WINLOCK VENEER CO.
v.
JUNEAU AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 94-167-A Decided September 5, 1995

Appeal from the assessment of additional compensatory damages based on the breach of a timber sale contract.

Affirmed.

1. Administrative Appeals: Generally--Board of Indian Appeals: Generally--Indians: Generally

   The Board of Indian Appeals will not consider arguments that could and should have been raised in prior litigation concerning the identical subject matter.

2. Indians: Timber Resources: Timber Sales Contracts: Breach and Damages

   In determining whether damages should be awarded following the breach of a contract for the sale of trust timber, the standard is whether the non-breaching party exercised ordinary reasonable care in attempting to mitigate damages.

3. Administrative Appeals: Generally--Board of Indian Appeals: Generally--Indians: Generally

   The Board of Indian Appeals is not required to consider evidence and arguments raised for the first time in a reply brief .

APPEARANCES: Leonard Mungo, Esq., Detroit, Michigan, for appellant; Roger L. Hudson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Winlock Veneer Co. seeks review of an August 31, 1994, decision of the Juneau Area Director, Bureau of Indian Affairs (Area Director; BIA), assessing additional compensatory damages based on appellant's breach of Timber Sale Contract No. E00C14203082. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

WWWVersion

Background

This is the third time that issues relating to this timber sale contract have been before the Board. See Winlock Veneer Co. v. Acting Juneau Area Director, 20 IBIA 3, recon. denied, 20 IBIA 100 (1991) (Winlock I), and Winlock Veneer Co. v. Juneau Area Director, 22 IBIA 314 (1992) (Winlock II). Winlock I held that appellant had breached the contract, while Winlock II addressed the calculation of damages for timber sold as a result of the breach. The factual background of this matter is fully set forth in the Board's earlier decisions, and will not be repeated here.

The present case concerns the calculation of damages for timber which appellant did not harvest under the breached contract, and which was later harvested by Klukwan Forest Products (Klukwan). It appears that the first notice appellant may have received that the Area Director was considering additional damages was a June 27, 1994, decision letter. Appellant appealed this decision to the Board. Before transmitting the administrative record to the Board, the Area Director requested that the matter be remanded to him so that he could issue an amended decision which would include damages inadvertently omitted from the June 27, 1994, decision. The Board granted a limited remand on August 23, 1994, and the Area Director issued an amended decision on August 31, 1994. The August decision tracked the June decision except for the inclusion of new material assessing the additional damages. The Board treats appellant's appeal as being from the amended August 31, 1994, decision.

The Area Director assessed additional compensatory damages in the total amount of $430,383.93. His decision stated:

> The amount of $415,998.31 is owed for the lost use of anticipated receipts from the date when payment was due in full under [appellant's] contract [until] the date of receipt [of] the final payment under the Klukwan contract. The amount of $14,385.62 is the difference between what the allottees would have received in stumpage if [appellant] had completed performance of its contract on time and in a commercially reasonable manner, and the amount they did receive for the same timber when they resold it to Klukwan * * * in mitigation of [the allottees' damages after the cancellation of [appellant's] contract. This amount is due and owing under [appellant's] contract and carries interest under [Alaska Stat. §] 45.45.010 at a rate of $4.14 per day until paid. [Footnote omitted.]

(Decision at 7-8).

Both appellant and the Area Director filed briefs on appeal.

Discussion and Conclusions

The first question before the Board is whether the Area Director's assessment of additional damages is time-barred. Appellant argues that the

WWWVersion

assessment is barred by the 4-year statute of limitations established in Alaska Stat. § 45.02.725. This section states in pertinent part: "(a) An action for breach of a contract for sale must be commenced within four years after the cause of action has accrued. * * * (b) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach."

The Area Director responds that this matter is governed by Federal, not State, law, and that the applicable statute is 28 U.S.C. § 2415(a) (1994), 1/ which provides in relevant part:

> Subject to the provisions of section 2416 of this title [which establishes exclusions not relevant here], and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.

Appellant replies that 28 U.S.C. § 2415(a) applies to civil actions filed in Federal court, not to administrative proceedings, and that therefore there is no relevant Federal statute and Alaska State law prevails.

Appellant's argument is unpersuasive. If the Federal statute does not apply to this administrative proceeding because the statute is a limitation on the filing of a judicial action, then the Alaska statute does not apply either, because it, too, is a limitation on the filing of a judicial action.

In Walch Logging Co. v. Assistant Portland Area Director, 11 IBIA 85, 98, 90 I.D. 88, 95, recon. denied, 12 IBIA 126 (1983), the Board held that "[t]he construction of Federal contracts, including contracts approved on behalf of an Indian or Indian tribe by the Secretary of the Interior in his fiduciary capacity, is a question of Federal law," but that "[i]n the absence of Federal [law] on point, state law may be used as an indication of the general common law" of contracts. See also Naegele Outdoor Advertising, Inc. v. Acting Sacramento Area Director, 24 IBIA 169 (1993); Kombol v. Assistant Portland Area Director, 21 IBIA 116 (1991). The application of state law is appropriate, however, only "to the extent it does not conflict with the Federal interest in developing and protecting the use of Indian resources." United States v. Humboldt Fir, Inc., 426 F. Supp. 292, 297 (N.D. Calif. 1977), aff'd mem., 625 F.2d 330 (9th Cir. 1980). See also Priebe & Sons, Inc. v. United States, 332 U.S. 407 (1947).

The Board finds that 28 U.S.C. § 2415(a), rather than any state law, governs the filing of a claim for money damages arising under a Federal

---

1/ All further citations to the United States Code are to the 1994 edition.

WWWVersion

contract, and concludes that if suit may still be filed in Federal court, the matter may also still be raised in an administrative proceeding that is a necessary prerequisite to the filing of a court action. Accordingly, the Board declines to dismiss this matter as being time-barred.

Appellant next raises two related arguments in which it seeks a declaration that the cancelled contract was void. Realizing that these arguments should have been raised in either or both Winlock I or Winlock II, appellant contends at page 12, n. 10, of its Opening Brief that it is not precluded from raising these arguments for the first time in its third appeal "inasmuch as it has never previously" made the arguments. It cites Mountain Fir Lumber Co., 6 IBIA 86 (1977), in support of an argument that res judicata and stare decisis do not apply in administrative proceedings.

Appellant's reliance on Mountain Fir is misplaced. The Board's decision in that case was reversed by the United States Court of Claims. See Mountain Fir Lumber Co. v. United States, No. 361-78 (Ct.Cl. Feb. 8, 1980).

[1] Appellant cites no other authority for its proposition that it can raise issues now that could, and should, have been raised in prior litigation involving the identical subject matter. Indeed, appellant's failure to cite other Board support is understandable, because of the Board's otherwise consistent application of the doctrines of res judicata and stare decisis. As most relevant here, the doctrines were followed in Winlock II when the Board declined to revisit the question of whether appellant had breached the contract, although most of the arguments appellant raised in Winlock II related not to the calculation of damages for timber it had sold, but rather to the fact of breach.

Furthermore, the fact that appellant previously appeared without counsel does not give it additional rights. The Board recently reiterated in Tullius v. Acting Anadarko Area Director, 28 IBIA 110 (1995), that an appellant who appears pro se is bound by her own statements. As this principle applies here, even a pro se appellant is precluded from raising arguments that were available to it, but were not made, in prior proceedings. 2/

Accordingly, the Board declines to consider appellant's arguments that the cancelled contract should be declared void.

Appellant next argues that the Area Director unreasonably delayed in taking action to mitigate damages. Appellant contends that "[b]ecause the overall delay was not commercially reasonable under the circumstances, the

---

2/ Appellant now attempts to argue that the contract price and payment provisions were totally ambiguous. However, appellant performed under those provisions and "neither [appellant] nor its agents [previously] voiced or demonstrated any misunderstanding as to the price and payment provisions of this contract, or any interpretation of them which was at odds with that advanced by the BIA, and later in effect adopted by this Board" (Area Director's Answer Brief at 8).

WWWVersion

Area Director failed to mitigate damages as required by law, and [appellant] should not be charged with damages for consequences that could reasonably--and easily--have been avoided" (Opening Brief at 30).

Appellant's argument is based upon the chronology of events during late 1989 and early 1990. The Area Director cancelled appellant's contract on October 20, 1989. On December 28, 1989, after appellant filed its appeal in Winlock I, the Area Director requested that appellant be required to file an appeal bond. On January 23, 1990, the Area Director withdrew his request for a bond, explaining at page 2 of his notice of withdrawal that it had "since been determined that the best means of protecting the Indian allotment owners from potential financial loss which could result from the delay inherent in the present appeal is to proceed immediately with a resale of the timber covered by the terminated * * * contract," in accordance with the Board's decision in Walch Logging Co. v. Assistant Portland Area Director, 11 IBIA 85, 90 I.D. 88, recon. denied, 12 IBIA 126 (1983). The Area Director's motion indicated that he was previously unaware of the decision in Walch Logging. The Area Director advertised the resale, and on March 21, 1990, awarded the contract to Klukwan. Because of the lateness of the season, the necessity to obtain certain permits, and its prior commitments of men and equipment, Klukwan did not begin logging until the 1990-91 season. Klukwan completed the resale contract on November 3, 1992.

In support of its unreasonable delay argument, appellant quotes selectively from the Board's decision in Kombol v. Assistant Portland Area Director (Economic Development), 21 IBIA 116, 122-23 (1991). The Board believes a more complete quotation from Kombol would be instructive here:

> The Area Director contends that the phrase "duty to mitigate damages"is actually a misnomer and that the principle should be referred to as the "doctrine of avoidable consequences." The principle that a nonbreaching party will not be awarded damages for those expenses which he could have avoided through the exercise of reasonable care has been termed both a "duty to mitigate damages" and the "doctrine of avoidable consequences' by the courts. Because of the apparent confusion arising from the term "duty," the Board will refer to this principle as the doctrine of avoidable consequences.
>
> Whatever the principle has been called, it clearly does not create enforceable rights in the breaching party. Rather, it concerns only the amount of damages that will be awarded to the nonbreaching party. Thus, if the nonbreaching party could have avoided certain expenses through the exercise of reasonable care, it will not be awarded those expenses as damages from the breaching party. However, the breaching party has no enforceable right to require the nonbreaching party to take any action to avoid the expenses. Neither is the nonbreaching party required to recoup all losses, so long as his actions are, under the circumstances existing at the time, reasonable attempts to

WWWVersion

minimize the breaching party's damages. Cf., e.g., Iverson v. Marine Bancorporation, 86 Wash.2d 562, 546 P.2d. 454 (1976); Kubista v. Romaine, 14 Wash. App. 58, 538 P.2d 812 (1975), aff'd, 87 Wash.2d. 62, 549 P.2d 491 (1976). * * *

* * * * * *

Appellant's intent is clearly to "second-guess" every decision made by the Tribe and BIA in administering the resale contract, and perhaps in administering the contract which appellant breached. Under ordinary circumstances, appellant would lack standing to challenge actions taken by BIA as supervisor of the [resale] contract, because appellant was not a party to that contract. See * * * 25 CFR 2.2. 5/ Under his interpretation of the "duty to mitigate damages," appellant attempts to claim an interest in the resale contract sufficient to allow him to raise questions concerning the management of that contract. In effect, appellant attempts to place himself in the position of a "third-party beneficiary" of the resale contract.

The doctrine of avoidable consequences does not reach this far. The doctrine neither requires the nonbreaching party to be perfect in all actions taken after a breach of contract, nor makes the nonbreaching party a guarantor for the breaching party. It merely requires the nonbreaching party to exercise reasonable care in attempting to minimize the damages resulting from breach. If reasonable care is exercised any remaining damages will be awarded. Cf. Iverson, supra; Kubista, supra. 6/

5/ The Board notes that even if appellant had been a party to the resale contract, the time for challenging BIA's actions as supervisor of that contract has long since passed. 25 CFR 2.9(a) ; * * * 43 CFR 4.332(a).

6/ In Kubista, the Washington Court of Appeals stated at 14 Wash. App. at 63, 538 P.2d at 815-16:

"It has long been the law in this state and elsewhere that an injured party must, whenever possible, attempt to mitigate his damages, and cannot be compensated for damages which he might have prevented by reasonable efforts and expenditures. The obvious corollary to this rule is that an injured party is generally entitled to all legitimate and reasonable expenses necessarily incurred by him in an honest and good faith effort to reduce the damages from or following the wrongful act. * * * Although prudent action and ordinary diligence is of course required, the following statement of the applicable principles of law has been approved by the [Washington] Supreme Court:

"'While it is economically desirable that personal injuries and business losses be avoided or minimized as far as possible by persons against whom wrongs have been committed, yet we must not in the application of the present doctrine lose sight of the

WWWVersion

> fact that it is always a conceded wrongdoer who seeks its protection. Obviously, there must be strict limits to the doctrine. A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen. Hogland v. Klein, 49 Wash.2d 216, 221, 298 P.2d 1099, 1102 (1956), citing C. McCormick, Law of Damages, § 35, 133 (1935)." (Citations omitted; emphasis in original.)

(21 IBIA at 122-23).

Appellant contends at page 26, n.16, of its Opening Brief that its situation can be distinguished from that in Kombol because it does not focus on any failure to mitigate on the part of Klukwan, but rather focuses on BIA's failures. This contention is unavailing. BIA's actions were also the focus of the allegations and decision in Kombol.

As was the case in Kombol, appellant attempts to second-guess the decisions BIA made concerning the resale contract. Each of appellant's contentions is presented in the abstract, almost solely in term of the amount of time that passed, with no acknowledgment of the historical circumstances at the relevant time.

Thus appellant contends that BIA unreasonably delayed in advertising the resale contract, even though during the entire period between the cancellation decision and the advertisement of the resale contract, appellant was attempting to negotiate either a reinstatement of the original contract or some other settlement. In fact, appellant objected to the resale in a letter to the Superintendent dated February 28, 1990. Under the totality of the circumstances, the Board cannot accept appellant's suggestion that the sole reason for the delay was the Area Director's failure to understand the state of the law.

Appellant also alleges that BIA unreasonably delayed in identifying an alternate buyer and allowing cutting to begin. The Area Director notes that although the advertisement provided a shorter than usual bid opening schedule, the resale contract was subject to regulatory provisions establishing specific time periods for such things as furnishing a performance bond. The Area Director also states that BIA did not determine when cutting would begin.

Appellant suggests that BIA should have chosen another logging company if Klukwan was not able to begin cutting during the 1989-90 logging season. However, appellant has presented no basis for a determination that BIA could have selected a different bidder under the statutory and regulatory framework governing BIA's awarding of timber contracts.

WWWVersion

Finally, appellant alleges unreasonable delay in the Area Director's assessment of the damages under review here. Appellant contends that "the Area Director assessed $4.14 per day in interest against [appellant] from November 3, 1992 [the date when Klukwan completed the resale contract] until the present. * * * However, the only reason interest has accrued from November 3, 1992 until the present is that the Area Director took two years' time to calculate those damages" (Opening Brief at 30). The Area Director states that not all of the information necessary to calculate the damages was available as of November 3, 1992, and that BIA spent some time trying to determine the best methodology for calculating the allottees' damages.

[2] The Board has previously held that the standard for determining whether damages should be awarded as a consequence of breach is whether the nonbreaching party exercised ordinary reasonable care in attempting to mitigate the damages. See especially Kombol. Appellant's arguments do not persuade the Board that BIA acted with less than ordinary reasonable care. Accordingly, the Area Director's decision to assess damages is affirmed.

Appellant next argues that the "Jones sale," which BIA selected as the most comparable sale and on which it based the calculation of damages, was not comparable. Appellant contends that

> [i]n the 1987 timber appraisal for purposes of setting the stumpage values for [appellant's] contract, the BIA estimated that 53 percent of the Sitka spruce and 23 percent of the western hemlock was of export quality. * * * The remaining timber was of domestic quality. * * * As shown by the appraisal and other calculations in the record, export quality timber commands a much higher price than domestic quality timber. By contrast, the Final Invoice on the Jones sale * * * shows that * * * 96 percent was * * * export grade and only 4 percent was domestic grade. Comparing these figures to the BIA's estimate * * *, it is clear that the Jones sale timber was of higher quality.

(Opening Brief at 33).

The Area Director replies:

> The problem with [appellant's] analysis is that it mischaracterizes the quality of the allotment timber. [Appellant] relies on the BIA's 1987 appraisal in support of the proposition that only 53% of the spruce and 23% of the hemlock on the allotments was export grade. * * * The real proof as to whether or not the allotment timber was export grade is not what the BIA estimated three years earlier, when the market was much weaker, but rather, whether the allotment timber was in fact sold into the export market after it was cut. In point of fact, buyers were found for all the sawlogs harvested from the allotments--by both [appellant] and [Klukwan]--in the seasons bracketing the year of the Jones sale. Therefore, using [appellant's] analysis would, if anything, justify valuing the allotment timber at a slight

WWWVersion

> premium to the Jones sale price, since an additional four percent of it was export grade. [Emphasis in original.]

(Answer Brief at 31-2).

The Board agrees with the Area Director that the estimates of log quality made in 1987 are not relevant to the determination of the actual quality of the logs.

In its reply brief, appellant abandons its argument concerning the estimated quality of the timber, and instead raises entirely new arguments based on a February 27, 1995, affidavit from Kelly L. Niemi, who identifies himself as President and Founder of Niemi Forestry. In its reply brief, appellant contends that the quality of the timber involved in the "Jones sale" was superior to the timber it sold before its contract was cancelled and to the timber cut and sold by Klukwan. Again based on the Niemi affidavit, appellant argues for the first time that it actually owes no damages because the amount received by the allottees under the Klukwan sale was higher than what they would have received from a sale by appellant of the allegedly inferior allotment timber.

[3] The Board has consistently held that it is not required to consider issues and evidence raised for the first time in a reply brief. See, e.g., Strain v. Portland Area Director, 23 IBIA 114 (1992); Kombol, surpa. Cf. Winlock I, 20 IBIA at 18, in which the Board cited this rule, but departed from it, based on "the significance of the Constitutional issue raised," when appellant alleged that filing a reply brief would violate the Fifth Amendment right against "be[ing] compelled in any criminal case to be a witness against himself."

Appellant has presented no explanation for its failure to discover and present the arguments based on the Niemi affidavit at an appropriate point in this proceeding. The closest appellant comes to providing an explanation is a statement in paragraph 21 of Niemi's February 27, 1995, affidavit that, although Niemi had requested information from the principals in the "Jones sale" "some weeks ago," he had only received it "within the past week to ten days." Appellant's amended opening brief was dated December 22, 1994. The Area Director's answer brief was dated February 8, 1995. The fact that appellant requested information from the principals in the "Jones sale" "some weeks" before February 27, 1995, does not provide a sufficient basis for the Board to depart from its long-established rule declining to consider evidence and arguments presented for the first time in a reply brief.

Appellant's last argument is that the Area Director violated the contract by failing to apply appellant's advance payments toward the present damage award. Appellant contends that an advance payment of $6,925.09 to one of the allottees should have been applied against any damages under contract section B4.2. As quoted by appellant, that section provides:

> Advance payments are partial payments of the estimated value of timber to be cut on each allotment and are required

WWWVersion

> in all sales of allotment timber in which the cutting period exceeds two years. Advance payments may be paid to the allotment owner as soon as received, and are not refundable. Such payments shall be credited against the allotment timber as it is cut and scaled * * *.

The Area Director replies that appellant has not considered the entire section, which continues: "If the advance payments on any allotment exceed the total value of the timber cut on that allotment by the Purchaser, the amount of the advance payments shall be declared to be the value of the timber so cut."

The Board agrees with the Area Director's reading of the contract. Appellant's advance payments were considered in the damage calculation relating to the timber which appellant cut, and which was under review in Winlock II. The advance payments are not relevant to the calculation of damages for timber which appellant did not cut, i.e., the issue presently on appeal.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 31, 1994, decision of the Juneau Area Director is affirmed.

_____
Kathryn A. Lynn
Chief Administrative Judge

I concur:

_____
Anita Vogt
Administrative Judge

WWWVersion