



INTERIOR BOARD OF INDIAN APPEALS

Stewart Stone, Inc. v. Acting Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

63 IBIA 147 (05/31/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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STEWART STONE, INC.,)	Order Affirming Decisions
Appellant,)	
)	
v.)	
)	Docket No. IBIA 15-039
ACTING EASTERN OKLAHOMA)	15-070
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	May 31, 2016

A “lessee” of minerals in the Osage mineral estate must pay reasonable damages for use of the surface of the leased lands, and “[i]f the parties are unable to agree concerning damages the same shall be determined by arbitration.” 25 C.F.R. § 214.14. We conclude that one cannot be a “lessee” through the unilateral act of signing a lease form in order to invoke the arbitration provision in § 214.14. Appellant Stewart Stone signed a lease form for entering into a gravel mining lease with the Osage Minerals Council (OMC),¹ but concedes that the proposed lease was not signed or approved by OMC. Because Appellant’s signature on the lease form did not make it a “lessee,” within the meaning of § 214.14, we affirm a decision of the Bureau of Indian Affairs (BIA)² rejecting as premature Appellant’s request that BIA facilitate arbitration with surface owners concerning Appellant’s use of certain Osage reservation lands in Oklahoma for gravel mining.³

We also affirm a second decision by BIA to refund to Appellant a \$2,500 payment that Appellant proffered as the second-year payment for a 3-year “permit” approved by

¹ When the Osage Reservation was allotted, the mineral estate was reserved to the Osage Tribe, with beneficial ownership in the owners of “headright” interests. *See Tillman v. Acting Eastern Oklahoma Regional Director*, 60 IBIA 143, 146 (2015). The Osage mineral estate is administered by OMC. *See id.* at 143.

² Letter from Acting Eastern Oklahoma Regional Director (Regional Director), BIA, to Appellant, Oct. 7, 2014 (Arbitration Decision).

³ Part 214 of 25 C.F.R. applies to leases of minerals other than oil and gas on Osage reservation lands in Oklahoma. The parties apparently agree that gravel mining on Osage reservation lands is governed by Part 214.

OMC in connection with a possible mining lease with Appellant.⁴ Whatever OMC's intent in approving a permit for Appellant, it is undisputed that Appellant does not have either a permit or a lease with OMC that was approved by BIA, and the payment does not relate to any function that BIA serves in accepting payments for either permits or leases.

Background

The source of the conflict in this case appears rooted in an admittedly confusing resolution passed by OMC in 2013, which concluded that it was in the best interest of the Osage minerals estate and headright owners to “approve the permit negotiation” for Appellant for a 3-year period, “with a minimum permit payment of \$2,500 per year.” OMC Resolution 2-185, July 17, 2013 (Administrative Record (AR) 4B).⁵

Following OMC's approval of Resolution 2-185, Appellant wrote to OMC proposing to enter into a 3-year gravel mining lease. Letter from Stewart to Yates, Aug. 26, 2013 (Supp. AR 3). The record does not indicate any response from OMC, but in October 2013, as a follow-up to OMC's approval of Resolution 2-185, BIA's Osage Agency Superintendent (Superintendent) provided Appellant with Limestone/Dolomite Lease forms for Appellant to complete and return to BIA. Letter from Superintendent to Stewart, Oct. 29, 2013 (AR 1). Appellant apparently filled in the proposed terms of the lease. Appellant signed the lease form on November 11, 2013, and submitted it to BIA, which assigned it Contract No. G-6-22909. *See* Checklist for New Lease (Other Minerals), undated (AR 2); Limestone/Dolomite Lease, Nov. 11, 2013 (Proposed Lease) (AR 4D).

It is undisputed that the lease form prepared and signed by Appellant was not signed by a representative of OMC, as lessor, and Appellant concedes that OMC has not approved the lease. Notice of Appeal and Statement of Reasons, Nov. 10, 2014⁶ (15-039 SOR), at 2. Appellant also concedes that BIA has not approved the proposed lease submitted by Appellant. *Id.* Notwithstanding the absence of a proposed lease signed by both parties—a

⁴ Letter from Regional Director to Appellant, Feb. 2, 2015 (Refund Decision).

⁵ Citations to AR are to the administrative record for BIA's Arbitration Decision, which is the subject of the appeal in Docket No. IBIA 15-039. The record for BIA's Refund Decision, the subject of the appeal in Docket No. IBIA 15-070, will be referred to as the Supplemental AR (Supp. AR).

⁶ Appellant's notice of appeal from the Arbitration Decision is “dated” October 7, 2014, but on page 1 of the notice of appeal, Appellant's counsel states that he received the decision on October 10, 2014. The certificate of service is dated November 10, 2014, which is also the date the notice of appeal was filed by mail with the Board.

lessee and a lessor—BIA accepted a payment from Appellant for \$2,500. BIA Suspense Deposit Record (Supp. AR 4) (“for an unapproved Limestone/Dolomite Lease . . . Contract No. G06-22909”).⁷

Meanwhile, another prospective lessee, Candy Creek Crusher LLC, made an offer to OMC for mining limestone on lands that include a portion of those for which Appellant was seeking a lease. 15-039 SOR at 2. Candy Creek offered a royalty rate higher than that in Appellant’s lease form, and on March 19, 2014, OMC passed a resolution accepting Candy Creek’s offer. OMC Resolution 2-237 (AR 4C); *see also* Proposed Lease at 1 (unnumbered). Previously, Candy Creek had reached an agreement with the surface owners for surface use of the land. Opposing Brief of Interested Parties, June 17, 2015, ¶ 9; *id.*, Exhibit (Ex.) B.⁸

On May 20, 2014, Appellant wrote to the Superintendent, declaring that Appellant had been “unable to reach agreement with the [surface] owners,”⁹ and requesting arbitration pursuant to 25 C.F.R. § 214.14 (*Use of surface lands*). Letter from Holcombe to Superintendent, May 20, 2014, at 1 (unnumbered) (AR 8B). Section 214.14 provides that “[l]esseees may use so much of the surface of the leased land as shall be reasonably necessary for the prospecting and mining operations and buildings required by the lease, and shall also have the right-of-way over and across such land to any point of prospecting or mining

⁷ Appellant contends that BIA accepted the payment as its first year payment for the “permit negotiation” granted to Appellant in Resolution 2-185. *See* 15-039 SOR at 2. The record indicates that BIA accepted the payment as advance payment of the minimum royalty recited in the lease form signed by Appellant and submitted to BIA. *See* Refund Decision at 2-3. The propriety of BIA’s acceptance of that payment, in the absence of a lease signed by both OMC and Appellant, is not an issue raised in this appeal.

⁸ Appellant objects to the introduction on appeal of a copy of the agreement between the surface owners and Candy Creek, arguing that the surface owners and Candy Creek were not “joined” as additional parties to this appeal because they did not formally seek to intervene under 43 C.F.R. § 4.313. *See* Appellant’s Reply to Opposing Brief of Millsap, June 25, 2015, at 1-2; Appellant’s Reply to Opposing Brief of Candy Creek, June 25, 2015, at 2. The Board does not require formal intervention by parties that have been identified as potentially interested parties, and included on service lists, when an appeal is filed. Nor does the outcome of these appeals rest on evidence or factual averments made by Candy Creek or the surface owners in their briefs.

⁹ The surface property is currently subject to the life tenancy of Claude G. Millsap, Jr., with the remainder interest in his daughters, Pam Heley, Melinda Millsap, and Claudia Matzdorf.

operations.” 25 C.F.R. § 214.14(a). Under § 214.14, “[l]essees before commencing and during [mining] operations shall pay all reasonable damages for the use of the surface land” as the parties in interest may agree. *Id.* “If the parties are unable to agree concerning damages the same shall be determined by arbitration.” *Id.*

In addition to seeking BIA’s assistance for arbitration with the surface owners, Appellant wrote to OMC after being “advised” that OMC “will be considering rescinding” Resolution 2-185. Letter from Holcombe to OMC, May 27, 2014 (AR 4). Appellant asked to appear at a meeting of OMC, to be held on June 18, 2014. *Id.* Appellant construed Resolution 2-185 as granting it a 3-year permit “to develop the rock lease with the landowner,” and stated that it had requested arbitration from the Superintendent. *Id.* Appellant apparently attended the OMC meeting, and contends that it was advised that no action to rescind Resolution 2-185 was being or had been taken. Notice of Appeal and Statement of Reasons, Mar. 9, 2015 (15-070 SOR), Ex. L at 1 (unnumbered) (Letter from Holcombe to OMC, July 25, 2014). On the day of the OMC meeting, Appellant submitted a check for \$2,500 to BIA, purportedly for the second year of its permit with OMC. 15-070 SOR, Ex. H. BIA refunded the payment because no rent was due without an approved lease. 15-070 SOR at 3; *see also* Supp. AR 4. Appellant then tried to submit payment to the OMC, which refused to accept it. 15-070 SOR at 3; Refund Decision at 3.

On July 10, 2014, the Superintendent issued a decision rejecting Appellant’s request for arbitration under § 214.14. The Superintendent found that Appellant’s proposed mining lease had neither been executed by OMC nor approved by BIA. Letter from Superintendent to Holcombe, July 10, 2014, at 1 (unnumbered) (AR 7). Without an approved lease, the Superintendent concluded, Appellant’s request for arbitration with the surface owners under § 214.14 was premature. *Id.* On appeal, the Regional Director affirmed the Superintendent.

Following the Superintendent’s decision on the arbitration issue, Appellant also made a third attempt to submit the \$2,500 “second annual permit” payment to BIA, in connection with Resolution 2-185. *See* Refund Decision at 3; Trust Funds Receivable Check Worksheet, Aug. 22, 2014 (Supp. AR 10). On August 22, 2014, the Superintendent notified Appellant that the check would be refunded for lack of a “valid lease.”¹⁰ Letter from Superintendent to Holcombe, Aug. 22, 2014 (Supp. AR 9). Appellant sought review by the Regional Director of the Superintendent’s refusal to accept the additional payment.

¹⁰ The Superintendent’s August 22 decision did not include appeal rights; subsequently, the Superintendent issued the decision with appeal rights. Letter from Superintendent to Holcombe, Oct. 2, 2014 (Supp. AR 12).

The Regional Director upheld the Superintendent's decision. As he had in the Arbitration Decision, the Regional Director found that Appellant is not a "lessee." Refund Decision at 5. Although the Regional Director found Resolution 2-185 to be ambiguous, he concluded that it did not constitute an approved lease or permit, but was instead an authorization for Appellant to pursue a mining contract, which did not impose on Appellant any payment obligation for the right to negotiate. *Id.* The Regional Director concluded that the Superintendent did not err in deciding to refund Appellant's payment "because Appellant does not have an approved permit or lease requiring an annual payment." *Id.* In response to an argument by Appellant that the Superintendent's refusal to accept the payment would adversely affect Appellant's separate appeal from the Arbitration Decision, the Regional Director found otherwise, acknowledging that Appellant had a continued right to pursue and negotiate a mining contract, unless OMC clarified, amended, or rescinded Resolution 2-185. *Id.*

Appellant appealed the Arbitration Decision and, subsequently, the Refund Decision, to the Board, and the appeals were consolidated. In lieu of opening briefs, Appellant relied on the Statements of Reasons filed with the notices of appeal. The Regional Director, the surface owners, and Candy Creek filed answer briefs in opposition. Appellant filed reply briefs to the answer briefs.

Discussion

I. Standard of Review

The Board reviews a regional director's decision to determine whether it comports with the law, is not arbitrary and capricious, and is supported by substantial evidence. *Miles v. Southern Plains Regional Director*, 60 IBIA 257, 263 (2015); *Hicks v. Northwest Regional Director*, 59 IBIA 285, 290 (2015). The Board applies a *de novo* standard when reviewing questions of law and the sufficiency of the evidence. *Miles*, 60 IBIA at 263. The appellant bears the burden of showing error in a regional director's decision. *Id.* Mere disagreement with the decision is insufficient to meet the appellant's burden of proof. *Kelley v. Eastern Oklahoma Regional Director*, 54 IBIA 26, 30 (2011).

II. Appellant Is Not Entitled to Arbitration Under 25 C.F.R. § 214.14.

Appellant contends that BIA erred in finding that, in the absence of having an approved lease, it is not a "lessee," and that its request for arbitration is thus premature. According to Appellant, the term "lessee," as used in the mining regulations, is not limited to a party to an approved lease. *See* 15-039 SOR at 4-5. Appellant contends that OMC gave Appellant "a 3-year permit to negotiate the terms of contract with the land owners," and because BIA requires an approval letter from surface owners as part of a proposed lease

package, BIA’s refusal to facilitate arbitration effectively gives the surface owners “absolute control,” even though they hold no mineral rights. *Id.*

The problem for Appellant in this case, however, is not that BIA may require an approval letter from the landowners as part of a proposed lease package, but that Appellant has yet to negotiate a mining lease with OMC. We agree that the meaning of the term “lessee” in the mining regulations is not necessarily limited to a party to a lease that has been approved by BIA. For example, § 214.2 requires that leases shall be filed with BIA within 30 days from the date of execution “by the lessee and [OMC],” and in that context the term obviously refers to the prospective lessee in a not-yet-approved lease. But even in § 214.2, the word lessee refers to a party to a lease signed by the lessor and lessee. We are not convinced that the use of the term “lessee” in § 214.14 was intended to include an entity that has signed a lease form, but not actually entered into a lease. To become a “lessee,” one must *at least* be a party to a lease, which requires an agreement between a lessee and a lessor.¹¹ Appellant not only concedes that OMC has not approved the proposed lease it submitted to BIA, *see* 15-039 SOR at 2, but it now contends that OMC “breached” and “essentially nullified” Resolution 2-185, by accepting Candy Creek’s offer for a mining lease, *id.* at 7. Whatever complaint Appellant may have against OMC with respect to the “permit” granted in Resolution 2-185—a permit never approved by BIA—BIA correctly concluded that Appellant is not a “lessee,” within the meaning of § 214.14, and thus its request for arbitration was premature.¹²

Appellant complains that an “unwritten” policy of OMC requires that mine operators reach agreement with the surface owners before OMC will negotiate a mining lease. Appellant’s Reply to Millsap at 3. Thus, argues Appellant, it “must face a landowner holding *carte blanche* authority to nix any negotiations” for a mining lease, the solution for which is for the Superintendent to “take charge of leasing,” *see* 25 C.F.R. § 214.1 (definition of “officer in charge”), and impose arbitration on the surface owners under § 214.14. *Id.* But a policy of OMC that causes difficulties for Appellant cannot make a

¹¹ BIA may well be correct that the use of the term “lessee” in § 214.14 only applies to a party to a lease that has been approved by BIA. Otherwise, it is difficult to understand on what basis BIA’s regulations could impose an obligation to arbitrate. But in the present case, we need not reach that issue because Appellant did not even enter into a lease with OMC.

¹² Appellant argues that the term “lessee” includes prospective lessee, based on “a plain reading of the Procedures for Obtaining Sandy Soil and Rock Mining Lease,” a document apparently used by the Osage Agency and distributed to prospective lessees. 15-039 SOR at 5; *see* AR 8B. BIA’s procedural handout does not purport to construe § 214.14, and in any event does not have the force of a rulemaking.

BIA regulation, § 214.14, into something it is not. The fact is that Appellant does not have a lease signed by OMC, is not a lessee under § 214.14, and cannot invoke the arbitration provision to obtain an agreement for use of the surface lands.¹³

III. BIA Properly Decided to Refund Appellant’s Proffered Payment For Its “Permit” Under Resolution 2-185.

Appellant’s primary allegation against the Regional Director’s Refund Decision is that it was “fashioned . . . to potentially, negatively affect the Appellant in its pending appeal” of the Arbitration Decision by including “dicta that without appeal by the Appellant may potentially be used against it.” 15-070 SOR at 8. In this vein, Appellant generally objects to the Regional Director’s findings of fact regarding Appellant’s understanding of OMC Resolution 2-185. *See id.* at 7-8.

Appellant has not met its burden to show error in the Refund Decision. Appellant does not identify any legal or factual error made by the Regional Director in affirming the Superintendent’s decision not to accept Appellant’s \$2,500 proffered payment for the second year of its “permit” with OMC under Resolution 2-185. Instead, Appellant provides a list of the Regional Director’s conclusions and “dicta” with which it “disagrees,” and argues that each conclusion may be prejudicial to its arbitration appeal and should not have been included in the decision. *See id.* at 2, 6. But aside from the critical finding, which we affirm—that Appellant is not a “lessee” under § 214.14—none of the Regional Director’s conclusions in the Refund Decision had any bearing on our resolution of Appellant’s appeal from the Arbitration Decision. And BIA’s decision to refund the \$2,500 payment was undoubtedly correct because BIA had no role in accepting a payment by Appellant for the “permit” from OMC, which was not required or approved by BIA, to negotiate a mining lease, even assuming Resolution 2-185 were construed to require such a payment to OMC. Mere disagreement with a regional director’s decision is not sufficient to meet an appellant’s burden of proof to show error on appeal. *Kelley*, 54 IBIA at 30. Appellant has failed to meet its burden of proof, and we affirm the Refund Decision.

¹³ Appellant also complains that BIA’s procedures, *see supra* note 12, require an approval letter from the surface owners as part of a lease approval package. Whether or not a policy by BIA to require such an agreement could be grounds for complaint by OMC, i.e., if the policy interfered with OMC’s ability to gain BIA’s approval for a lease for the dominant mineral estate, it is unclear on what grounds a prospective lessee, without being joined by OMC, would have standing to complain.

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 affirms the Regional Director's decisions of October 7, 2014, and February 2, 2015.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Robert E. Hall
Administrative Judge