



INTERIOR BOARD OF INDIAN APPEALS

Joe Cox v. Acting Muskogee Area Director, Bureau of Indian Affairs

35 IBIA 43 (04/21/2000)



United States Department of the Interior

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

JOE COX,	:	Order Affirming Decision
Appellant	:	as Modified
	:	
v.	:	
	:	Docket No. IBIA 99-61-A
ACTING MUSKOGEE AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	April 21, 2000

This is an appeal from a March 24, 1999, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), declining to approve a voluntary cancellation of Oil and Gas Lease 601-5191 (21265), Eliza Wacoche, Creek 9050, which covers the SE 1/4 of sec. 29, T. 18 N., R. 7 E., Indian Meridian, Creek County, Oklahoma. For the reasons discussed below, the Board affirms the Area Director's decision as modified herein.

The lease at issue here was approved on February 20, 1911, by the First Assistant Secretary of the Interior. An assignment of the lease to Joe F. Cox Oil and Gas, Inc. (Lessee), was approved by the Area Director on February 3, 1993.

On November 12, 1996, the Bureau of Land Management, Tulsa District Office (BLM), ordered Lessee to plug and abandon Wells 3, 4, and 5 on the lease. BLM repeated this order in letters dated October 13, 1998, December 1, 1998, and February 8, 1999. Notice of a right to appeal the order was included in the November 12, 1996, and December 1, 1998, letters. ^{1/} The February 8, 1999, letter stated that Lessee would be assessed \$500 per day beginning April 1, 1999, upon failure to comply with the order.

On February 1, 1999, Appellant filed with BIA a request for voluntary cancellation of the lease. He stated as his reason for making the request: "This Lease is No Longer Profitable to Operate." On Form 5-296-A, Statement to Accompany Release, Appellant answered "No" to the question "Have all wells on lands surrendered been properly plugged and abandoned, including wells drilled by lessee and wells drilled prior to acquiring lease rights, if obtained by assignment?"

^{1/} The record does not include copies of any appeal documents concerning the BLM orders. However, in an Apr. 1, 1999, memorandum to BIA, BLM stated that "[t]he current operator has exhausted appeal rights with BLM in regard to the plugging of the * * * wells."

In the Apr. 1, 1999, memorandum, BLM requested that Lessee's bond, surety, and/or letter of credit be called upon to pay for plugging and abandoning the wells.

BIA sought advice from BLM concerning Appellant's request for voluntary cancellation. On February 16, 1999, BLM responded, stating:

If the * * * property is allowed to become a District Court lease, the lease can be shut-in under Oklahoma rules and will not and cannot be expired due to lack of production. This lease can remain inactive until such time as the price of crude oil rises above \$15/bbl and remains so for 90 consecutive business days.

The release of the lease does not seem to be in the best interest of the allottee. The invaluable oversight performed by the different agencies; BLM - operations, MMS [Minerals Management Service] - monies and BIA - leasing; will be eliminated. 2/

On March 24, 1999, the Area Director denied Appellant's request for voluntary cancellation, stating:

We have given careful consideration to your request, plus ask [sic] for a recommendation from [BLM].

We do not feel it is in the best interest of the mineral owner to approve a voluntary cancellation at this time. Our primary concern is that a cancellation would result in a new lease being approved through the District Court, resulting in the loss of invaluable oversight performed by [BIA, MMS, and BLM]. We explained to Mrs. Eliza King, the mineral and surface owner, your proposed cancellation. Mrs. King concurs with our decision.

On appeal to the Board, Appellant states that he has requested the mineral owner to execute a new lease, and has offered her a bonus and increased royalties. He contends that she is in favor of a new lease but was advised by BIA that "by allowing a new oil and gas lease to be taken, that her property would not be environmentally protected by the Oklahoma Corporation Commission." Appellant's Opening Brief at 3. 3/ Appellant contends that a new lease would

2/ In his answer brief in this appeal, the Area Director explains:

"Conveyances of interests, including oil and gas leases, in restricted lands owned by the **heirs** of Five Civilized Tribes allottees must be approved by the state district courts of Oklahoma pursuant to Section 1 of the Act of August 4, 1947, 61 Stat. 731. The regulations at 25 C.F.R. Part 213 [Leasing of Restricted Lands of Members of Five Civilized Tribes, Oklahoma, for Mining] do not apply to state court approved leases."

Area Director's Answer Brief at 3 n.1.

3/ King has been advised of all proceedings in this appeal and has been served with the filings of the other parties. She has not, however, participated in the appeal.

be in the mineral owner's best interest because it would allow her to receive a bonus and increased royalties. He also contends that regulation of the lease by the Oklahoma Corporation Commission would be equal or superior to regulation by the Federal bureaus.

In his answer brief, the Area Director quotes from 25 C.F.R. § 213.40, Cancellations:

(b) On the following conditions, the lessee may, on approval of the Secretary of the Interior, surrender a lease or any part of it:

* * * * *

(4) That he make a satisfactory showing that full provision has been made for conservation and protection of the property and that all wells, drilled on the portion of the lease surrendered, have been properly abandoned.

The Area Director contends that, because Appellant conceded in his request for voluntary cancellation that the wells had not been plugged and abandoned, he had failed to "make a satisfactory showing that * * * all wells, drilled on the portion of the lease surrendered, have been properly abandoned," as required by this regulation. The Area Director further contends that he "was completely justified in declining to approve the Appellant's request for voluntary cancellation." Area Director's Answer Brief at 4.

Appellant did not file a reply brief and thus has left the Area Director's contention undisputed.

As far as the record shows, the wells on the lease had not been plugged and abandoned when the Area Director issued his decision on March 24, 1999. In fact, statements made in Appellant's June 29, 1999, opening brief before the Board suggest that, even at that time, there were wells on the lease which had not been plugged and abandoned.

It clearly appears that the Area Director could have based his decision on Appellant's failure to show compliance with 25 C.F.R. § 213.40(b)(4). He did not do so, however. Instead, he based his decision solely upon his conclusion that cancellation of the lease would not be in the best interest of the mineral owner.

Appellant disagrees with the Area Director as to what is in the mineral owner's best interest. He does not, however, contend that the Area Director violated any law or regulation in denying his request for voluntary cancellation.

It is questionable whether Appellant has standing to raise the issue of the mineral owner's best interest. See, e.g. Gossett v. Portland Area Director, 28 IBIA 72, 75 (1995); Clausen v. Portland Area Director, 19 IBIA 56, 60 (1990). Even assuming he does have standing in that regard, however, he cannot succeed here.

A BIA determination of what is in the best interest of an Indian beneficiary is a decision based on the exercise of discretion. An appellant who challenges a discretionary BIA decision must show that the BIA official did not properly exercise discretion. E.g., *Evans v. Sacramento Area Director*, 28 IBIA 124, 127 (1995).

Appellant's differing view as to the mineral owner's best interest is insufficient to show that the Area Director did not properly exercise discretion.

More importantly, Appellant fails to show that he satisfied the requirements of 25 C.F.R. § 213.40(b)(4). Thus, he fails to show that he was entitled to have his request for voluntary cancellation considered at all.

The Area Director should have identified Appellant's failure to satisfy the requirements of 25 C.F.R. § 213.40(b)(4) as a reason for denying his request for voluntary cancellation. Under the circumstances here, where the issue has been raised during the course of this appeal and Appellant has had an opportunity to address the issue, the Board finds that the Area Director's error may be cured in this appeal through modification of his decision.

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 March 24, 1999, decision is affirmed as modified to include as a basis for the decision Appellant's failure to show compliance with 25 C.F.R. § 213.40(b)(4).

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge