INTERIOR BOARD OF INDIAN APPEALS

Mobil Oil Corp. v. Albuquerque Area Director, Bureau of Indian Affairs

18 IBIA 315 (07/02/1990)

Judicial review of this case:

Set aside, *Mobil Oil Corp. v. Babbitt*, No. CIV 92-N-1039 (D. Colo. May 22, 1995)

Related Board cases:

17 IBIA 269

18 IBIA 86

United States Department of the Interior

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

MOBIL OIL CORP.
v.
ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-102-A Decided July 2, 1990

Appeal from a determination that two tribal oil and gas leases had expired by their own terms because of failure to produce oil and/or gas in paying quantities.

Affirmed.

1. Indians: Leases and Permits: Cancellation or Revocation--Indians: Leases and Permits: Generally-- Indians: Mineral Resources: Oil and Gas: Generally

   A Bureau of Indian Affairs determination that an Indian oil and gas lease has expired by its own terms is not a cancellation of the lease within the meaning of 25 CFR 211.27.

2. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Indians: Trust Responsibility

   The administration of Indian oil and gas leases under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), is a trust responsibility of the United States.

3. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally

   An oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases.

4. Constitutional Law: Due Process--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally

No prior notice to the lessee is required where an oil and gas lease issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1982), expires by operation of law. The lessee's right to due process is protected by the administrative appeals process at 25 CPR Part 2 and 43 CFR Part 4, Subpart D.

APPEARANCES: R. Dennis Ickes, Esq., Salt Lake City, Utah, for appellant; Barry K. Berkson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for appellee; Thomas H. Shipps, Esq., Durango, Colorado, for the Southern Ute Indian Tribe.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Mobil Oil Corporation seeks review of an August 11, 1989, decision of the Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), finding that Southern Ute Tribal Oil and Gas Leases Nos. MOO-C-1420-1660 (Lease No. 1660) and MOO-C-1420-1661 (Lease No. 1661) had expired by their own terms because of failure to produce in paying quantities. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

On August 22, 1974, the Southern Ute Indian Tribe (Tribe) and TransOcean Oil, Inc., entered into Lease No. 1660, covering 1,282 acres of tribal land, and Lease No. 1661, covering 1,245.56 acres of tribal land.

The lease term for both was “10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." The leases were approved by the Acting Superintendent, Southern Ute Agency, BIA, on September 10, 1974.

Both leases were placed into production during their primary terms. In September 1979, TransOcean entered into a gas purchase contract with Northwest Pipeline Corporation, under which Northwest was to purchase all the gas produced from the two leases. In 1981, the leases were assigned to appellant; appellant also succeeded to TransOcean's gas purchase contract with Northwest.

In August 1987, appellant entered into a farmout agreement covering both leases with Vince Allen and Associates. On August 11, 1988, Allen assigned its interest in the agreement to Meridian Oil Inc. (70%) and San Juan Basin Drilling Associates (30%). Meridian and San Juan completed two wells, the Ute 200 and Ute 201 wells, on the leases in November and December 1988. Another well, the Ute 1-2 well, had been recompleted by their predecessors-in-interest. The parties agree that all three wells received the necessary authorizations and approvals from the Tribe and the Department.

Beginning in 1984, the Federal Energy Regulatory Commission (FERC) issued a number of orders affecting the transportation of natural gas through pipelines. 1/ These orders, inter alia, encouraged pipeline companies to convert from purchaser/sellers of natural gas to open access transporters of gas. On June 10, 1988, Northwest accepted a permanent open access transportation certificate under FERC Order No. 500.

Northwest shut in Leases Nos. 1660 and 1661 on July 18, 1988. 2/ By letter dated September 30, 1988, Northwest notified the producers with which it had gas purchase contracts that it would terminate the contracts on November 1, 1988, pursuant to their "noneconomical purchases" provisions, unless the contracts were either revised to provide for "best effort" takes or assigned to Northwest's sister company, the Williams Gas Supply Company, an unregulated entity.

On May 3, 1989, the Tribe informed the Superintendent, Southern Ute Agency, that no commercial production from the leases had been reported from August 1, 1988, through March 31, 1989. After reviewing production reports, royalty payment reports, and tribal severance tax returns, and ascertaining that appellant had not requested approval for the shut-in; the Superintendent notified appellant by letter dated May 5, 1989, that the leases had expired. The Superintendent stated:

> It has come to the attention of this office that there has been no commercial production from the leases during the

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1/ See, e.g., Order No. 380, 49 FR 22778 (June 1, 1984); Order No. 436, 50 ER 42408 (Oct. 18, 1985); Order No. 451, 51 FR 22168 (June 18, 1986); and Order No. 500, 52 FR 30334 (Aug. 14, 1987).

2/ Affidavit of Ed Barber, Exhibit D to Appellant's Opening Brief, at 2. The same affidavit states at page 3 that Lease No. 1660 was not shut in until August.

> period of August 1988 through March 31, 1989, the last reported period.
>
> *   *   *   *   *   *
>
> The absence of production on the * * * leases requires this office to conclude that the leases have terminated and expired by their own terms. Accordingly, you are hereby notified that said leases have expired, and that operations conducted by you, your agents or employees on said premises should cease.
>
> Past the primary term, the production in paying quantities is judged on a monthly cycle, therefore, production is considered to have ceased prior to the August 1988 monthly cycle. These leases expired of their own terms, due to lack of production.

(Superintendent's May 5, 1989, letter at 1-2).

Appellant appealed this notification to the Area Director. On June 28, 1989, pursuant to a request from the Tribe, the Area Director ordered appellant to post an appeal bond in the amount of $1.5 million and imposed certain conditions under which appellant was to be permitted to manage the leases during the pendency of the appeal. Appellant appealed this order to the Board. Before the appeal to the Board was briefed, the Area Director decided the underlying appeal. Accordingly, the Board dismissed the appeal pending before it as moot. Mobil Oil Corp. v. Albuquerque Area Director, 17 IBIA 269 (1989).

On August 11, 1989, the Area Director affirmed the Superintendent's May 5 decision, stating in part:

> The statute pursuant to which the * * * leases were issued, 25 U.S.C. 396a, further states that the duration of such leases shall be "for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities." The * * * leases are

> in their extended terms. Past the primary term, the production in paying quantities is judged on a monthly cycle. The facts of this case clearly indicate that there was absolutely no commercial production from the * * * leases during the period of August 1, 1988, through March 31, 1989. The appellants do not dispute this fact of nonproduction. In this case the statutory requirements of 25 U.S.C. 396a control and only Congress can change the clear provisions of the statute. Therefore, production is considered to have ceased prior to the August 1988 monthly cycle.

(Area Director's Aug. 11, 1989, Letter at 1-2).

Appellant's appeal from this decision was received by the Board on September 8, 1989. Another appeal from the same decision was filed by Meridian and San Juan; it was docketed as No. IBIA 90-3-A. The appeals were consolidated on October 12, 1989.

On November 27, 1989, the Board approved an interim agreement and stipulation between all appellants and the Tribe. The agreement, which had been approved by the Superintendent, provided: (1) Meridian and San Juan would conduct oil and gas operations on lands embraced by the leases prior to final resolution of this dispute; (2) the Tribe would be paid royalties pursuant to the terms of the leases in dispute; (3) an additional payment, constituting a 4-percent overriding royalty interest before payout and a 12-1/2-percent overriding royalty interest thereafter, would be paid into an escrow account; (4) the escrowed funds would be disbursed to the Tribe if the decision at issue in this appeal is ultimately affirmed and to appellant if it is ultimately reversed; (5) in the event appellant prevails, operations may continue under the leases; and (6) in the event the Area Director's decision is affirmed, the Tribe, Meridian, and San Juan will execute a Minerals Agreement that has been negotiated and agreed to by the Tribe, Meridian and San Juan. The Superintendent indicated by letter dated November 13, 1989, that be intends to approve the Minerals Agreement if the Area Director's decision is affirmed.

On December 18, 1989, the Board received from Meridian and San Juan a motion for leave to withdraw from this appeal. The Board granted the motion and dismissed Docket No. IBIA 90-3-A on December 20, 1989. Meridian Oil Inc. & San Juan Basin Drilling Associates v. Area Director, 18 IBIA 86 (1989).

Appellant, the Area Director, and the Tribe filed briefs in Docket No. IBIA 89-102-A.

Discussion and Conclusions

Appellant's leases were issued under authority of the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396f (1982). 3/ 25 U.S.C. § 396a provides:

> On and after May 11, 1938, unallotted lands within any Indian reservation or lands owned by any tribe, group, or band of Indians under Federal jurisdiction * * * may, with the approval of the Secretary of the Interior, be leased for mining purposes, by authority of the tribal council or other authorized spokesmen for such Indians, for terms not to exceed ten years and as long thereafter as minerals are produced in paying quantities.

3/ All further references to the United States Code are to the 1982 edition.

Regulations implementing the IMLA are found at 25 CFR Part 211.

Appellant concedes that no oil and/or gas was produced from leases Nos. 1660 and 1661 for a period of at least 6 months, i.e., from c. July 18, 1988, through c. January 31, 1989, 4/ while the leases were in their extended terms. Even so, appellant contends, its leases did not expire. It advances a number of arguments in support of this contention: (1) the leases did not expire without a factual determination because 25 U.S.C. § 396a is not a self-executing statute; (2) appellant was denied due process; (3) the requirement that production during the extended term of the leases must occur during a 30-day cycle is an invalid unpublished rule: (4) the Area Director's decision was arbitrary and capricious, an abuse of discretion, and inconsistent with underlying statutes; (5) BIA is estopped to hold appellant's leases terminated because of its delay in informing appellant of the termination; (6) appellant has performed under the leases; and (7) appellant is excused from performance by force majeure.

Appellant characterizes its first argument as a threshold argument. The Board agrees. If, contrary to appellant's view, 25 U.S.C. § 396a is a "self-executing" statute, in the sense that a lease in its extended term expires automatically when it ceases to produce in paying quantities, then many of appellant's further arguments need not be reached.

4/ In his answer brief, the Area Director concedes that the original statement that the period of nonproduction extended through Mar. 31, 1989, was incorrect (Area Director's Brief at 18). The parties agree, however, that there was no production for at least 6 months.

Appellant argues that expiration of its leases was not automatic but required some action on the part of the Superintendent. Further, appellant contends, the Superintendent was required to follow the procedures for lease cancellation in 25 CFR 211.27, 5/ and his failure to do so was a denial of appellant's right to due process.

[1] Appellant's argument concerning the applicability of 25 CFR 211.27 is easily disposed of. The Board has previously held that a BIA determination that a lease has expired by its own terms does not constitute a cancellation of the lease. See Bekco Oil & Gas Corp. v. Acting Muskogee Area Director 18 IBIA 202, 204 (1990). Accord Solicitor's Opinion, "Oil and Gas Leases on Allotted Indian lands," 58 I.D. 12 (July 2, 1942). Accordingly, the Board holds that the Superintendent did not cancel appellant's leases and was not required to follow the cancellation procedures in 25 CFR 211.27.

The Area Director and the Tribe argue that appellant's leases expired automatically by the terms of the statute and the leases. The Tribe contends that, interpreted strictly, 25 U.S.C. § 396a requires automatic termination of a lease for any cessation of production during the extended term, no matter how temporary. The view that expiration is automatic and

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5/ 25 CFR 211.27(a) provides:

"When, in the opinion of the Secretary of the Interior, the lessee has violated any of the terms and conditions of a lease or of the applicable regulations, the Secretary of the Interior shall have the right at any time after 30 days' notice to the lessee specifying the terms and conditions violated, and after a hearing, if the lessee shall so request within 30 days after issuance of the notice, to declare such lease null and void, and the lessor shall then be entitled and authorized to take immediate possession of the land."

immediate is in accord with established Departmental interpretation. In the Solicitor's Opinion cited above, the Acting Solicitor stated:

> By what is known in the nomenclature of the oil industry as the "thereafter clause," contained in section 2 of these leases, each lease specifies with particularity the conditions upon which extension of the lease beyond the 10-year period depends. Unless the conditions specified are met, it is firmly established that the lease terminates, not by forfeiture, but by expiration of the period fixed by the contract of the parties. * * * Neither payment of rent nor excuses for nonperformance, can avoid that result. * * * No act or declaration of the lessee can revive the lease. * * * And no notice to the lessee of the expiration of the lease is required. * * * Under the "thereafter clause" as found in the usual oil and gas lease the lease terminates, after the primary term has expired, when production stops. In order to keep the lease alive it is not only necessary to take the oil from the ground but the oil must also be marketed in order to carry out the purposes for which the lease is made.

Solicitor's Opinion, 58 I.D. at 13, 14, 15.

A similar interpretation formerly governed oil and gas leases on public lands and was apparently the impetus for a 1954 amendment to section 17 of the Mineral Leasing Act of 1920, 30 U.S.C. § 226i, providing for, inter alia, notice and a period of at least 60 days in which a lessee may place a shut-in lease into a producing status in order to avoid termination of his lease. 6/ The House report on the amendment states:

> Under existing law, if a discovery is made on a lease by a well capable of producing oil or gas in paying quantities but is

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6/ As amended, 30 U.S.C. § 226(i) provides in part:

"No lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by

> shut off for various reasons, such as lack of transportation facilities, lack of market, etc., upon the shutting-off of such well, departmental decisions have held that if the lease is in its secondary term by virtue of the discovery well, it terminates when production ceases. The proposed amendment would continue the lease for 60 days or more after notice that he must place his well on a producing status.

H.R. Rep. No. 2238, 83d Cong., 2d Sess. (1954), reprinted in 1954 U.S. Code Cong. & Admin. News 2695, 2697.

No provision corresponding to this amendment appears in the IMLA. Appellant argues, however, that BIA should follow the same policy for Indian leases as Congress has legislated for public land leases, because "Congress saw that it was grossly unfair for producing leases to be terminated for justifiable temporary cessation of production. Congress did not indicate that what was considered unfair for public lands would be considered fair for Indian lands" (Appellant's Opening Brief at 50).

The Board considered and rejected a similar argument, made with respect to cancellation of rights-of-way, in Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 94 I.D. 353 (1987), aff'd, Star Lake Railroad Co. v. Lujan, 17 Indian L. Rep. 3052 (No. 88-2135 (D.D.C. Feb. 27, 1990)). In that case, the Board held that a statutory provision excusing nonuse of a right-of-way over public lands should not be read into the statutes governing rights-of-way over Indian lands because "[the] failure of Congress to

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fn. 6 (continued)
registered or certified mail, within which to place such well in producing status or unless, after such status is established, production is discontinued on the leased premises without permission granted by the Secretary under the provisions of this chapter."

include such a provision in the Indian right-of-way statutes, when it has included one in the public land statutes, is reasonably construed * * * as an indication of intent on the part of Congress to deal differently with these different types of land" and because "the general body of statutory law governing tribal lands reflects a policy quite different from the policy which guides the management of the public lands." 15 IBIA at 238, 94 I.D. at 362. 7/

For the same reasons, the Board rejects appellant's argument here. As discussed below, the Federal policy governing Indian mineral resources includes a Federal trust responsibility to manage those resources for the benefit of the Indian owners and a rule requiring interpretation of ambiguities in the relevant statutes and regulations in favor of those Indian owners. These characteristics clearly distinguish the Federal policy for Indian mineral resources from the policy concerning mineral resources on the public lands.

Appellant's leases are governed by the IMLA, the regulations promulgated thereunder, and the leases' own terms. There is no provision in the IMLA which excuses nonproduction after the primary term of a lease. We turn therefore to the regulations and to the language of appellant's leases.

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7/ In affirming the Board's decision, the district court noted:

"The IBIA thoroughly considered related statutes that do provide for discretion and that excuse conditions of easements and other grants of public lands. * * * Given the difference between those statutes and the statute and regulations at issue here--the former specifically provide for such exceptions, while the Indian Right of Way Act does not--the IBIA properly declined to read similar exceptions into plaintiff's grant of easement." (Footnotes omitted; emphasis in original). Star Lake Railroad Co. v. Lujan, 17 Indian L. Rep. at 3055.

Appellant argues that 25 CFR 211.19 and section 3(f) of its leases are force majeure provisions which excuse nonproduction in the circumstances of this case. 25 CFR 211.19 provides:

> The lessee shall exercise diligence in drilling and operating wells for oil and gas on the leased lands while such products can be secured in paying quantities; carry on all operations in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; plug securely all wells before abandoning the same and to shut off effectually all water from the oil or gas-bearing strata; not drill any well within 200 feet of any house or barn on the premises without the lessor's written consent approved by the superintendent; carry out at his expense all reasonable orders and requirements of the supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; bury all pipelines crossing tillable lands below plow depth unless other arrangements therefore are made with the superintendent; pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations: Provided, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

By paragraph 3(f) of its leases, appellant agreed to assume these obligations.

It is apparent that the proviso to 25 CFR 211.19 pertains to the obligations imposed upon the lessee in that section and would excuse, under certain circumstances, a lessee's failure to meet those obligations. There is no indication, however, that the proviso is intended to modify 25 CFR

211.10, "Term of leases," 8/ or the durational provisions of appellant's leases. 9/

To the contrary, another provision in Part 211 indicates that the regulations do not intend to alter the durational provisions of leases by excusing nonproduction in the circumstances present here. Section 211.14a permits the Secretary to authorize suspension of production in cases where "it is considered that marketing facilities are inadequate or economic conditions unsatisfactory," in certain specified circumstances, i.e., where the tribe consents, where the lease is in its primary term, and where the

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8/ 25 CFR 211.10 provides: "Mining leases may be made for a specified term not to exceed ten years from the date of approval by the Secretary of the Interior, or his authorized representative, and as much longer as the substances specified in the lease are produced in paying quantities."

9/ In some instances, the durational provisions of Indian leases have been explicitly modified to allow for nonproduction in circumstances such as those present here. The leases discussed in the Solicitor's Opinion noted above contained such a modification. Section 2 of those leases provided that they were

"for the term of ten years from and after the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil, gas, casing head gas or any one of them, is produced in paying quantities from said land by lessee * * * or as much longer thereafter as lessee is engaged in completing the drilling of a well commenced during the ten-year term * * *. Provided, should lessee be unable to market the production from said land he may, with the consent of the Secretary of the Interior, discontinue the operation of the producing wells thereon and this lease shall remain in force notwithstanding such cessation of operations * * * ."

The Solicitor explained the modification:

"Realizing the hardship of this rule [that, after the primary term, the lease terminates when production stops], on the lessee in many cases, the Department inserted in the lease under consideration a provision by which the lessee could avoid the application of this general rule. This was done by the proviso contained in section 2 of the lease that the lessee could, with the consent of the Secretary, discontinue the operation of producing wells should he be unable to market the production. Such cessation of operations would not cause a termination of the lease, if done with the consent of the Secretary."

Solicitor's Opinion, 58 I.D. at 13, 15. Appellant's leases do not contain such a proviso.

lease is for minerals other than oil and gas. 10/ The clear import of this section is that suspensions are not permitted in circumstances other than those described. None of the conditions required by this section are present here--the Tribe did not consent; the period of nonproduction did not occur during the primary term; the lease was not for minerals other than oil and gas; and the Secretary did not authorize a suspension of production.

By their terms, neither the regulations in Part 211 nor appellant's leases excused appellant's nonproduction.

In addition to the language of the statute, the regulations, and the leases, the Board takes into consideration the Federal policy concerning oil and gas leasing on Indian lands, as expressed in congressional enactments and interpreted by the Federal courts.

[2] Congress has explicitly acknowledged that the administration of Indian oil and gas is a trust obligation of the United States. See section 2 of the Federal Oil and Gas Royalty Management Act of 1982,

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10/ 25 CFR 211.14a provides in part:

"The Secretary of the Interior or his authorized representative, after obtaining the consent of the tribe, may authorize suspension of operating and producing requirements on mining leases for minerals other than oil and gas whenever during the primary term of the leases, it is considered that marketing facilities are inadequate or economic conditions unsatisfactory."

A proposed revision of the regulations concerning oil and gas leasing on Indian lands would allow for suspensions of production for "economic or marketing reasons" during the extended term of a lease, but would require "written consent of the Indian mineral owner and a written agreement executed by the parties setting forth the terms pertaining to the suspension of production." Proposed 25 CFR 225.54(b), 52 FR 39332, 39360 (Oct. 21, 1987).

30 U.S.C. § 1701. 11/ The Federal courts have held that the IMLA, specifically, imposes fiduciary responsibilities upon the Federal Government. E.g., Assiniboine & Sioux Tribes v. Montana Board of Oil & Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986). Further, "[a]s a fiduciary for the Indians, the Secretary is responsible for overseeing the economic interests of Indian lessors, and has a duty to maximize lease revenues"; and BIA "must take the Indians' best interests into account when making any decision involving leases on tribal lands." Kenai Oil & Gas, Inc. v. Department of the Interior, 671 F.2d 383, 386, 387 (10th Cir. 1982).

Both the statutes and the regulations concerning Indian mineral resources are subject to the rule that enactments intended to benefit Indians must be liberally construed in their favor. Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324, 1331-32 (10th Cir. 1982). Further, where the mineral leasing regulations may reasonably be interpreted in two ways, the trust responsibility requires that the Secretary choose the alternative which is in the best interests of the Indians. Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1566-69 (10th Cir. 1984), dissenting opinion adopted as majority opinion, 782 F.2d 855 (10th Cir.) (en banc), cert. denied, 479 U.S. 970 (1986).

11/ 30 U.S.C. § 1701 provides in part:

"(a) Congress finds that--

* * * * * * *

"(4) the Secretary should aggressively carry out his trust responsibility in the administration of Indian oil and gas.

* * * * * * *

"(b) It is the purpose of this chapter--

* * * * * * *

"(4) to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources."

Under the principles enunciated in these cases, if there were any ambiguity in the statute or regulations as to whether appellant's nonproduction could be excused, it would have to be resolved in favor of the best interests of the Tribe. In this case, it seems apparent that the best interests of the Tribe coincide with the manifest intent of the regulations not to excuse nonproduction in circumstances such as are present in this case. The Tribe clearly considers the termination of appellant's leases to be in its best interests. 12/ The Tribe's assessment is supported by the fact that it has now negotiated a minerals agreement which it expects to yield it greater revenue than it received from appellant's leases. 13/

[3] The case law concerning the administration of Indian mineral resources supports the conclusion that no provision of the IMLA, 25 CFR Part 211, or appellant's leases excused appellant's nonproduction. The Board holds, therefore, that appellant's nonproduction was not excused and that its leases have expired by operation of law.

[4] The Board briefly touches on some of appellant's remaining arguments. Appellant contends that its right to due process was violated because, inter alia, it was deprived of a substantial property right by the

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12/ E.g., Tribe's Statement of Reasons and Supplemental Argument in Support of Superintendent's Decision, Aug. 7, 1989, at 17-18.

13/ The Tribe states that it is presently a party to 17 minerals agreements under the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, and that many of its agreements permit the Tribe to participate as a working interest owner in addition to being a royalty recipient. It notes that "[i]n investigative proceedings before the United States Senate Select Committee on Indian Affairs, held only several months ago, the Southern Ute Indian Tribe was broadly acclaimed for its sophistication in oil and gas resource management." (Tribe's Response to Appellant's Motion for Reconsideration of Appeal Bond and Interim Orders, July 26, 1989, at 10.)

Superintendent's decision but was not given notice and an opportunity to be heard before the decision was issued. As discussed above, however, appellant's leases expired by operation of law, not by act of the Superintendent. The expiration had already occurred at the time the Superintendent wrote his May 5, 1989, letter to appellant. 14/

Unlike 30 U.S.C. § 226(i), the IMLA does not require that notice be given before leases may expire by their own terms. In this regard, the IMLA resembles an Indiana statute concerning the lapse of unused mineral interests which was addressed by the Supreme Court in Texaco, Inc. v. Short, 454 U.S. 516 (1982). Rejecting an argument that the absence of specific prior notice rendered ineffective the self-executing feature of the statute, the Court stated:

> [T]he State of Indiana has enacted a rule of law uniformly affecting all citizens that establishes the circumstances in which a property interest will lapse through the inaction of its owner. None of the cases cited by appellants suggests that an individual must be given advance notice before such a rule of law may operate.

454 U.S. at 537.

The Superintendent's letter informed appellant of its right to appeal to the Area Director under 25 CFR Part 2. Appellant has participated fully in all proceedings before the Area Director and this Board. The Board finds

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14/ Accordingly, the Superintendent's letter is perhaps more properly characterized as a notice of expiration than as a decision. Such notifications are fully appealable under 25 CFR Part 2. Bekco Oil & Gas Corp., supra.

that, in the circumstances of this case, appellant's due process rights have been adequately protected by the administrative review procedures in 25 CFR Part 2 and 43 CFR Part 4 Subpart D. See Martineau v. Billings Area Director, 16 IBIA 104 (1988).

Appellant also argues that the Superintendent relied on a rule of his own devising when he stated that "production in paying quantities is judged on a monthly cycle." Such a rule, appellant contends, is invalid because not published in accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 553. The Superintendent's letter, however, is clearly not a rule within the meaning of the APA. 15/ In any event, inasmuch as neither the IMLA nor 25 CFR Part 211 allow any grace period following cessation of production, appellant's leases technically expired immediately upon cessation of production. The Superintendent's allowance of a "monthly cycle" in which to judge production was therefore to the advantage of appellant, rather than to its detriment. For this reason, and for the even more obvious reason that appellant's leases were in a state of nonproduction for 6 months, it is clear that the Superintendent's reference to a "monthly cycle" did no harm to appellant. Even if error, therefore, it was harmless error.

Appellant's remaining arguments have been considered and rejected, in light of the conclusions reached above.

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15/ 5 U.S.C. § 551(4) defines "rule" as

"the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describe the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Albuquerque Area Director's August 11, 1989, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge