



INTERIOR BOARD OF INDIAN APPEALS

McCann Resources, Inc. v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs

46 IBIA 266 (02/28/2008)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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McCANN RESOURCES, INC.,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 06-26-A
EASTERN OKLAHOMA REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	February 28, 2008

Appellant McCann Resources, Inc., appealed to the Board of Indian Appeals (Board) from a November 8, 2005, decision of the Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director upheld the January 21, 2005, decision of the Acting Osage Agency Superintendent (Agency; Superintendent), in which the Superintendent concluded that Oil and Gas Lease No. 14-20-G06-17699 (Lease), between the Osage Tribe of Indians of Oklahoma (Tribe) as lessor and Appellant as lessee, had terminated by its own terms for failure to produce oil and/or gas in paying quantities. The Regional Director concluded that the Lease had terminated because Appellant had failed to comply with a 60-day deadline set by BIA for Appellant to produce evidence that the Lease was capable of producing minerals in paying quantities, and because an Agency inspection of the property shortly after the deadline did not reveal any evidence of oil or gas production. We conclude that Appellant has failed to carry its burden of showing error in the Regional Director's decision, and therefore we affirm.

Background

The Superintendent approved the Lease on March 17, 1999. The Lease covers the SE $\frac{1}{4}$ of Section 10, Township 27 N., Range 11 E., Osage County, Oklahoma, containing 160 acres, more or less. The Lease had a two-year primary term, beginning March 17,

1999, and then “as long thereafter as oil and-or natural gas is produced in paying quantities.”¹

Appellant agreed to operate two wells on the leased property, Well No. 289 and Well No. 509.² Although Well No. 509 apparently produced oil and a small amount of gas in 2001, the well began to have mechanical problems in 2002 and its production ceased. Numerous repairs and improvements were made to Well No. 509 between 2002 and 2004. BIA apparently provided Appellant with numerous extensions of time in which to make the repairs and return Well No. 509 to production. On March 3, 2004, Appellant notified BIA that Well No. 509 had returned to production on March 2, 2004.

On March 26, 2004, the Superintendent issued a decision in which he concluded that the Lease terminated by its own terms for failure to produce oil and/or gas in paying quantities. The Regional Director reversed the Superintendent’s decision on October 28, 2004. The Regional Director determined that the Superintendent did not allow Appellant sufficient time to determine if Well No. 509 was capable of producing in paying quantities once the well had been returned to production. The Regional Director granted Appellant 60 days to “provide the Agency with information that the [L]ease is capable of producing minerals in paying quantities.” Letter from Regional Director to Appellant, Oct. 28, 2004, at 2. The Regional Director provided appeal rights. Appellant did not appeal the Regional Director’s letter.³

By letter dated December 23, 2004, Appellant advised the Superintendent that “Well # 509 [was] returned to production on 12-21-04.” No information was provided concerning the well’s actual production, its ability to produce in paying quantities, or

¹ The Lease required Appellant to pay royalties on oil — based on gross proceeds from sales — and on natural gas — based on the value of gas and products sold — after deducting the amounts of oil and gas used by Appellant for development and operation purposes of the Lease.

² No information appears in the record about the status of Well No. 289 until January 4, 2005, when BIA inspected the well. At that time, BIA determined that the well had “no equipment” and was not producing. BIA Office Memorandum, Jan. 5, 2005. Appellant has not challenged this determination.

³ By letter dated November 9, 2004, the Superintendent reminded Appellant that it had until December 27, 2004, to provide the Agency with information that the Lease is capable of producing in paying quantities.

Appellant's inability to provide the requested information. In addition, no explanation was provided for the need to "return" the well to production after it previously had been "returned to production" in March 2004.

On January 4, 2005, an Agency engineer inspected the leased property, and prepared a memorandum summarizing his findings. The memorandum showed that the fluid level in the single stock tank was at 1'6¼", the same amount it had contained at an earlier inspection on November 10, 2004. The engineer noted that Well No. 509 was "equipped for production w/pumping unit and electric motor." BIA Office Memorandum, Jan. 5, 2005. The memorandum concluded that the status of the Lease was "non-producing." *Id.* A report included in the administrative record, apparently prepared by the Agency but based on information provided by Appellant, shows that a total of six barrels of oil were produced by Well No. 509 in March and April 2004. The same report shows no sales of oil and no royalties were paid.

On January 21, 2005, the Superintendent issued a decision in which he determined that the Lease had terminated by its own terms for failure to produce minerals in paying quantities. The Superintendent noted that BIA had set a 60-day deadline for Appellant to produce evidence that the Lease was capable of producing minerals in paying quantities. The Superintendent summarized the engineer's findings, noting that the fluid level in the stock tank had remained at 1'6¼" from November 10, 2004, through January 4, 2005. He noted that Agency records show the last reported production on the Lease was April 2004.

Appellant appealed the Superintendent's decision to the Regional Director. Appellant attached to its statement of reasons an affidavit by its President, in which it asserted that it had determined that the Lease was capable of producing minerals in paying quantities, and offered documentation — in the form of monthly reports, well service reports, and electric bills — to support its assertions. The handwritten notes purport to show that Well No. 509 was "producing oil" between December 24, 2004, and January 10, 2005, in an unknown amount, and overall a total of 47.32 barrels of oil beginning January 12, 2004, through March 31, 2005.

On November 8, 2005, the Regional Director upheld the Superintendent's decision. The Regional Director found that Appellant had failed to comply with the requirement to provide information by December 27, 2004, that the Lease was capable of producing minerals in paying quantities. The Regional Director also noted that the Agency's and Appellant's records showed that the fluid level in the tank remained at 1'6" through January 10, 2005, after Well No. 509 allegedly returned to production. The Regional Director also observed that Appellant's monthly reports subsequently showed production of 3.5 barrels of oil on January 12, 2005.

Appellant appealed to the Board, and included a statement of reasons with its notice of appeal. BIA filed an answer brief.

Discussion

Appellant bears the burden of proving error in the Regional Director's decision. *Tallgrass Petroleum Corp. v. Acting Eastern Oklahoma Regional Director*, 39 IBIA 9 (2003). Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. See *King v. Eastern Oklahoma Regional Director*, 46 IBIA 149, 153 (2007). We conclude that Appellant has not carried its burden and therefore affirm.

Ordinarily, when an oil and gas lease is for a primary term and "as much longer thereafter as oil and/or gas is produced in paying quantities," the lease, if in its extended term, expires when production ceases. *Dyck v. Acting Eastern Oklahoma Regional Director*, 35 IBIA 250, 251 (2000). Expiration occurs by operation of law and not because of any action taken by BIA. *Magnum Energy, Inc. v. Eastern Oklahoma Regional Director*, 38 IBIA 141, 142 (2002). In the case of Appellant's lease, BIA provided Appellant with an opportunity to demonstrate that the leasehold is capable of producing oil and/or gas in paying quantities before determining that the leasehold had expired for nonproduction.

Appellant contends that the Regional Director's October 28, 2004, letter did not specify what "information" Appellant was required to submit to show that the Lease was capable of producing minerals in paying quantities, and did not require evidence of actual production of oil. Appellant asserts that, even if the Regional Director's October 28 letter did require evidence of actual production of oil, the Agency's monitoring of the fluid level in the storage tank did not establish that Well No. 509 was not actually producing oil from the well, only that oil was not being delivered from the well into the storage tank. Appellant suggests that the Agency was required to complete tests to determine whether Well No. 509 was actually producing minerals, including (1) inspecting the well to see if it was actually pumping and producing fluid; (2) taking a jar sample; (3) checking the inlet line to the separator; (4) checking the outlet oil line; and (5) inspecting the separator.

We conclude that it was appropriate for the Regional Director to determine that the Lease had terminated because Appellant failed to offer evidence that the Lease was capable of producing minerals in paying quantities before the December 27, 2004, deadline established by the Regional Director. Both the Regional Director's October 28, 2004, letter and the Superintendent's November 9, 2004, letter clearly advised Appellant that it had 60 days provide the Agency with information that the lease is capable of producing minerals in paying quantities; the Superintendent's letter specifically informed Appellant that the deadline for Appellant's response was December 27, 2004. Appellant responded

4 days before the deadline by asserting, without more, that Well No. 509 had been “returned to production.” Appellant did not offer any statement, much less actual information or evidence, to explain how the fact Well No. 509 had been returned to production established that the Lease was capable of producing minerals in paying quantities nor did Appellant offer any other explanation or assurance that established the Lease’s ability to produce minerals.

On appeal to the Regional Director in April of 2005, 4 months after the deadline had expired, Appellant offered evidence for the first time — in the form of the affidavit of its President, electricity bills, and monthly reports — to show that the Lease had produced approximately 47.32 barrels of oil between December 24, 2004, and March 31, 2005. Appellant now argues on appeal to the Board that the Regional Director arbitrarily ignored that evidence. However, the time for Appellant to present evidence that the Lease was capable of producing minerals in paying quantities was prior to the December 27, 2004, deadline.⁴ Appellant was granted the opportunity to show that the Lease was capable of producing oil in paying quantities but declined to do so.

We reject Appellant’s argument that the Regional Director’s October 28 letter was unclear about the nature of the information to be produced and whether Appellant was required to provide evidence that the Lease was “capable of producing” or actually producing minerals. Appellant made no attempt to provide information or evidence relating either to the Lease’s actual production or ability to produce. Appellant itself identified tests that it contends would show whether a well or leasehold is capable of producing minerals and, presumably in compliance with the lessee’s obligations under 25 C.F.R. § 226.13(b), the record contains reports generated by Appellant in 2005 that record the production of the well.⁵ However, Appellant made no effort to provide the results of any such tests to BIA or to provide any monthly reports that demonstrated production after April 2004. In short, Appellant’s bare assertion that Well No. 509 was

⁴ Appellant does not argue that the 60-day deadline set by BIA was unreasonable and any such argument would, in any event, be untimely. The Regional Director’s October 28, 2004, letter, which set out the deadline, included appeal rights that were not exercised by Appellant. Therefore, that decision — requiring information that the leasehold is capable of producing oil and/or gas in paying quantities within 60 days — became final for the Department. *See* 25 C.F.R. § 2.6.

⁵ Subsection 226.13(b) requires lessees to furnish certified monthly reports covering all operations, whether there has been production or not.

“returned to production” did not satisfy its burden of producing information that the Lease was capable of producing minerals in paying quantities.

Finally, the Agency’s January 4, 2005, inspection of the leasehold provided additional support for the Regional Director’s conclusion that the Lease had terminated. The Agency engineer inspected Well No. 509 and noted that the fluid level in the tank had not changed from the fluid level measured in November, despite Appellant’s assertion that Well No. 509 had returned to production. Thus, the Agency’s inspection did not reveal any evidence that Well No. 509 was producing minerals. We reject Appellant’s assertion that the Agency was required to run a series of tests to determine whether the well was capable of production. Appellant has cited to no authority for the proposition that BIA was required to complete any such testing or inspection. Rather, it was Appellant’s burden to provide information within 60 days that the well was capable of producing, not the Agency’s.

We conclude that the Regional Director properly concluded that the Lease had terminated because Appellant failed to provide information by December 27, 2004, that the Lease was capable of producing oil in paying quantities, particularly in light of the fact that the Agency’s inspection revealed no evidence of production.

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 Board affirms the Regional Director’s November 8, 2005, decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge