INTERIOR BOARD OF INDIAN APPEALS

Tesoro Petroleum Corp.; Noel W. Reynolds, Sr.;
and Noel W. Reynolds, Sr., d.b.a. La Quinta Oil Co.
v. Acting Albuquerque Area Director, Bureau of Indian Affairs

32 IBIA 296 (08/26/1998)

United States Department of the Interior

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

TESORO PETROLEUM CORP.
and
NOEL W. REYNOLDS, SR.; NOEL W. REYNOLDS, SR., d.b.a. LA QUINTA OIL CO.
v.
ACTING ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-52-A, 97-101-A, 97-103-A Decided August 26, 1998

Appeals from decisions relating to an oil and gas lease on Indian lands.

Vacated and remanded.

1. Administrative Procedure: Administrative Record--Bureau of Indian Affairs: Administrative Appeals: Generally

When the administrative record in an appeal from a Bureau of Indian Affairs Area Director's decision is inadequate to support the decision, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

APPEARANCES: John M. Battiato, Esq., San Antonio, Texas, for Tesoro Petroleum Corp.; Tommy Roberts, Esq., Farmington, New Mexico, for Noel W. Reynolds, Sr.; Janet L. Spaulding, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Albuquerque Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

These are consolidated appeals from two decisions issued by the Acting Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), in regard to Jicarilla Apache Oil and Gas Lease No. 420 (lease). Tesoro Petroleum Corporation (Tesoro) seeks review of decisions dated October 11, 1996 (Docket No. IBIA 97-52-A), and January 24, 1997 (Docket No. IBIA 97-101-A). Noel W. Reynolds, Sr.; Noel W. Reynolds, Sr., d.b.a. La Quinta Oil Company (Reynolds; La Quinta) seeks review of the same January 24, 1997, decision (Docket No. IBIA 97-103-A). For the reasons discussed below, the Board of Indian Appeals (Board) vacates the Area Director's decisions and remands this matter to the Area Director for further consideration in accordance with this opinion.

Background

The following recitation of the factual background of this matter is based on the documents in the administrative record furnished to the Board by the Area Director (record). 1/

The Jicarilla Apache Tribe (Tribe) and Tenneco Oil Company (Tenneco) entered into the lease on June 5, 1970, under the provisions of the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396f (1994). The lease, which covers approximately 2,081 acres of tribal trust land, was for a term of 10 years "and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." Lease para. 1. It was approved by the Superintendent, Jicarilla Agency, BIA (Superintendent), on June 19, 1970.

According to a March 28, 1995, memorandum from the Bureau of Land Management (BLM) to the Superintendent, the #1 Parlay well was drilled in 1971 and produced oil and gas from the Menefee formation. 2/ Also according to that memorandum, the #2 Parlay well was drilled in 1972 and produced oil and gas from the Mesaverde formation.

A BLM Designation of Operator form, dated only July 1971, shows that Tenneco designated Tesoro as the operator for a portion of the lease. Another Designation of Operator form, dated December 27, 1971, designates Tesoro as the operator for an additional portion of the lease.

On January 26, 1972, Tenneco assigned 50 percent of a portion of the operating rights under the lease to Tesoro, and 50 percent of the same portion to North American Exploration Company (NAEC). The Superintendent approved this assignment, except as to overriding royalties, on February 3, 1975.

On May 26, 1977, Tenneco assigned the lease equally to Tesoro and NEAC. The Superintendent approved this assignment on December 30, 1977.

On October 6, 1977, NAEC assigned an undivided one-fourth interest in the lease to Tesoro. This assignment was not on a BIA form. The lease assignment stated that it was "subject to the approval of the Secretary of the Interior or his authorized representative, and shall be effective from date of such approval." The copy of this assignment in the record does not show when it was received by BIA, or that it was approved by BIA. 3/

1/ Under 43 C.F.R. § 4.335(b)(3), the record must include "all information and documents utilized by the deciding official in rendering the decision appealed."

2/ Departmental responsibilities for overseeing Indian oil and gas leases are shared by BIA, BLM, and the Minerals Management Service (MMS), under a Tripartite Memorandum of Understanding (Tripartite MOU).

3/ At page 4 of its Opening Brief, Tesoro states that BIA approved this assignment on July 23, 1991, 2 years after BIA now states that the lease expired by its own terms.

The next document in the record is a BIA lease assignment form signed by NAEC. Although the form is dated October 10, 1977, a parenthetical notation under the date states: "Effective as of 10 October 1977, and executed on 20 June 1985." This assignment form shows that NAEC assigned "50% of its 50%" of the lease to Tesoro. Again, there is no indication as to when BIA received this form, or that BIA approved it. Nothing on the form indicates why it was executed in 1985, retroactive to 1977.

On July 9, 1979, and August 24, 1979, NAEC and Tesoro, respectively, executed BLM Designation of Operator forms designating Damson Oil Corporation (Damson) as the lease operator.

On August 21, 1985, NAEC assigned its remaining interest under the lease to Petro Operators, Inc. (Petro). BIA approved this assignment, except as to overriding royalty interests, on May 30, 1991.

Damson executed a BLM Designation of Operator form on August 13, 1986, designating La Quinta as operator. As noted in the introductory paragraph to this decision, Reynolds is doing business as La Quinta.

On July 25, 1988, Petro assigned all of its interest under the lease to Reynolds on a standard BIA form. The copy of this assignment in the record does not show a date of receipt, or approval, by BIA.

On October 21, 1988, Petro executed a document entitled "Assignment and Conveyance of Interests in Oil and Gas Leases and Bill of Sale." This document also conveyed all of Petro's interest in the lease to Reynolds. The copy of this assignment in the record does not show a date of receipt, or approval, by BIA.

It appears that sometime in 1994 or early 1995, BIA, BLM, and MMS began reviewing various Tribal oil and gas leases, including the lease at issue here. On March 28, 1995, BLM informed the Superintendent that there had been no production from the #1 Parlay well for March through August 1989; February through May 1990; January, July, November, and December 1991; January, February, and June through September 1992; or May through August 1994. BLM also stated that there had been no production from the #2 Parlay well for January through September, November, and December 1989; January, March through May, November, and December 1990; January through June 1991; January, February, and April through December 1992; January through March, and May through December 1993; or January, March, and June through August 1994. In regard to each well's lack of production, BLM stated that there was "no documentation in files that SI was approved." The Board assumes that "SI" stands for "shut in."

The record contains a computer printout, dated October 3, 1995, entitled "Production Accounting and Auditing System 3160/OSUM Header Data Inquiry." Although the source of this printout is not indicated, the Board assumes that it was generated by BLM because BLM is responsible under the Tripartite MOU for monitoring oil and gas production and because BLM regulations on onshore oil and gas operations are found in 43 C.F.R. Part 3160. This document shows "Noel Reynolds Company" as the operator.

In a November 7, 1995, memorandum to BLM, with a copy to the BIA Agency, MMS reported:

> We are in the process of auditing royalty calculations for the subject lease for the period August 1983 through February 1995. Included in our review is a comparison of production volumes used in the royalty calculations to production volumes reported to [BLM]. Our review disclosed that for the months of August, October and November 1985, all wells on the subject leases were shut in and no production occurred. In accordance with Section 3103.4 of 43 CFR, applications for the suspension of production are to be filed with BLM. Our review disclosed that no such application was submitted by the operator (Noel Reynolds). Our review indicates that the value of all products sold after production resumed totaled $118,373.56 for August 1985 through February 1995.
>
> We are providing you with this information so that appropriate action can be taken. Please advise us as to whether Noel Reynolds has violated the lease terms or the operating regulations.

On December 7, 1995, the President of Petro wrote to the BIA Agency Realty Officer, stating:

> [Y]ou requested that I send you a copy of the assignment of this lease to N.W. Reynolds, Sr. I have enclosed copies of this assignment and a copy of a mining lease form that was filed by N.W. Reynolds.
>
> I discussed this assignment with Mr. Reynolds and he stated that he had recorded the assignment and Conveyance of Interest of Oil and Gas and Bill of Sale dated October 21, 1988. He further stated that he had filed the Assignment of Mining Lease with the Department of the Interior, Bureau of Indian Affairs.
>
> Mr. Reynolds also stated that he has continued to produce the wells on this lease and was discussing with you the possibility of releasing part of the 2081 acres covered by the Oil and Gas Mining Lease #420.

Nothing in the record shows whether BIA requested this information orally or in writing, and nothing shows a specific BIA response. As discussed above, the record copy of the October 21, 1988, assignment from Petro to Reynolds does not show BIA approval.

In a May 3, 1996, memorandum to the Agency Realty Officer, the Tribal Revenue and Taxation division set out alleged delinquent amounts owed to the Tribe for this lease. The memorandum shows severance taxes owed from September 1994 through January 1996 in the amount of $929.45, with interest of $89.99; privilege taxes from September 1994 through January 1996 in the

amount of $3,090.09, with interest of $296.41; possessory taxes for 1995 and 1996 in the amount of $942.22; and lease rentals for 1985, 1986, 1987, and 1995 in the amount of $10,405.00. The total amount shown as delinquent was $15,366.76, with interest of $386.40, for a grand total of $15,753.16.

By letter dated May 16, 1996, MMS notified Petro of lease rentals owed on the lease. The letter stated that MMS had "reconciled the lease rentals paid by Noel Reynolds with information supplied by the [Tribe]," and alleged that rentals were still due for 1994 and 1995 in the total amount of $5,202.50, with interest of $714.63 through May 31, 1996. The letter continued: "Even though this lease has expired, the balance of the lease rentals are still due." Nothing in the record prior to this letter contained a finding that the lease had expired. MMS' letter shows that a copy was sent to Reynolds. No response from Petro is included in the record.

By memorandum of May 22, 1996, MMS wrote BLM:

> We understand that the lease has terminated and that [BIA] has notified [Petro] of this situation and that the company was given a 30 day period to appeal the decision. [4/] In addition, the BIA informed the company that an examination of royalty obligations will be made before the bond covering this property is released. By this memo we would like to inform you of the outstanding royalty and rental amounts that we have calculated so they may be used in resolving this case. The following amounts have been calculated:

	Principal	Interest	Total	
Rental	$ 5,505.50	$ 714.63$	5,917.13	(Attachment 1)
Royalty	$118,373.56	$13,234.46	$131,608.02	(Attachment 2)
Total	$123.576.06	$13,949.09	$137.525.15	

There were no documents attached to the copy of this memorandum in the record. However, based on the figures presented, the Board assumes that Attachment 1 was MMS' May 16, 1996, memorandum to BLM (although that memorandum shows the total rental owed as $5,202.50, rather than the $5,505.50 shown in the May 22, 1996, memorandum); and that Attachment 2 is the November 7, 1995, memorandum from MMS to BLM (although that memorandum shows $118,373.56 as "the value of all products sold" apparently after August 1985, rather than the amount of royalty owed as stated in the May 22, 1996, memorandum). On June 6, 1996, BLM notified MMS that, because this was an Indian lease, BIA was responsible for issuing any expiration notification and for hearing any subsequent appeal.

On June 24, 1996, MMS provided the same information to BIA as it had provided to BLM on May 22, 1996. Although MMS' memorandum refers to attached correspondence from BLM, there are no attachments to the record copy of this memorandum. Nothing in the record indicates whether MMS provided

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4/ No such notification letter from BIA to Petro appears in the record.

BIA with any supporting documentation setting forth the basis for its calculations.

The Superintendent subsequently began the process of attempting to collect the amount allegedly due and owing. The Superintendent's actions resulted in several appeals to the Area Director from different parties.

The first appeal was generated by a June 28, 1996, letter from the Superintendent to Parker & Parsley Petroleum (P&P). In this letter, the Superintendent stated that BIA records showed that P&P owned a 50 percent interest in the lease, demanded payment of royalties and taxes in the amount of $137,525.15, and stated that failure to pay the amount demanded within 30 days would result in a claim against P&P's bond. P&P appealed to the Area Director on August 30, 1996. In a September 18, 1996, Statement of Reasons, P&P stated that it had never acquired "a Record Title interest (or any other interest) in" the lease. By letter dated October 11, 1996, the Area Director acknowledged that P&P held no interest in the lease, and rescinded the Superintendent's demand letter. 5/

A group of appeals resulted from two letters from the Superintendent to Tesoro. In an August 6, 1996, letter, the Superintendent stated that the lease had expired, that Tesoro and its agents should cease operations, and that Tesoro might also be liable for plugging and abandoning the wells. The letter did not notify Tesoro of the amount determined to be due and owing.

Tesoro appealed to the Area Director on September 6, 1996, and filed a Statement of Reasons on September 27, 1996. Tesoro contended that it was not liable for any amount because it "had no interest in [the lease] during the periods of time complained of and had divested itself of all right, title and interest in [the lease] on June 21, 1985, by Assignment of Mining Lease dated June 21, 1985, attached as Exhibit 'A'." The attachment was a BIA Assignment of Mining Lease form in which Tesoro assigned all of its interest under the lease to Damson. The assignment was signed by Tesoro on June 21, 1985, retroactive to December 31, 1978.

The Superintendent again wrote to Tesoro on October 9, 1996. The Superintendent stated that Tesoro had not timely appealed the notice of expiration; that BIA records showed that Tesoro owned 50 percent of the record title in the lease; that the royalty currently due to the Tribe was $137,525.15; and that Tesoro had 30 days in which to make payment. The letter also indicated that the Tribe was reviewing the economic production capabilities of the wells, and a further determination would be made as to whether Tesoro would be required to plug and abandon the wells.

Without mentioning the Superintendent's October 9, 1996, letter to Tesoro, the Area Director responded to Tesoro's first appeal on October 11,

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5/ The Area Director's decision stated that the Superintendent had notified P&P on Mar. 14, 1996, that the lease had expired for failure to produce. No copy of this letter appears in the record.

1996. He affirmed the Superintendent's August 6, 1996, decision that the lease had expired. He also held that the assignment to Damson was not effective because the copy of the assignment which Tesoro provided did not show that it had been approved by BIA.

On October 17, 1996, Tesoro filed a second appeal with the Area Director, seeking review of the Superintendent's October 9, 1996, letter. Tesoro contended, inter alia, that it had timely appealed the August 6, 1996, notice of expiration to the Area Director.

Apparently there were subsequent telephone conversations between Tesoro and the Area Office. On October 21, 1996, Tesoro wrote the Area Office in response to one such conversation and provided it with a copy of an Assignment of Mining Lease dated March 27, 1979, under which Tesoro had assigned all of its interest in the lease to Damson and other persons. The copy was stamped received by BIA on May 25, 1979. Tesoro stated that the copy was found in the Agency's Records of Contract file on October 13, 1996. The Assignment form did not show BIA approval. 6/

On January 24, 1997, the Area Director held that Tesoro had filed a timely appeal from the Superintendent's August 6, 1996, decision, and affirmed the Superintendent's October 9, 1996, decision finding Tesoro liable for $137,525.15 in back royalties and taxes.

Tesoro timely appealed both the October 11, 1996, and January 24, 1997, decisions to the Board. Its appeal from the October 11, 1996, decision was assigned Docket No. IBIA 97-52-A, and its appeal from the January 24, 1997, decision was assigned Docket No. IBIA 97-101-A.

The third proceeding began on August 7, 1996, when Reynolds appealed to the Area Director from the Superintendent's June 28, 1996, letter to P&P. Reynolds stated that it owned the leasehold operating rights and working interest in the two wells located on the lease. In a September 4, 1996, Statement of Reasons, Reynolds argued that he was unable to respond to the June 28, 1996, letter because the letter did not include any documentation or information concerning when the lease was deemed to have expired. Reynolds therefore requested a copy of the record supporting the Superintendent's decision.

The Area Director responded to Reynolds on October 11, 1996. He stated that La Quinta was one of the entities sent a copy of the Superintendent's March 14, 1996, letter notifying P&P that the lease had expired, and that La Quinta had not appealed that notification. 7/ Despite this, he listed the months during which it was alleged that there had been no production,

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6/ This assignment appears to conflict with the assignment dated June 21, 1985, retroactive to Dec. 31, 1978, in which Tesoro assigned all of its interest to Damson alone.

7/ As stated in footnote 5, no copy of this Mar. 14, 1996, letter appears in the record.

stated that the lease expired as of March 31, 1989, and indicated that copies of the record would be forwarded. The Area Director stated at page 2 of his letter:

> By letter dated June 28, 1996, [La Quinta] was notified of outstanding royalties due the Tribe in the amount of $137,525.15. [8/] We are forwarding copies of all documentation used by this office to determine that [La Quinta] owes back royalties. The lease expired effective March 1989 and therefore all production from that date forward is considered to belong to the Jicarilla Tribe.

Reynolds did not appeal from the Area Director's October 11, 1996, letter to it, but did appeal from the Area Director's January 24, 1997, letter to Tesoro. Reynolds' appeal was assigned Docket No. IBIA 97-103-A. In its March 3, 1997, predocketing notice for Reynolds' appeal, the Board noted that there might be a question about whether Reynolds had standing to appeal, took that question under advisement, and informed Reynolds that he would be considered an amicus curiae under 43 C.F.R. § 4.313 if it was determined that he lacked standing to appeal.

The Board consolidated the three appeals. Tesoro, Reynolds, and the Area Director have filed briefs on appeal.

Participation of Reynolds

Citing Uinta Oil & Gas, Inc. v. Phoenix Area Director, 27 IBIA 3 (1994), and HCB Industries, Inc. v. Muskogee Area Director, 18 IBIA 222 (1990), the Area Director challenges Reynolds' standing to appeal on the grounds that he is an unapproved assignee of the lease. The Board agrees that nothing in the record shows that BIA approved Petro's assignment of its interest in the lease to Reynolds. 9/

However, it appears that Reynolds, through La Quinta, is also the designated operator of the wells on the lease. In Gavilan Petroleum, Inc. v. Acting Phoenix Area Director, 32 IBIA 191 (1998), BIA also argued that the appellant lacked standing because it did not have an approved lease assignment. In Gavilan, the appellant was the unit operator. The Board concluded that a unit operator was a proper appellant when the unit operating agreement authorized the unit operator to appear in any Departmental proceeding concerning the unit "for or on behalf of any and all interests affected" by the Departmental decision. See 32 IBIA at 214. Thus, the Board has held that persons other than assignees may have standing to appeal from BIA decisions regarding a lease.

8/ Only one copy of the June 28, 1996, letter is included in the record. That copy is addressed to P&P and does not show service on any other person or entity.

9/ Nothing in the record shows that Reynolds was an assignee of anyone other than Petro.

The Board has not previously considered the question of whether the operator of the wells on an Indian lease has standing to appeal from BIA decisions concerning the lease. During its consideration of these appeals, the Board briefly reviewed Departmental regulations and other guidance concerning the designation of operators for Indian oil and gas wells. Under 43 C.F.R. § 3162.3(a), "[w]henever a change in operator occurs, the [BLM] authorized officer shall be notified promptly in writing, and the new operator shall furnish evidence of sufficient bond coverage in accordance with § 3106.6 and subpart 3104 of this title." Under Attachment A, section 4.M, of the Tripartite MOU, BLM has final authority for addressing a change of operator and "will provide to BIA any type of notice reflecting operator changes." The Board found nothing which explicitly states that BLM must approve a change of operator; rather, it appears that BLM must merely be notified of such a change. 10/ Therefore, it appears possible that a change of operator is effective immediately upon the filing of a designation of operator form and without any Departmental approval. The question is whether Reynolds would have a sufficient interest as an operator to have standing to appeal from decisions concerning the lease.

The Area Director does not discuss Reynolds' standing in this context.

Under the circumstances of this case, the Board finds it is not necessary for it to decide whether Reynolds has standing to bring an appeal in his own right. Tesoro is a proper appellant and has brought a proper appeal from the January 24, 1997, decision. Therefore, the Board has jurisdiction to review that decision regardless of whether Reynolds has standing to maintain an appeal independently. Reynolds is at least an interested party in the appeal filed by Tesoro. See 25 C.F.R. § 2.2. Accordingly, the Board considers Reynolds' filings to be those of an interested party, rather than an amicus curiae.

Discussion and Conclusions

Because of the procedural posture of this matter before the Area Director, there is a great deal of overlap between the October 11, 1996, and January 24, 1997, decisions. For purposes of this decision, the Board finds that the Area Director made three substantive holdings in either or both of the two challenged decisions: (1) the lease expired by its own terms on March 31, 1989, for failure to produce in paying quantities during its extended period; (2) the amount owed in back royalties and taxes was $137,525.15; and (3) Tesoro, as the last lessee of record, was liable for the full amount found due and owing.

There is little actual dispute over the question of whether the lease expired on March 31, 1989. Reynolds focused his arguments on the amount owed, rather than on whether or not the lease expired.

10/ Presumably, BLM would have authority to disapprove a change of operator under, at a minimum, the circumstance that the new operator did not furnish evidence of sufficient bond coverage, as required under 43 C.F.R. § 3162.3(a).

Tesoro states that its involvement with this lease ended in 1979. BIA has not disputed this statement. Because it has had no involvement with the lease since 1979, Tesoro further states that it has no information on which to base an argument concerning whether or not the lease expired, although it notes that Reynolds operated the lease after March 31, 1989, and that BIA and the Tribe have acted as if Reynolds were a proper operator and/or lessee.

An appellant bears the burden of proving the error in the decision from which an appeal is taken. See, e.g., Price v. Acting Muskogee Area Director, 32 IBIA 290 (1998); Oneok Resources Co. v. Acting Muskogee Area Director, 30 IBIA 155 (1997), and cases cited therein. Ordinarily, the Board would hold that neither Tesoro nor Reynolds had carried the burden of proving that the Area Director erred in finding that the lease expired.

However, in footnote 6 of its Opening Brief, Tesoro states that the primary term of this lease was extended by court order. Citing Jicarilla Apache Tribe v. Andrus, 546 F. Supp. 569 (D.N.M. 1980), aff'd, 687 F.2d 1324 (10th Cir. 1982), and Jicarilla Apache Tribe v. Hodel, 821 F.2d 537 (10th Cir. 1987), Tesoro states that it

> now has no knowledge concerning how long the original term was extended, or whether any additional bonus on the Lease might have been owed or paid. Presumably, the BIA and the Tribe dealt with Tesoro's assignees regarding those matters. Once again, the record in this case contains nothing regarding that issue. Based upon the dates of the various options [for when the lease expired], it appears quite likely that the original lease term could have been extended beyond 1985.

The Board has reviewed the three cases which Tesoro cited. The Tribe initiated that litigation in 1976. Although the court decisions do not identify the leases involved in the litigation, the district court's decision states Tesoro was a party to the litigation at the time of trial. Therefore, Tesoro is likely to have knowledge of whether this lease was involved in the litigation. The district court tolled the primary term of each of the leases involved in the litigation from "the date upon which the particular lessee was served with process in this case * * * [until] the date of judgment entered herein." 546 F. Supp. at 585. The court of appeals held: "While we agree with the principle of tolling the primary terms of the leases, we vacate the trial court's ruling on this issue and remand for a determination whether the tolling period should be extended to include the pendency of this appeal and any certiorari proceedings." 687 F.2d at 1343. Because the cited decisions do not indicate what happened in further proceedings, it is impossible to determine from them when the primary terms of the affected leases actually ended.

In its November 7, 1995, memorandum to BLM, MMS stated that there had been no production on this lease during August, October, and November 1985. The fact that BIA held that the lease expired in 1989 rather than in 1985 may indicate that the lease was not in its extended term in 1985, but was

in 1989. However, as Tesoro notes, nothing in the record mentions the Federal court litigation. The Board will not make assumptions about the litigation and its possible effects on this lease.

Therefore, the Board vacates that part of the Area Director's decisions which held that the lease expired by its own terms on March 31, 1989, for failure to produce in paying quantities during its extended period. On remand, the Area Director shall state whether this lease was affected by the litigation cited above and, if so, when its primary term ended under the tolling ordered by the Federal courts. If the Area Director finds that the lease was in its extended term at the relevant time periods in 1989, he may reissue his decision. If the Area Director finds that the lease was not in its extended term during the relevant time periods in 1989, he shall issue a new decision stating when the lease expired.

The only issues actively in dispute in the present appeals are what amounts, if any, are due and owing; and who is liable for payment of any such amounts.

At pages 4-5 of his Answer Brief, the Area Director confesses error as to two aspects of the calculation of the amount owed:

> BIA agrees that royalties were paid during this period [apparently August 1985 through February 1995] and that these credits are not reflected in the $137,525.15 assessment by the BIA. BIA also agrees that the computation of the $137,525.15 includes periods prior to expiration of the lease. Accordingly the administrative record furnished to the Board is insufficient to allow the Board to determine the proper amount of damages. Therefore BIA requests that the Board remand the BIA's decision of January 24, 1997 to the Area Director * * * for a new decision in light of the inadequacies in the record.

[1] The Board has previously vacated and remanded cases when the administrative record did not support the decision. See, e.g., ZCA Gas Gathering, Inc. v. Acting Muskogee Area Director, 23 IBIA 228 (1993); McPhail v. Acting Muskogee Area Director, 18 IBIA 353 (1990); GMG Oil and Gas Corp. v. Muskogee Area Director, 18 IBIA 187 (1990). Although both Tesoro and Reynolds oppose the Area Director's motion, the Board grants the motion, but not as limited by the Area Director.

The Board finds that the Area Director's confession of error fails to address all of the problems evident from even a cursory review of the calculation of the amount owed. Most significantly, the Board has been unable to determine the methodology which BIA used for the calculation. Some aspects of the calculation appear intended to determine, with respect to the period after lease expiration, the amounts that would have been due under the lease if the lease had not expired (e.g., royalty payments, taxes, 11/ and advance

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11/ The Area Director's Jan. 24, 1997, decision states in one place that the sum of $137,525.15 included "back royalties and taxes" and in another

rentals). These aspects suggest that BIA was calculating the amount owed as if the lease had not expired. However, other statements in the record suggest that the calculation was more in the nature of a trespass damage calculation.

Because the Board cannot determine the methodology used for the calculation, it cannot determine whether the constituent elements of the calculation were properly addressed and cannot either affirm or reverse the calculation.

On remand, the Area Director shall start over on the calculation of the amounts, if any, owed. Initially, the Area Director shall set forth, in clear and concise terms, the methodology he is using to determine the amount owed. He shall include in the record a statement from MMS, with supporting documentation, setting forth the amounts of royalties and rentals paid, and any amounts determined to still be owed.

In calculating the amount, if any, owed, the Area Director shall consider each of the objections to the prior calculation raised by Tesoro and Reynolds in this appeal. The decision on remand shall show the Area Director's conclusion as to each of those objections.

The Area Director did not confess error as to, or request remand of, his determination of who was responsible for paying any amounts found due and owing. However, the Board finds that the record does not support the decisions on that issue. Therefore, it also vacates and remands those parts of the Area Director's decisions which held Tesoro liable for the amounts found due and owing.

On remand, the Area Director shall justify his decision as to the person or persons he finds liable for any amounts found due and owing. In making this determination, the Area Director shall discuss the impact of the several unapproved assignments in the record and of Tesoro's argument that any claim against it is barred by the doctrine of laches. If the Area Director finds that, under the particular circumstances of this case, BIA was partially or wholly responsible for the failure to have approved assignments, he shall also consider what effect that fact has in this case.

Finally, at page 3 of his Answer Brief, the Area Director contends that Tesoro "remains liable under the terms of the lease for all provisions of the lease, including the cost of plugging and abandoning the wells, as claimed by the Area Director in the October 11, 1996 letter to Tesoro."

This issue is premature. Nothing presently before the Board shows whether the wells are to be plugged and abandoned, or whether the Tribe, pursuant to its inspection, has determined to keep the wells in production.

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fn. 11 (continued)
place that it included only "back royalties." Aside from its confusion as to what the sum includes, the decision raises a question as to whether BIA has undertaken to collect the Tribe's taxes.

On remand, the Area Director shall also address the question of who is responsible for plugging and abandoning the wells, if it has been determined that the wells should be plugged and abandoned.

The points raised in this decision shall be viewed as the minimum requirements for a decision on remand. The Area Director shall also consider any other relevant matters which are raised by the parties on remand. Further he shall consider whether there are additional persons who should be parties to the proceeding on remand.

If the parties so desire, the Area Director shall allow an opportunity for the settlement of this controversy.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's October 11, 1996, and January 24, 1997, decisions are vacated. This matter is remanded to the Area Director for further consideration in accordance with this opinion.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge