



INTERIOR BOARD OF INDIAN APPEALS

HCB Industries, Inc. v. Muskogee Area Director, Bureau of Indian Affairs

18 IBIA 222 (03/28/1990)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

HCB INDUSTRIES, INC.

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-63-A

Decided March 28, 1990

Appeal from a decision declining to approve or disapprove certain oil and gas lease assignments.

Affirmed.

1. Indians: Leases and Permits: Assignments

An assignment of a lease of trust or restricted Indian lands is not effective until approved by the Secretary of the Interior or his delegate.

2. Indians: Leases and Permits: Assignments--Notice: Generally

The Bureau of Indian Affairs is not required to give notice of actions relating to the management of a lease of trust or restricted Indian lands to a person who is not a party to the lease.

3. Administrative Procedure: Standing--Indians: Leases and Permits: Assignments

A person who is not a party to a lease of trust or restricted Indian lands lacks standing to challenge actions taken by the Bureau of Indian Affairs in the management of the lease.

APPEARANCES: Donald L. Kahl, Esq., and Orval E. Jones, Esq., Tulsa, Oklahoma, for appellant; M. Sharon Blackwell, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Tulsa, Oklahoma, for appellee.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant HCB Industries, Inc., seeks review of a March 27, 1989, decision of the Muskogee Area Director, Bureau of Indian Affairs (BIA; appellee), declining to approve or disapprove certain oil and gas lease

assignments. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

The Bruce Pool Prue Sand Unitization Agreement, MC-IND-U-248, covering 1,130.36 acres, more or less, in secs. 2, 3, 4, 10, and 11, T. 17 N., R. 9 E., Indian Meridian, Creek County, Oklahoma, was approved by BIA on May 1, 1961, with Sinclair Oil Corporation as the unit operator. The agreement includes 340.19 acres from the following restricted Creek leases:

41614, Contract I27ind-2862, Pearlie Bosen, Creek NB 978;
 42728, Contract I27ind-46696, Minnie Chisholm Cholokee, Creek NB 443;
 42728, Contract 14-20-402-2719, Minnie Chisholm Cholokee, Creek NB 443;
 42728, Contract I27ind-4638, Minnie Chisholm Cholokee, Creek NB 443;
 42728, Contract I27ind-40808, Minnie Chisholm Cholokee, Creek NB 443;
 46273, Contract GO2C1420-6579, Sarah Lindsey Tiger, Creek NB 1191;
 66205, Contract 14-20-402-2659, Della Scott Yaholar, Creek NB 1245; and
 67186, Contract 14-20-402-5055, Pearlie Bosen, Creek NB 978. ^{1/}

Arrow Production Company (Arrow) acquired the unit in 1985. Arrow drilled the Chisholm No. 12-1 well into a different formation in the area covered by the unitization agreement in January 1986. The Chisholm No. 12-1 is thus a lease well, which is separate from the unit. In 1986, Arrow was sued for lack of diligent operation by certain of its working interest partners, with the result that the court appointed a receiver/operator for the unit. Order Appointing Receiver/Operator in Arrow Production Co. v. Pepin, No. CJ-86-2948 (Dist. Ct. Tulsa County, Okla., Aug. 20, 1986).

By memorandum dated April 7, 1988, appellee advised the Bureau of Land Management (BLM), the Departmental supervisor of the leases, that BIA had been attempting to cancel lease 42728 since April 1987 and requested BLM to review the status of the unit. Appellee stated that the Indian mineral owner had received only one royalty check in 1987. On May 24, 1988, BLM responded to appellee, reporting that in September 1969, Atlantic-Richfield, successor to Sinclair, declared the unit uneconomical and requested a final disposition of the unit. The unit was put up for bid and went through several small unit operators before being acquired by Arrow. BLM further stated that the unit was a marginal operation, and concluded that it had been developed to its potential as of May 24, 1988. BLM also indicated that production from the Chisholm No. 12-1 was less than 1 bbl per day.

On July 1, 1988, Arrow assigned the Indian leases in the unit, as well as the lease covering the Chisholm No. 12-1, to appellant. In August and November 1988, appellant discussed with officials of BLM and the Muskogee Area Office, BIA, the necessity of obtaining approvals of the assignments

^{1/} In 1961, the unitization agreement also included a ninth restricted Indian lease. Federal supervision over that lease was relinquished in February 1985.

of the Indian leases. The assignments were not submitted to appellee for approval until November 9, 1988. Appellee returned the assignments to appellant on March 27, 1989, stating that the leases were in the process of being canceled. ^{2/}

On September 22, 1988, BLM advised Arrow that its monthly reports showed that production in paying quantities had ceased for the unit and requested Arrow to file a declaration of dissolution of the unit. On November 10, 1988, BLM further advised Arrow that the Indian leases had expired because of "the sporadic nature of unit production since 1969 and the current total lack of production reports," and noted that although the leases had been assigned to appellant, appellant's activities were in violation of the unit agreement because the assignments had not been approved by BIA. On January 31, 1989, BLM notified Arrow that the unit had expired under its own terms on May 31, 1987, and requested that Arrow notify all interested parties of the expiration. Finally, on April 17, 1989, appellee further advised Arrow that the Indian leases, both those committed to the unit and the Chisholm No. 12-1, had expired by their own terms on May 31, 1987. Arrow did not appeal from any of these notifications.

Appellant filed a notice of appeal from BIA's March 27, 1989, letter, returning its lease assignments. The Board received appellant's notice of appeal on April 28, 1989. Both appellant and appellee filed briefs. In addition, on February 20, 1990, appellee filed a motion pursuant to 25 CFR 2.6 and 43 CFR 4.21(a), asking the Board to place his decision into immediate effect. Appellant objected to this motion.

Discussion and Conclusions

Appellant's primary argument in this appeal is that it was denied due process because it was not given notice of and an opportunity to respond to appellee's determination that the Indian leases had expired by their own terms for lack of production in paying quantities. Appellant contends that because appellee was on notice that the leases had been assigned to it, he should have given notice of his decision to appellant who was the person adversely affected by the decision.

The leasing of restricted lands of members of the Five Civilized Tribes for mining purposes is regulated by 25 CFR Part 213. The assignment of leases is governed by 25 CFR 213.38(a):

Leases or any interest therein, may be assigned or transferred only with the approval of the Secretary of the Interior, and to

^{2/} Appellee's use of the term "cancel" in this context appears to constitute harmless error under the circumstances of this case. The Board has previously held that a finding that an Indian lease has expired by its own terms does not constitute a cancellation of the lease. Idaho Mining Corp. v. Deputy Assistant Secretary -Indian Affairs (Operations), 11 IBIA 249, 261 (1983); rev'd on other grounds, Wilson v. United States Department of the Interior, No. CV-R-83-350-BRT (D. Nev., Aug. 7, 1985) ; vacated and remanded as moot, 799 F.2d 591 (9th Cir. 1986).

procure such approval the assignee must be qualified to hold such lease under existing rules and regulations, and shall furnish a satisfactory bond for the faithful performance of the covenants and conditions thereof. No lease or any interest therein, or the use of such lease, shall be assigned, sublet, or transferred, directly or indirectly, by working or drilling contract, or otherwise, without the consent of the Secretary of the Interior. Assignments of leases shall be filed with the Area Director within 20 days after the date of execution.

Appellant's due process argument assumes that even though its lease assignments were not approved as required by 25 CFR 213.38(a), it nevertheless acquired a property interest in the leases. Appellant contends that because the Secretary has authority to approve a conveyance of trust or restricted lands retroactively, with approval relating back to the date of the execution of the attempted conveyance, its "title" is not void, but merely imperfect until approved. Appellant cites Lykins v. McGrath, 184 U.S. 169 (1902), and Pickering v. Lomax, 145 U.S. 310 (1892), in support of this argument.

In Wishkeno v. Deputy Assistant Secretary - Indian Affairs (Operations), 11 IBIA 21 (1982), the Board addressed retroactive approval of conveyances of trust or restricted lands. Retroactive approval is predicated on the requirement that "the transaction [be] fair in all respects," although the conveyance document was not properly presented to BIA for approval. George Big Knife, 13 L.D. 511, 515 (1891). As the Supreme Court has held, however, "[t]he doctrine of relation [back in retroactive approval of conveyances of trust or restricted lands] is a legal fiction, resorted to for the purpose of accomplishing justice." Kendall v. Ewert, 259 U.S. 139, 148 (1922).

[1] The doctrine of retroactive approval of conveyances of trust or restricted lands has no effect in the present situation. The doctrine provides that, under appropriate conditions and for equitable reasons, a conveyance that initially had no force or effect for failure to be approved may be revived through the application of a legal fiction. This does not equate with a finding that the initial unapproved conveyance actually passed some form of legal title or property interest to the grantee. Such a holding would be antithetical to the very essence of the statutory and regulatory proscriptions against the conveyance of trust or restricted lands without Secretarial approval. The Board has previously held that an unapproved conveyance of trust or restricted lands is void ab initio, has no force or effect, and grants no rights to either the attempted grantor or grantee. Smith v. Acting Billings Area Director, 17 IBIA 231, 235 (1989). Although Smith dealt with an initial lease of trust or restricted lands, the Board finds that the same rule applies to assignments.

[2, 3] Because an assignment of a lease of trust or restricted lands is not effective until it has been approved, appellant acquired no interest in the leases and was not a party to them. Accordingly, appellant was not a person to whom BIA was required to give notice of actions affecting lease management and lacks standing to object to any such actions. Cf. San Juan County, Washington v. Portland Area Director, 18 IBIA 12 (1989) (a person

having no legal status in the litigation has no standing to continue the litigation beyond a settlement reached by the real parties-in-interest); ITT Rayonier, Inc. v. Deputy Assistant Secretary - Indian Affairs (Operations), 13 IBIA 90 (1985) (same for an intervenor who is not actually a party to the dispute); Estate of Ethel Edith Wood Ring Janis, 15 IBIA 216 (1987) (a person who is not a party in interest lacks standing).

The approval of conveyances of trust or restricted lands, including approval of lease assignments, is discretionary with BIA. See, Escalanti v. Acting Phoenix Area Director, 17 IBIA 290 (1989), and cases cited therein. In reviewing BIA discretionary decisions concerning whether a conveyance of trust or restricted lands should be approved, it is not the Board's function to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. See, e.g., Absentee Shawnee Tribe of Indians of Oklahoma v. Anadarko Area Director, 18 IBIA 156 (1990); Escalanti, supra.

Here, appellee declined either to approve or disapprove appellant's lease assignments on the grounds, in essence, that the underlying leases were not available for assignment. Furthermore, appellee had begun the formal process of determining that the leases had expired by their own terms 3 months before the assignments were executed, and Arrow had been advised of the expiration determination 1-1/2 months before the assignments were presented for approval. Appellee committed no legal error and did not abuse his discretion by declining to approve or disapprove the assignments of leases that both he and BLM had already determined had expired by their own terms for lack of production.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Muskogee Area Director's March 27, 1989, declination to approve or disapprove the lease assignments at issue here is affirmed. 3/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

3/ Because of this disposition, the Board denies as moot appellee's request to put his decision into immediate effect. Under the Board's regulations in 43 CFR 4.312 (54 FR 6486 (Feb. 10, 1989)), "rulings by the Board are final for the Department and shall be given immediate effect."