



INTERIOR BOARD OF INDIAN APPEALS

Plains Marketing and Transportation, Inc. v. Acting Muskogee Area Director,  
Bureau of Indian Affairs

37 IBIA 73 (12/31/2001)

Related Board case:  
34 IBIA 133



# United States Department of the Interior

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

PLAINS MARKETING AND TRANSPORTATION, INC.

v.

ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 99-9-A, 99-42-A

Decided December 31, 2001

Appeals from decisions concerning payments for Osage royalty oil under an oil purchasing and marketing agreement.

Vacated and remanded.

Constitutional Law: Due Process--Indians: Mineral Resources: Oil and Gas:  
Royalties

When the Bureau of Indian Affairs makes an assessment for amounts due to an Indian tribe under an oil purchasing and marketing agreement, due process requires that the party being assessed be provided with some means of verifying the accuracy of the assessment.

APPEARANCES: Dennis J. Whittlesey, Esq., Washington, D.C., for Plains Marketing and Transportation, Inc.; Alan R. Woodcock, Esq., Office of the Field Solicitor, Department of the Interior, Tulsa, Oklahoma, for the Acting Muskogee Area Director.

## OPINION BY ADMINISTRATIVE JUDGE VOGT

These are appeals from an August 28, 1998, decision and a December 28, 1998, decision issued by the Acting Muskogee Area Director, Bureau of Indian Affairs (Regional Director; 1/BIA), concerning payments for royalty oil under an oil purchasing and marketing agreement (Agreement) between Plains Marketing and Transportation, Inc. (Plains) and the Osage Tribal Council on behalf of the Osage Tribe (Tribe). For the reasons discussed below, the Board vacates the Regional Director's decisions and remands this matter to him for further proceedings.

---

1/ The Muskogee Area Director is now known as the Eastern Oklahoma Regional Director. He will be called "Regional Director" in this decision.

### Background

The Osage mineral estate underlies the Osage Reservation (now Osage County, Oklahoma). It is held in trust for the Tribe and leased under authority of the Osage Tribal Council. At present, there are approximately 12,000 producing oil wells under leases of the Osage mineral estate.

Under section 4 of the Act of June 28, 1906, 34 Stat. 539, 544, the royalties received from leases of the mineral estate are required to be paid into the Treasury of the United States and distributed per capita to the persons on the 1906 tribal roll or their heirs. <sup>2/</sup> The regulations in 25 C.F.R. Part 226 require that royalty payments be made to the Superintendent, Osage Agency, BIA (25 C.F.R. § 226.11(a)(1)), by either the lessee or the purchaser (25 C.F.R. § 226.13(a)). Apparently, these payments have typically been made by the purchaser.

25 C.F.R. § 226.11 recognizes the right of the Tribe to take its royalty in kind. See 25 C.F.R. § 226.11(a)(2) and (3). <sup>3/</sup> In 1995, the Tribe elected to do so, whereupon it entered into the Agreement at issue here. The Agreement is dated October 27, 1995, and was approved by the Regional Director on that date. It provides in part:

#### 1. PURPOSE OF AGREEMENT.

\* \* \* [Plains] will buy both royalty and working interest barrels of crude oil and condensate produced from the Osage mineral estate in Osage County, Oklahoma. \* \* \* [Plains] will then sell, trade, exchange, transport, or otherwise

---

<sup>2/</sup> For more background on this requirement, see, e.g., Estate of Vivian M. Rogers v. Acting Muskogee Area Director, 14 IBIA 217, 218 (1986); Cohen's Handbook of Federal Indian Law, 788-97 (1982 ed.).

<sup>3/</sup> 25 C.F.R. § 226.11(a) provides in part:

“(2) Unless the Osage Tribal Council, with approval of the Secretary, shall elect to take the royalty in kind, payment is owing at the time of sale or removal of the oil \* \* \* and settlement shall be based on the actual selling price, but at not less than the highest posted price by a major purchaser \* \* \* in Osage County, Oklahoma, who purchases production from Osage oil leases.

“(3) *Royalty in kind.* Should Lessor, with approval of the Secretary, elect to take the royalty in kind, Lessee shall furnish free storage for royalty oil for a period not to exceed 60 days from date of production after notice of such election.”

market this product to enhance the value received by the Tribe. This is expected to be a profitable endeavor for both parties hereto. [Plains] shall share all of these marketing profits with Tribe using the formula hereinafter set forth in paragraph 7.(B). \* \* \*

\* \* \* \* \*

7. PRICE.

(A) The purchase price payable by [Plains] to [BIA] for royalty barrels of crude oil sold to [Plains] under this Agreement shall be in accordance with the price established by the Code of Federal Regulations, Title 25, Indians, Section 226.11(a)(2) which requires the payment of the highest posted price. In addition thereto, [Plains] will pay to [BIA] for the Tribe's royalty barrels any per barrel premium that the lessee is receiving for sale of its working interest oil where such lessee is selling its oil to entities other than [Plains], provided however, that [Plains] may elect not to purchase either royalty or working interest oil in such instances if the purchase will not result in a profit. \* \* \* In addition to the foregoing amounts [Plains] shall pay to [BIA] each month the net profits as defined in Sub-paragraph (B) below, that [Plains] realizes from the sale, resale, exchange or trading of all royalty interest and all leasehold interest crude oil that is purchased under this Agreement. \* \* \*

(B) Net profits to be paid to Tribe shall be defined by using the following formula:

[Formula omitted.]

Each payment to [BIA] or to the Tribe under this Agreement shall be preceded by [Plains'] computation of the amounts payable and by documentation supporting the revenues and allowable deductible costs as specified above. The Tribe and [BIA] shall be entitled upon written request to [Plains] to all information and records that relate to the verification of the costs. \* \* \* Tribe, [Plains] and the Agency Superintendent will mutually agree upon the precise documentation to be furnished so that each may properly account for all transactions.

8. PAYMENT TERMS.

Payment for royalty crude oil shall be made in accordance with the Code of Federal Regulations, Title 25, Indians, Section 226.13, and will be paid

directly to [BIA] as it shall direct. [4/] Payment for any other crude oil that Tribe may obtain and sell to [Plains] shall be made directly to Tribe \* \* \*. \* \* \* [Plains] will furnish all additional data necessary to enable the Tribe and [BIA] to fully account for all purchases, costs and income to be received under this Agreement. Payments of net profits realized on sales of royalty crude oil and on sales of leasehold interest crude oil, other than for leasehold interest crude oil belonging to Tribe, shall be made directly to [BIA] on or before the 25th day of each month succeeding the sales of the crude oil and the computation of net profits. Payments for net profits realized on sales of leasehold interest crude oil belonging to the Tribe shall be made directly to [the Tribe]. \* \* \*

Plains began performance under the Agreement in January 1996. It estimated the amount of the premium to be paid under Paragraph 7(A) at 35 cents per barrel, an estimate which the Tribe evidently accepted. Plains' payments to BIA included premium payments based upon that estimate.

On February 21, 1996, Plains submitted data concerning its payment for January 1996. In a memorandum of the same date, a BIA production analyst noted that certain required information was missing from Plains' submission and indicated that she had spoken to a representative of Plains concerning the problem.

The next documents in the record are dated May 1997. Those documents reflect communications between BIA and Plains concerning information needed to verify that Plains' payments were correct. The record includes a May 16, 1997, letter from Plains to BIA, referring to a meeting which evidently had already taken place and which had been attended by representatives of Plains, the Tribe and BIA. An attachment to the letter describes tasks to be performed by Plains, the Tribe, and BIA for the purpose of resolving differences concerning the payments. The record does not show whether these tasks were accomplished.

---

4/ 25 C.F.R. § 226.13 provides in part:

“(a) Royalty payments due may be paid by either purchaser or Lessee. Unless otherwise provided by the Osage Tribal Council and approved by the Superintendent, all payments shall be due by the 25th day of each month and shall cover the sales of the preceding month. Failure to make such payments shall subject Lessee or purchaser, whoever is responsible for royalty payment, to a late charge at the rate of not less than 1½ percent for each month or fraction thereof until paid. The Osage Tribal Council, subject to the approval of the Superintendent, may waive the late charges.”

In September 1997, Plains submitted information to BIA on a computer disk. However, there were discrepancies between the information on the disk and information Plains had submitted earlier. BIA met with a representative of Plains on January 15, 1998, to discuss issues concerning the 1996 payments for the Tribe's royalty oil.

On February 5, 1998, the Acting Superintendent, Osage Agency (Superintendent), furnished Plains with BIA's initial calculation of underpayment for the Tribe's royalty oil for 1996, as well as its calculation of late charges. BIA calculated the amount of underpayment at \$297,428.87 and the amount of late charges at \$82,494.08. Noting that the calculations did not include profit paid by Plains, the Superintendent explained: "It is our opinion that profit payment may not be used to defray royalty deficiencies, since changes in the amount paid for royalty will of necessity alter the amount of profit owed. The monthly profit will have to be recalculated due to the difference in royalties due."

On February 23, 1998, Plains wrote to the Superintendent, stating: "To date, Plains has not been advised by the Tribe or the BIA of any lease where the Lessee is selling its production at a higher price than the price paid for the Royalty oil by Plains. \* \* \* Plains formally requests the detail on any leases that appear to be receiving a higher price." Plains' Feb. 23, 1998, Letter at 1. Plains stated that it was requesting that information for the purpose of making its marketing decisions for March 1998. It also asked to review the manner in which BIA had arrived at its figures. On March 6, 1998, Plains again wrote to the Superintendent, arguing that it owed the Tribe no more than \$16,310 for 1996 and stating that it was willing to pay that amount in order to resolve the alleged underpayment. It also stated:

[I]t is [Plains'] position that it has not underpaid [the Tribe] because pursuant to the provisions of the Agreement, [Plains] is not required to purchase barrels that are unprofitable. Since the inception of the Agreement [Plains] has provided [the Tribe] and the BIA with its monthly profit calculations and, to date, [Plains] has not been advised of any lease that would have been unprofitable due to a higher price being paid to the Lessee versus the price being paid to [the Tribe] by [Plains]. In fact, [Plains] has paid Osage Tribal Council taxes in the amount of \$192,623 in 1996 and \$214,523 in 1997 based upon the implied representation that it was not purchasing production from unprofitable leases. Such taxes would not have been paid on any lease that was unprofitable.

Plains' Mar. 6, 1998, Letter at 1.

On March 24, 1998, the Superintendent furnished Plains with “a list of leases that indicated that ‘Plains’ paid less for royalty oil than paid by the purchaser of the working interest production” for the January 1998 production month. Superintendent’s Mar. 24, 1998, Letter to Plains. The list attached to the Superintendent’s letter included approximately 500 leases.

BIA scheduled a meeting with Plains for March 31, 1998, to discuss “the procedure utilized to determine the additional royalty due and to attempt to answer any questions [Plains] may have concerning this matter.” Superintendent’s Mar. 23, 1998, Letter to Plains.

On April 7, 1998, the Superintendent furnished Plains with a new calculation of 1996 underpayments and late charges, requesting that Plains make payment by April 24, 1998. The new calculation showed Plains owing \$87,402.21 to correct underpayments and \$25,033.26 in late charges. It appears that the substantial reduction from the February 1998 calculation resulted from a BIA decision to give Plains credit for its profit payments. The Superintendent provided Plains with a spreadsheet summary of BIA’s calculations and stated that Plains was being separately provided with seven computer disks containing detailed royalty accounting information. Finally, the Superintendent informed Plains of its right to appeal to the Regional Director.

On April 16, 1998, the Superintendent provided Plains with a revised calculation for 1996, explaining the corrections being made and stating that the amount due for underpayments was \$80,422.71 and the amount due in late charges was \$22,415.94. This letter also informed Plains of its right to appeal to the Regional Director.

On April 17, 1998, the Superintendent wrote to Plains, stating:

Enclosed is a spreadsheet, adjusting the profit for 1996. We have recalculated these figures based on the actual royalty cost and the amount of profit paid by Plains for each month in 1996. A future audit could possibly change the profit amount. According to our calculations, Plains owes an additional \$31,935.19 for 1996 Profit.

The letter requested payment by May 15, 1998, and informed Plains of its right to appeal.

On May 7, 1998, the Superintendent wrote to Plains stating that Plains owed \$507,982.57 in underpayments and \$72,810.67 in late charges for 1997. The Superintendent’s letter stated that, although the figures were preliminary, BIA was not anticipating any major changes. The letter advised Plains to pay promptly to stop the accumulation of late

charges and stated that Plains would receive a refund or credit if it overpaid. It also stated that Plains was being furnished with computer disks containing detailed accounting information and informed Plains of its right to appeal.

On May 14, 1998, Plains wrote to the Agency requesting the “source documents utilized by [BIA] to arrive at the ‘Ticket Price’ for [certain leases].” Plains stated: “We at Plains understand the sensitive data must be blanked out to protect the confidentiality of the documents. The data that is imperative to Plains is the volume of barrels and price paid by lease number to the operator.”

The Superintendent responded to this request on May 21, 1998, stating:

We have determined that these “source documents” are in fact the run statements provided by various companies which are in direct competition with you. We have determined to withhold all the data requested under Exemption 4 of [the Freedom of Information Act (FOIA)]. 5/

FOIA Exemption 4 is taken on information that was determined to be commercial or financial, obtained from third parties and is considered confidential as the information has not been disclosed to the public by the submitters nor has the information been routinely made available to the public from other sources. The information is determined to be confidential in that its disclosure is likely to cause substantial harm to the competitive position of the submitters. This information is fairly detailed and closely held by the submitters. It is believed that any release could allow competitors to estimate and/or undercut the submitter’s business.

The Superintendent advised Plains that it could appeal the denial to the Department’s FOIA Appeals Officer. Plains filed an appeal.

On May 29, 1998, the Superintendent wrote to Plains stating that Plains owed \$111,336.24 in underpayments and \$5,655.29 in late charges for the period January - March, 1998. The remainder of the letter was similar to the Superintendent’s May 7, 1998, letter.

---

5/ Exemption 4 of FOIA, 5 U.S.C. § 552(b)(4), allows an agency to withhold “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”

Also on May 29, 1998, Plains gave notice to the Tribe that it was terminating the Agreement effective July 1, 1998. 6/ Plains indicated, however, that it was interested in renegotiating the Agreement.

On August 10, 1998, the Superintendent wrote to Plains stating that Plains owed \$57,057.03 in underpayments and \$2,176.26 in late charges for April and May, 1998. The remainder of the letter was similar to the Superintendent's May 7 and May 29, 1998, letters.

Plains appealed the Superintendent's April 16, April 17, May 7, May 29, and August 10, 1998, letters to the Regional Director. The Regional Director addressed Plains' appeals from the first four of these letters in his August 28, 1998, decision. He addressed Plains' appeal from the Superintendent's August 10, 1998, letter in his December 28, 1998, decision. He affirmed all of the assessments made by the Superintendent.

Plains' appeal from the Regional Director's August 28, 1998, decision was docketed as IBIA 99-9-A. Its appeal from the Regional Director's December 28, 1998, decision was docketed as IBIA 99-42-A. 7/

Briefs have been filed by Plains and the Regional Director. Although the Tribe was advised of its right to participate in these appeals, it has not done so. The two appeals were separately briefed but have been consolidated for purposes of decision.

---

6/ Paragraph 4 of the Agreement provides in part:

"[T]his Agreement may be terminated by either the Tribe or [Plains] at any time within any twelve month's term upon the service of written notice upon the other party at least thirty (30) days in advance of the proposed effective termination date, termination to be effective at the end of the month next succeeding the service of the written notice."

7/ In a Sept. 25, 1998, letter to Plains, the Superintendent assessed amounts for underpayments and late charges for June 1998. Plains did not immediately appeal that assessment to the Regional Director but, in July 1999, attempted to file an appeal out of time. On Aug. 5, 1999, the Regional Director dismissed Plains' attempted appeal as untimely. On Oct. 6, 1999, the Board affirmed the dismissal. Plains Marketing & Transportation, Inc. v. Acting Muskogee Area Director, 34 IBIA 133 (1999). Because of Plains' failure to timely appeal the Superintendent's Sept. 25, 1998, letter, the assessment for June 1998 is final for the Department of the Interior.

Plains' FOIA Appeal

Upon undertaking active consideration of these appeals in early 2000, the Board found that it could not determine from the materials before it whether or not Plains' FOIA appeal had been decided. It therefore requested a status report from Plains, which reported that its FOIA appeal was still pending. On February 1, 2000, the Board stayed proceedings pending a decision in the FOIA appeal.

The FOIA appeal was decided on September 4, 2001. Affirming the Superintendent's May 21, 1998, decision, the FOIA Appeals Officer stated:

[The withheld material] contains financial information, about the quantities and price of oil sold from various leases, that was obtained from a number of corporations that have business in Osage County. \* \* \* [T]he Department has determined that the information is confidential in nature, and it was voluntarily submitted to BIA. \* \* \*

The documents are monthly "run statements" from the companies that purchase the oil from the lessee. These purchasing companies are in direct competition with Plains. The price that the other oil purchasing companies are paying to the lessees would be very important to Plains if Plains were to try to obtain the contracts for purchasing oil from these lessees. The Department has long held that this type of information is confidential.

The Department finds that sound grounds exist for the continued withholding on the basis of exemption (4), of all material involved in [Plains'] appeal.

FOIA Appeals Officer's Sept. 4, 2001, Decision at 2.

The parties were given an opportunity to state their views as to the effect of the FOIA Appeals Officer's decision on the present appeals. Plains and the Regional Director filed statements indicating that their arguments are, in essence, the same as they have been throughout this appeal.

Discussion and Conclusions

Plains argues that BIA lacked jurisdiction to make the assessments at issue here. <sup>8/</sup> It asserts that BIA's claim to jurisdiction in this matter rests only on 25 C.F.R. Part 226, which concerns leases and royalties, but not agreements such as the one at issue here. Further, Plains argues: "The royalty obligation to the Tribe pursuant to Section 226.11 was met when the Tribe's lessees delivered its royalty in kind. Once the royalty obligation to the Tribe was met by the payment of royalty in value or the delivery of royalty in kind, Section 226.11 no longer applied." Plains' Reply Brief in Docket No. IBIA 99-9-A at 4. Thus, Plains reasons, "[t]he subsequent Marketing Agreement that the [Tribe] has with Plains is outside of the regulatory provisions dealing with leases." *Id.* at 5.

It is true, as Plains contends, that the payments made by Plains were not themselves royalties but, rather, payments for the Tribe's royalty oil. Thus, by their terms, 25 C.F.R. §§ 226.11 and 226.13 appear to be inapplicable to the payments made by Plains. However, in describing the price to be paid by Plains, Paragraph 7 of the Agreement explicitly cites 25 C.F.R. § 226.11(a)(2). Further, the first sentence of Paragraph 8 reads: "Payment for royalty crude oil shall be made in accordance with the Code of Federal Regulations, Title 25, Indians, Section 226.13, and will be paid directly to [BIA] as it shall direct." It is clear from this language that the parties intended to incorporate the provisions of 25 C.F.R. § 226.13 into the Agreement to some extent.

Plains views the intended incorporation as limited. It contends that the "[r]eference to these regulatory provisions allows the Tribe and Plains to determine the price and make payments in a manner similar to that provided by the regulations, but it does not make the Marketing Agreement subject to the jurisdiction of the BIA." Plains' Reply Brief on Jurisdiction in Docket No. IBIA 99-9-A at 4. Plains appears to be arguing that the parties intended that BIA would serve as a banker for the Tribe but would have no authority to determine whether the amounts Plains was paying were correct.

---

<sup>8/</sup> Plains made its jurisdictional argument for the first time in its reply brief in Docket No. IBIA 99-9-A. The Regional Director requested permission to respond to the new argument. The Board granted permission and authorized a reply by Plains.

In Docket No. IBIA 99-42-A, Plains made its jurisdictional argument in its opening brief. Under these circumstances, and because the argument concerns jurisdictional matters, the Board considers it. Nevertheless, Plains clearly should have raised this issue much earlier—at the latest, when it appealed the assessments to the Regional Director.

Plains' "banker" argument is inconsistent with the requirement in Paragraph 8 that Plains "furnish all additional data necessary to enable \* \* \* [BIA] to fully account for all purchases, costs and income to be received under this Agreement." It is likewise inconsistent with the similar reporting requirement in Paragraph 7(B). If BIA was to have no enforcement authority, there would have been no point to such requirements.

Indeed, if Plains' theory is correct, there would have been no need to refer to 25 C.F.R. § 226.11(a)(2) or § 226.13 at all. A simple direct statement in Paragraph 7 describing the basic price to be paid and a simple direct statement in Paragraph 8 that payments were to be made to BIA would have been sufficient and would have had the advantage to Plains of eliminating any question concerning the extent to which the provisions of 25 C.F.R. Part 226 were intended to apply to the Agreement.

Both Paragraph 7 and Paragraph 8 evidence the understanding of the parties that BIA would have authority to enforce the Agreement.

Other provisions of the Agreement are consistent with such an understanding. Paragraph 14 requires Plains to post a bond or letter of credit satisfactory to BIA; Paragraph 16 requires that all notices under the Agreement be served on BIA; and Paragraph 21 requires that amendments to the Agreement be approved by BIA. These provisions clearly reflect the parties' recognition of BIA as monitor/enforcer.

Thus the language of the Agreement as a whole supports the conclusion that the parties intended BIA to have authority to enforce the Agreement.

To the extent the Agreement may be ambiguous in this regard, the actions of Plains following approval of the Agreement would dispel the ambiguity. See Pinoleville Indian Community v. Acting Sacramento Area Director, 26 IBIA 292, 296 (1994), and cases cited therein ("An ambiguity in a written contract can be overcome by the contemporaneous actions and understandings of the parties"). It is clear from Plains' communications with BIA that Plains understood BIA to have authority to enforce the provisions of the Agreement concerning payment for royalty oil.

The Regional Director argues that, while no statutory authority is cited in the Agreement, the Indian Mineral Development Act (IMDA), 25 U.S.C. §§ 2101-2108, is the only applicable statute. He argues further that IMDA authorizes enforcement by BIA. Regional Director's Response Brief in Docket No. 99-42-A at 3.

The Agreement clearly appears to fall within the types of agreements authorized by IMDA. 9/ As the Regional Director contends, IMDA provides for an enforcement role for BIA. 25 U.S.C. § 2103(e). 10/ Further, the regulations implementing IMDA explicitly authorize BIA to conduct audits to determine compliance with minerals agreements. 25 C.F.R. § 225.26. 11/ Thus, if IMDA applies here, there is additional authority for BIA's enforcement role.

However, it is not clear from the record whether the parties submitted the Agreement for approval under IMDA. Further, the Agreement does not appear to comply with all the

---

9/ 25 U.S.C. § 2102(a) provides:

“Any Indian tribe, subject to the approval of the Secretary and any limitation or provision contained in its constitution or charter, may enter into any joint venture, operating, production sharing, service, managerial, lease or other agreement \* \* \* providing for the exploration for, or extraction, processing, or other development of, oil, gas, uranium, coal, geothermal, or other energy or nonenergy mineral resources \* \* \* in which such Indian tribe owns a beneficial or restricted interest, or providing for the sale or other disposition of the production or products of such mineral resources.”

10/ 25 U.S.C. § 2103(e) provides:

“Where the Secretary has approved a Minerals Agreement in compliance with the provisions of this chapter and any other applicable provision of law, the United States shall not be liable for losses sustained by a tribe or individual Indian under such agreement: *Provided*, That the Secretary shall continue to have a trust obligation to ensure that the rights of a tribe or individual Indian are protected in the event of a violation of the terms of any Minerals Agreement by any other party to such agreement: *Provided further*, That nothing in this chapter shall absolve the United States from any responsibility to Indians, including those which derive from the trust relationship and from any treaties, Executive orders, or agreement between the United States and any Indian tribe.”

11/ 25 C.F.R. § 225.26 provides:

“The Secretary may conduct audits relating to the scope, nature and extent of compliance with the minerals agreement and with applicable regulations and orders to lessees, operators, revenue payors, and other persons with rental, royalty, net profit share and other payment requirements arising from the provisions of a minerals agreement.”

requirements of 25 C.F.R. Part 225. <sup>12/</sup> Because the Regional Director expresses some uncertainty as to the applicability of IMDA (Regional Director's Response Brief in Docket No. 99-42-A at 3 and n.1), and Plains has not addressed the point at all, the Board is reluctant to make a determination here as to whether or not IMDA and its implementing regulations apply to the Agreement.

In the end, the Board finds it unnecessary to determine whether IMDA applies to the Agreement because it concludes that the Agreement itself, when read in light of BIA's trust responsibility for the Osage mineral estate, is sufficient to support BIA's enforcement role in this matter.

The Board rejects Plains' contention that BIA lacked jurisdiction in this matter.

On the merits, Plains argues that it cannot be required to pay the amount assessed by BIA for two reasons: (1) BIA failed to provide Plains with timely notice that its payments were inadequate and (2) BIA would not provide Plains with the documents on which its assessments were based.

In the first of these two arguments, Plains contends: "Someone had an obligation to provide information about premiums and the one thing that is clear is that the 'someone' is not Plains. Plains is not a lessee and does not have information regarding premiums paid by other purchasers." Plains' Reply Brief in Docket No. 99-9-A at 7. Plains appears to be arguing that either BIA or the Tribe was obligated under the Agreement to furnish Plains with the information Plains would need to determine the price it must pay.

In the same argument, Plains contends that, because it did not receive timely notification of a shortfall from BIA, it was not able to protect itself from the accrual of late charges and was not able to make business decisions as to whether or not purchases of certain oil would generate a profit.

Contrary to Plains' apparent interpretation of the Agreement, nothing therein obligated either BIA or the Tribe to provide Plains with information to assist it in making determinations as to whether purchases would be profitable. Nor is there anything in the Agreement which

---

<sup>12/</sup> For example, the Agreement does not include a dispute resolution provision, as required by 25 C.F.R. § 225.25:

"A minerals agreement shall contain provisions for resolving disputes that may arise between the parties. However, no such provision shall limit the Secretary's authority or ability to ensure that the rights of an Indian mineral owner are protected in the event of a violation of the provisions of the minerals agreement by any other party to the minerals agreement."

indicates that Plains' obligations under the Agreement were dependent upon its receipt of such information from BIA or the Tribe. Profitability determinations were clearly the responsibility of Plains to make. Further, Plains was obligated to make its determinations in a timely manner in order to avoid harm to the Tribe. See Paragraph 5 of the Agreement. 13/

Aside from the terms of the Agreement itself, there is, the Regional Director contends, a practical problem which renders Plains' theory a "logical impossibility"—BIA could not have provided Plains with purchase price information in time for Plains to make its profitability determinations. The Regional Director argues: "[E]ven the BIA does not know the purchase price until it is reported by buyer and seller after the fact. Thus, BIA could not advise [Plains] prior to [Plains'] purchase of oil, because the BIA does not know the price for such oil." Regional Director's Response Brief in Docket No. 99-9-A at 10-11.

The Board finds that it was Plains' obligation under the Agreement to make determinations as to profitability; that Plains' obligation to do so was not dependent upon the receipt of information from BIA or the Tribe; and that BIA's responsibility as a monitor/auditor arose after the fact, that is, after the time Plains was obligated to make its profitability determinations.

Plains' second argument on the merits is that it cannot be compelled to pay the amount assessed by BIA because BIA has declined to release the source documents on which its assessment is based. Citing Paragraph 19 of the Agreement, Plains contends that it was entitled to that information.

Paragraph 19, AUDIT, provides:

Each party and its duly authorized representatives shall have access to the accounting records and other documents maintained by the other party which

---

13/ Paragraph 5, QUANTITY, provides in relevant part:

"[Plains] shall not be required to purchase working interest crude oil belonging to Tribe or to other lessees or royalty crude oil that will not generate a profit. In such instances [Plains] will give Tribe adequate advance notice of [Plains'] election not to purchase such crude oil so that Tribe may continue to sell its royalty interest crude oil to the same purchaser who buys the lessee's crude oil so that Tribe may continue to obtain any premiums paid above the highest posted price. Should [Plains] fail to properly advise Tribe with adequate advance notice in any such circumstance, [Plains] will reimburse Tribe for all losses sustained in either or both of diminished premiums or basic selling price so that Tribe will sustain no loss. In the alternative [Plains] will purchase such crude oil at the price, including premium, that Tribe might have received for such crude oil."

relate to this Contract, and shall have the right to audit such records at any reasonable time or times within twenty-four (24) months of the date a statement is rendered.

The Regional Director argues that Paragraph 19 does not apply to BIA because BIA is not a party to the Agreement. He contends that BIA has no obligation under the Agreement to provide information to Plains and, in particular, no obligation “to divulge confidential and proprietary records.” Regional Director’s Response Brief in Docket No. 99-9-A at 14.

The Regional Director also argues that “BIA has furnished, within the limits of the FOIA, adequate information from which [Plains] can determine the reliability of the BIA computations.” *Id.* at 15. The documents to which the Regional Director refers are the list of leases furnished to Plains on March 24, 1998, and the spreadsheets which accompanied the Superintendent’s assessment letters.

There is nothing in the Agreement which indicates that BIA was a party to the Agreement. Paragraph 19 applies only to parties. The Board finds no provision in the Agreement, and Appellant has identified none, which requires BIA to furnish the source documents to Plains. The Board therefore rejects Plains’ contention that BIA was obligated under the Agreement to furnish the source documents to Plains.

The inquiry does not end here, however. While, as discussed above, the parties agreed that BIA was to monitor Plains’ performance under the Agreement, there is nothing in the Agreement which suggests that Plains would be required to pay assessments made by BIA without being afforded some means of verifying the accuracy of those assessments. The Board cannot agree with the Regional Director that the information included in the list of leases and the spreadsheets was adequate for this purpose because the critical purchase price data was not included in those documents.

[1] The Board holds that due process requires that Plains be provided with some means of verifying the accuracy of the assessments made by BIA. Because Plains has not yet been provided with such a means, the Regional Director’s August 28, 1998, and December 28, 1998, decisions must be vacated.

The Board does not hold that Plains should be relieved of its payment obligations under the Agreement. While the exact amount of underpayment by Plains may be disputed, it seems apparent from the record that Plains has underpaid to some extent. It also seems apparent that Plains is aware that it has underpaid.

This matter will be remanded to the Regional Director. In light of the dilemma posed by the circumstances here, the Board urges the parties to consider an alternative dispute resolution mechanism, such as mediation, to resolve this dispute. 14/

The Tribe may also have a remedy under the Agreement. As Plains points out in these appeals, it agreed to pay the Tribe's attorney fees and costs should the Tribe find it necessary to employ an attorney to collect amounts due. 15/

In the absence of any other resolution of this dispute, the Regional Director shall reissue a decision which relies only on information available to Plains.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's August 28, 1998, and December 28, 1998, decisions are vacated, and this matter is remanded to him for further proceedings in accordance with the preceding paragraphs.

\_\_\_\_\_  
//original signed

Anita Vogt  
Administrative Judge

I concur:

\_\_\_\_\_  
//original signed

Kathryn A. Lynn  
Chief Administrative Judge

---

14/ The Board inquired earlier as to whether the parties would consider attempting to resolve this dispute through mediation or other alternative means. The parties' responses led the Board to conclude that alternative resolution was not feasible at that time. Nevertheless, the Board hopes that, in light of the decision issued today, the parties will give serious consideration to pursuing resolution of this dispute by alternative means. The parties may contact the Board for information about the Department's Alternative Dispute Resolution program.

15/ Paragraph 15, ATTORNEY FEES, provides:

"In the event that it should be reasonably necessary for Tribe to resort to the services of an attorney to collect, or assist in the collection of any amount due Tribe, then [Plains] agrees to pay to Tribe in addition to all other amounts due Tribe hereunder, reasonable attorneys' fees and investigative costs for the services of such attorneys, plus all costs of collection."