparently Appellant, has attempted to locate a copy of this opinion from another source, to no avail.

but does not specify or provide—restricts all Indian owned chat or restricts at least McNeely's ownership interest in the Western.[9]

It is neither Appellant's burden nor the Board's responsibility to discover the reasoning and facts on which the Regional Director is relying to support the conclusions in his Decision. Those matters are to be articulated in BIA's decision and supported in the record on which we base our review. Here, the Regional Director has not adequately explained the rationale and factual basis for the Decision, and we cannot find substantial evidence in the record to support the Decision. Therefore, we must vacate the Decision and remand the case for issuance of a new decision. *See ZCA Gas Gathering*, 23 IBIA at 240.

During remand, BIA should consider all of the arguments and information that has been presented by the parties in these proceedings. In particular, BIA's decision should discuss, and the record should contain, all legal authorities and documents—especially when not readily available to other parties and the Board—that BIA considers relevant to the determination of whether McNeely's ownership interest in the Western is restricted against alienation without approval of the Secretary. This includes, without limitation, all relevant Federal statutes, Federal regulations, court decisions, memoranda or decisions from officials within the Department, and leases, mining contracts, or chat remilling contracts that were approved by BIA or other Departmental agencies.

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 vacates the Regional Director's December 4, 2013, decision, and remands the matter for development of an adequate record and issuance of a new decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

[9] BIA's position appears to be that all Indian owned chat derived from Quapaw allotments is restricted against alienation by operation of the same set of legal authorities and possibly other documents. But BIA has not demonstrated this, and therefore we consider it at least plausible that a case-by-case determination may be necessary.