WHITE MOUNTAIN APACHE TRIBE d.b.a. FORT APACHE TIMBER CO.
v.
DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 85-30-A Decided August 25, 1989

Appeal from a decision of the Deputy Assistant Secretary--Indian Affairs (Operations) disapproving a tribal resolution setting interim stumpage ratios for the period January 1, 1984, through April 30, 1984.

Affirmed. Conclusions of recommended decision adopted.

1. Board of Indian Appeals: Jurisdiction--Indians: Timber Resources: Timber Sales Contracts: Generally

   The determination whether to approve stumpage rates under a timber sale contract between a tribe and its tribal forest enterprise is committed to the discretion of the Bureau of Indian Affairs. In reviewing such a decision, it is not the function of the Board of Indian Appeals to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Indians: Timber Resources: Timber Sales Contracts: Generally--Indians: Tribal Powers: Self-Determination-Indians: Trust Responsibility

   There is no conflict between the Federal policy favoring tribal self-determination and the Federal trust responsibility for tribal timber resources where both tribal law and Federal regulations require that stumpage rates for tribal timber be approved by the Bureau of Indian Affairs.

3. Indians: Timber Resources: Timber Sales Contracts: Generally

   25 CFR 163.6(c) requires that stumpage rates for tribal timber sold to Indian tribal forest enterprises be authorized by the Secretary of the Interior.

WWWVersion

4. Appraisals--Indians: Timber Resources: Generally

A Bureau of Indian Affairs appraisal of tribal timber resources conducted for the purpose of evaluating proposed stumpage rates will not be overturned unless it is shown to be unreasonable.

APPEARANCES: Claudeen Bates Arthur, Esq., Whiteriver, Arizona, for appellant; Robert Moeller, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant White Mountain Apache Tribe d.b.a. Fort Apache Timber Company challenges a January 31, 1985, decision of the Deputy Assistant Secretary--Indian Affairs (Operations), which affirmed a decision of the Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), disapproving Resolution 84-19 enacted by the White Mountain Apache Tribal Council. The resolution established interim stumpage ratios for tribal timber sold to the Fort Apache Timber Company (FATCO) for the period January 1, 1984, through April 30, 1984. 1/

For the reasons discussed below, the Board adopts the conclusions of the decision recommended by Administrative Law Judge Harvey C. Sweitzer on May 26, 1989, and affirms the decision appealed from.

Background

FATCO is a tribal enterprise of the White Mountain Apache Tribe. At all times relevant to this appeal, it operated pursuant to a Plan of Operations adopted by Resolution 80-10 of the White Mountain Apache Tribal Council on January 2, 1980, and approved by the Area Director on August 8, 1980. Section B.1 of the Plan of Operations describes FATCO's purpose:

> To promote the economic development of the White Mountain Apache Tribe, and its members, through efficient utilization of the tribal timber resources; to earn a net profit; to provide business training for members of the Tribe and the White Mountain Apache Tribal Council; to economically and efficiently manufacture lumber or other timber products at a profit while providing employment opportunities for members of the Tribe.

Section B.3 provides that FATCO is to purchase tribal timber under timber sales contracts approved by the Tribal Council and the Area Director.

1/ The stumpage ratio system used to determine FATCO's payments to the tribe is evidently a modification of the standard stumpage rate system and is calculated by dividing the stumpage rate for the timber by the sales price for all lumber produced. Appellee's original answer brief before the Board, Aug. 23, 1985, at 4.

WWWVersion

On June 1, 1983, the Tribal Council enacted Resolution 83-173, which established the stumpage ratios to be paid to the tribe by FATCO for the period May 1, 1983, through April 30, 1984. These ratios were based on BIA recommendations. On January 12, 1984, the Tribal Council enacted Resolution 84-19, proposing to establish interim stumpage ratios for the period January 1, 1984, through April 30, 1984, to supersede the ratios set in the earlier resolution. Resolution 84-19 states that the proposed ratios had been recommended by FATCO "to give a reasonable profit return to the company and still be a fair and equitable stumpage rate to the Tribe."

In February 1984, an interim reappraisal was prepared at the Fort Apache Agency, BIA, to evaluate the tribe's proposal. The appraisal concluded, inter alia, that the ratios proposed in Resolution 84-19 did not represent fair market value and were less equitable than the ratios in Resolution 83-173. While acknowledging these conclusions, the agency Superintendent recommended to the Area Director that Resolution 84-19 be approved in deference to considerations of tribal self-determination. 2/

By memorandum to the Superintendent dated May 7, 1984, the Area Director rejected the Superintendent's recommendation and disapproved Resolution 84-19. The Area Director gave as grounds for disapproval:

> 1. The proposal is contrary to the policy contained in 25 CFR 163.6(c). [3/]
>
> 2. Your [the Superintendent's] analysis that the proposal is not fair and equitable is confirmed by this office.
>
> 3. Your conclusion that the current ratio (royalty) percentage offers an equitable stumpage rate is likewise confirmed by this office.
>
> 4. The proposal defies sound business practice.
>
> 5. We see no advantage to the tribe in artificially inflating mill profits. Rather we are concerned about the potential adverse effects of doing so.

2/ Three memoranda from the Superintendent recommending approval appear in the record. They are dated Feb. 23, Mar. 20, and Apr. 17, 1984.

3/ 25 CFR 163.6 provides in part: "Indian tribal forest enterprises may be initiated and organized with consent of the authorized tribal representatives. * * * Subject to approval by the Secretary the following actions may be taken:

"(a) Authorized tribal enterprises may enter into formal agreements with tribal representatives for the use of tribal forest products, and with individual Indian owners for allotted forest products.

* * * * * * *

"(c) With the consent of the Indian owners, such enterprises may, without advertisement, contract for the purchase of forest products on Indian lands at stumpage rates authorized by the Secretary."

WWWVersion

6. Since mill profits are reasonable and the proposal is not fair and equitable, the tribe has, in effect, offered no reason for approving this stumpage adjustment.

7. The proposal is not, in our opinion, consistent with the enterprise plan of operation or pertinent timber sale contracts.

8. The Bureau's policy of self-determination neither encourages nor suggests deliberately endorsing action clearly in defiance of sound business practice.

(May 7, 1984, memorandum at 5). By letter of June 8, 1984, the Area Director informed the tribe of its right to appeal pursuant to 25 CFR Part 2.

Appellant appealed to the Deputy Assistant Secretary--Indian Affairs (Operations), who, by decision dated January 31, 1985, affirmed the Area Director. The decision stated that it was based on the exercise of discretionary authority and was final for the Department of the Interior.

Appellant's notice of appeal to the Board was received on April 8, 1985. After briefing was completed, appellant filed a motion for oral argument or, in the alternative, an evidentiary hearing. On February 26, 1986, upon concluding that the record was insufficient to permit resolution of the appeal, the Board referred the case to the Hearings Division of the Office of Hearings and Appeals for assignment of an Administrative Law Judge to conduct an evidentiary hearing. 14 IBIA 69.

The case was assigned to Administrative Law Judge Harvey C. Sweitzer. Following several postponements of the hearing date, 4/ a hearing was held December 5 through 7, 1988. Judge Sweitzer issued a recommended decision on May 29, 1989, recommending that appellee's decision be affirmed.

As provided in 43 CFR 4.339, the parties had 30 days from their receipt of the recommended decision in which to file exceptions or other comments with the Board. Appellant filed exceptions, which were received by the Board on July 3, 1989.

Recommended Decision

Judge Sweitzer's recommended decision addressed each of the 13 contested issues of law and fact identified in the joint preheating statement filed by the parties. Judge Sweitzer found:

4/ The parties first requested a postponement in order to narrow the issues and prepare a joint preheating statement. Thereafter, appellant replaced its counsel, and its new counsel requested additional time to prepare. Finally, Judge Sweitzer again postponed the hearing on the understanding that the parties would attempt to settle the matter. Settlement efforts were unsuccessful.

WWWVersion

1. Appellee's characterization of his decision as discretionary was erroneous to the extent that the decision was based on an interpretation of the timber contract between the tribe and FATCO or on FATCO's Plan of Operations, and to the extent that it was based on a determination that it was made in conformity with all applicable laws and regulations. These are legal conclusions which are reviewable by the Board of Indian Appeals.

2. Appellant bears the burden of proving that appellee's decision is in error.

3. The Board lacks jurisdiction to review BIA's exercise of discretionary authority.

4. The decision not to approve Resolution 84-19 did not violate a right or privilege granted to the tribe by the timber contract, the Indian Self-Determination and Education Assistance Act, the Indian Reorganization Act, or the tribe's constitution.

5. Stumpage ratios to be paid to the tribe by FATCO are subject to Secretarial approval.

6. 25 CFR 163.6(c) applies to sales of the tribe's timber to FATCO.

7. Although depreciation is generally a factor to be included in conducting appraisals and calculating fair market value, appellant has not shown that depreciation must be included as a matter of law in determining the stumpage ratios to be paid to the tribe by FATCO.

8. Appellant's assertion that the Area Director incorrectly applied the law to the facts by failing to consider known relevant factors is not reviewable by the Board to the extent that it alleges a judgmental error in the Area Director's exercise of discretion. To the extent appellant argues that BIA failed to comply with Federal and tribal law, the argument is addressed in paragraph 4.

9. The determination of whether stumpage ratios proposed by the tribe are fair and equitable is committed to the discretion of BIA.

10. While Resolution 84-19 does not appear to be inconsistent with FATCO's Plan of Operations, except insofar as it lacks the Area Director's approval, the decision not to approve the resolution does not violate any right or privilege granted by the Plan of Operations.

11. The Area Director's decision conforms with all applicable legal requirements.

12. The tribe's submittals were given due consideration, and an adequate explanation of the basis of the Area Director's decision was provided.

13. The decision not to approve Resolution 84-19 was made in conformity with appellee's trust responsibility to the tribe and in accordance

WWWVersion

with the policy of encouraging tribal enterprises. There was no breach of any trust obligation in the circumstances of this case.

Appellant's Exceptions to the Recommended Decision

In its exceptions to Judge Sweitzer's recommended decision, appellant contends: (1) appellant has met its burden of proving that appellee's decision was in error; (2) BIA's failure to include depreciation in its appraisal was an abuse of discretion; (3) the tribe and FATCO are a single entity, and therefore Judge Sweitzer's reliance on the timber contract between the tribe and FATCO was in error, because the tribe cannot contract with itself; (4) 25 U.S.C. § 81 (1982) 5/ does not apply to the contract between the tribe and FATCO; (5) the tribe's sovereign powers are not limited to those delineated in its constitution; (6) the tribe did not incorporate under 25 U.S.C. § 477, and therefore Judge Sweitzer's reliance on that provision was in error; (7) the tribe's constitutional power to manage its forest resources is not limited by any Federal law, and therefore the tribe has the authority to decide whether it will derive the profits from sale of its timber as profits to FATCO or as stumpage ratios; and (8) the provisions of 25 CFR Part 163 relied upon by Judge Sweitzer do not apply to the tribe because they are incompatible with the tribe's power to manage its forest resources and they are not made expressly applicable to the tribe as required by the tribe's constitution.

Discussion and Conclusions

Although a number of issues have been raised and discussed in this appeal, there are really only three central issues. The first concerns the extent of the Board's jurisdiction over this matter. The second and third issues are substantive: Whether the interim stumpage ratios set in Resolution 84-19 were subject to Secretarial approval and, if so, whether the Area Director's disapproval of Resolution 84-19 was proper. 6/

[1] As Judge Sweitzer recognized, the Board has a well-established rule concerning its jurisdiction over appeals like the present one where the decision appealed from is based in part on the exercise of discretion but also involves issues of law. While the Board lacks jurisdiction over decisions of BIA officials to the extent they are based on the exercise of discretionary authority, it may review such decisions to the extent of any legal conclusions reached. Further, the Board has authority to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority. E.g., City of Eagle Butte v. Aberdeen Area Director, 17 IBIA 192, 96 I.D. 328 (1989); Vielle v. Billings Area Director, 15 IBIA 40 (1986).

5/ All further citations to the United States Code are to the 1982 edition.

6/ The Board finds that some of the statutory provisions discussed by Judge Sweitzer, e.g., 25 U.S.C. §§ 81 and 477, are not necessary to the conclusions reached in this decision. They are therefore not addressed.

WWWVersion

The Board adopts Judge Sweitzer's conclusion that the Board has jurisdiction over legal issues in this appeal but not over BIA's exercise of discretionary authority.

[2, 3] Appellant argues that pursuant to its constitution, its inherent sovereignty, and the policy enunciated in the Indian Self-Determination Act, 25 U.S.C. § 450 et seq., it has the unilateral authority to set stumpage ratios for tribal timber sold to FATCO, the tribe's own forest enterprise. It contends that BIA "has used the trust responsibility verbiage as an administrative tool to overcome the policy of Indian self-determination" (Appellant's exceptions at 11).

The Board recognizes that serious issues of trust responsibility and tribal self-determination lie behind this dispute. Congress has imposed upon the Secretary a trust responsibility for the management of Indian timber resources. See United States v. Mitchell, 463 U.S. 206 (1983). Congress has also expressed a policy favoring tribal self-determination. See 25 U.S.C. § 450a. BIA is faced with a difficult task when it attempts to arrive at the proper balance between these two policies in the management of tribal timber.

However, even though these policies may sometimes be in conflict, it does not appear that they are in conflict in this case. Despite appellant's present argument that the Area Director's approval of stumpage ratios is not required, the tribe has, as a matter of tribal law, made the stumpage ratios for timber sold to FATCO subject to approval of the Area Director. As noted above, by Resolution 80-10 of January 2, 1980, the tribe adopted the FATCO Plan of Operations in effect at the time this dispute arose. The resolution provides in part:

> WHEREAS, the Tribal Council has thoroughly reviewed the provisions of an amended Plan of Operations including amendments previously discussed by the Council, and
>
> WHEREAS, the Tribal Council finds that its proposed amendments to the Plan of Operations are satisfactory to the Tribal Council and in the best interest of the Tribe and its enterprise operations, and
>
> WHEREAS, the Tribal Council finds that the provisions therein for approval by the Bureau of Indian Affairs in forestry decisions is appropriate, and that the deletion of Area Director approvals from the business management provisions regarding the Board of Directors, General Manager and Sales Representative, is within the scope of authority and self-determination efforts of the Tribal Council, acting in the best interests of the Tribe,
>
> * * * * * *
>
> BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it hereby approves and directs the enforcement of the amended Plan of Operations for the Fort Apache Timber

WWWVersion

Company a copy of which is attached hereto and by this reference incorporated herein.

Section B.3 of the Plan of Operations requires the Area Director's approval of timber Sales contracts:

> Timber Source. (a) The Tribe agrees to sell the Company, and the Company agrees to buy, under timber sale contracts, and in accordance with the terms and conditions of this plan and with the Standard Provisions of the timber sale contracts, all the timber and other forest resources which may be manufactured, processed or produced by the Company, as may be designated for sale and removal by the Bureau of Indian Affairs, within the Tribal, Northfork, Maverick and West Blocks, hereinafter known as the FATCO Operating Area. Contracts for the sale of timber or other forest resources shall be subject to the prior approvals of the Tribal Council and of the Area Director.

Section B.4(a) requires the Area Director's approval of the method for determining stumpage ratios, at least where the ratios are not based on an appraisal:

> Payment for Timber. The rates to be paid for timber specified in Section B(3) of this Plan may be the appraised rates determined by separate appraisals of the individual logging units under timber sale contracts, subject to any adjustment provisions specified under each particular contract; or any other reasonable method or combination of methods developed as a basis for payment which is satisfactory to the Company, the Tribal Council, and the Area Director. The basis of payment shall be specified in the individual Timber Sale Contracts.

Appellant's witness Hal Butler, FATCO's former manager, testified that the stumpage ratios set in Resolution 84-19 were not based on an appraisal but, rather, on calculations that would assure FATCO a profit of at least 10 percent (Tr. 264-271). It clearly appears therefore that this section of the Plan of Operations subjected the methodology utilized in Resolution 84-19 to the approval of the Area Director.

The FATCO timber contract form 7/ includes at Section A9 a provision for inclusion of the stumpage rates applicable to the contract. Under Section B.3 of the Plan of Operations, these rates are subject to approval

---

7/ A blank contract form for FATCO timber contracts is included in the record as appellant's Exhibit N. It has a 1979 revision date, predating the 1980 revision of the FATCO Plan of Operations, but apparently was still in use at the time this dispute arose.

WWWVersion

by the Area Director. Section B4.2 of the contract, Redetermination of Stumpage Rates-Ratio System, provides in part:

> [D]uring the effective period of this contract, or any extension thereof, the Approving Officer [the Area Director or his authorized representative] shall annually establish a thirty-day consultation period to study the ratio percentage then in effect to ascertain its equity to both parties hereto. Upon review of the circumstances and the written facts submitted by the parties hereto or on their behalf, the Approving Officer with consent of the Tribal Council will make whatever decision concerning adjustment of the percentage he finds warranted. If an adjustment is made, the adjusted percentage will be made effective retroactive to the first day of the thirty-day consultation period. In addition to the annual review of the ratio percentage, FATCO or the Tribe or the Bureau may request either jointly or severally a review of the existing ratio percentage. Such a request shall be supported by sufficient documentation of the facts and circumstances as the Approving Officer or the Tribe may require. Interim reviews and adjustments of the ratio percentage and the basis upon which it is developed will not be made at less than three-month intervals. Changes in the timber ratio percentage must generally be based on economic factors of a substantial nature that affect the FATCO mill, markets or resource supply that were not present, foreseen or anticipated at the time the timber ratio percentage then in effect was established.

This section clearly contemplates that the Area Director must agree to an interim change in stumpage ratios.

The quoted provisions of Resolution 80-10, the Plan of Operations, and the timber contract make it apparent that those documents were intended to require the Area Director's approval of the stumpage ratios at issue here.

Appellant argues that any reliance on the timber contract is erroneous because the tribe and FATCO are a single entity, the tribe cannot contract with itself, and therefore there is no valid contract. 8/ As noted above, however, tribal law requires that tribal timber sales to FATCO be made under timber sales contracts and in accordance "with the Standard Provisions of the timber sales contracts" (FATCO Plan of Operations, Paragraph B.3(a)).

Appellant also argues that 25 CFR 163.6(c) does not apply to the tribe because it is incompatible with the tribe's constitutional authority to

---

8/ Appellant also argues that BIA lacks authority to interpret the timber contract because it is not a party to the contract. The contract itself, however, provides at section B2.2:

"Interpretation of Contract. The decision of the Approving Officer shall prevail in the interpretation of the contract, subject to the right of appeal prescribed in Section B2.11 herein [i.e., appeal pursuant to 25 CFR Part 2]."

WWWVersion

manage its forest resources. Appellant cites the provision by which the constitution was approved by the Assistant Secretary of the Interior, which provides in part:

> Upon ratification of this revised Constitution and Bylaws, all rules and regulations promulgated by the Interior Department or by the Bureau of Indian Affairs, so far as they may be incompatible with any of the provisions of the said revised Constitution and Bylaws, are declared inapplicable to the White Mountain Apache Tribe, except where the rule or regulation expressly indicates otherwise.

Article V, section 1(i), of the tribe's constitution authorizes the Tribal Council "[t]o manage all economic affairs and enterprises of the tribe including tribal lands, timber, sawmills, flour mills, community stores, and any other tribal activities." Acting pursuant to this provision 9/, the Tribal Council adopted the FATCO Plan of Operations, which, as discussed above, requires stumpage ratios to be approved by the Area Director. Tribal law is, in this regard, entirely consistent with the regulatory requirement for Secretarial authorization of stumpage rates in 25 CFR 163.6(c). Whatever other effect the "incompatibility" provision of the tribe's constitution might have, it is clear that it does not render this regulatory provision inapplicable to the tribe.

Judge Sweitzer found that 25 CFR 163.6(c) applies to appellant's timber operation. Appellant has not shown that this conclusion was erroneous.

The Board adopts Judge Sweitzer's conclusions that the interim stumpage ratios in Resolution 84-19 were subject to the approval of the Area Director and that 25 CFR 163.6(c) applies to appellant's timber operation.

[4] Appellant also challenges the appraisal prepared by BIA for the purpose of evaluating appellant's proposed interim stumpage ratios. Appellant argues that BIA's failure to include depreciation in the appraisal was an abuse of discretion. Judge Sweitzer found that appellant had not shown that depreciation was required to be included in the appraisal as a matter of law. Appellant's exceptions to Judge Sweitzer's recommended decision also fail to make such a showing.

In its cases concerning appraisals, the Board has noted that appraisals require the exercise of judgment and that reasonable people may differ in the conclusions they reach pursuant to an appraisal. The Board does not substitute its judgment for BIA's in such determinations. In order to successfully challenge a BIA determination based on an appraisal, an appellant bears the burden of showing that the determination is not reasonable. E.g., Navajo Nation v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 15 IBIA 179, 184-185, 94 I.D. 172, 175 (1987).

9/ Resolution 80-10 states that it was adopted by the Tribal Council "pursuant to authority vested in it by Article V, Section l(i) of [the constitution]."

WWWVersion

In this case, appellant did not conduct its own appraisal. It conceded that its proposed stumpage ratios were not based on an independent determination of fair market value but were calculated to result in a profit of at least 10 percent for FATCO. Appellant's objections to the BIA appraisal are insufficient to show that it was unreasonable.

The Board concludes that appellant has not shown either that BIA's appraisal was legally flawed or that it was unreasonable.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the conclusions of the May 26, 1989, recommended decision of Administrative Law Judge Harvey C. Sweitzer are adopted, and the January 31, 1985, decision of the Deputy Assistant Secretary--Indian Affairs (Operations) is affirmed.

_____
Anita Vogt
Administrative Judge

I concur:

_____
Kathryn A. Lynn
Chief Administrative Judge

WWWVersion