

CROSS CREEK CORP.

IBLA 92-541

Decided September 29, 1994

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, affirming order to plug and abandon wells on Indian oil and gas lease. SDR-92-16.

Affirmed.

1. Board of Land Appeals--Bureau of Indian Affairs: Generally--Bureau of Land Management--Indians: Mineral Resources: Oil and Gas: Generally--Res Judicata--Rules of Practice: Appeals: Jurisdiction

Where a decision by BIA declaring that an Indian oil and gas lease held in its extended term by production terminated for lack of production is not appealed, review of that termination is barred by the doctrine of administrative finality. Further, neither BLM nor the Board of Land Appeals has jurisdiction to review BIA's decision, which is committed entirely to its authority.

2. Bureau of Indian Affairs: Generally--Bureau of Land Management--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Assignments and Transfers--Oil and Gas Leases: Termination

Where an Indian oil and gas lease held by production has been deemed by BIA to have terminated due to lack of production, BLM properly requires the lessee of record to plug and abandon wells on the leased land.

APPEARANCES: Earl P. Enos, Esq., Duncan, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Cross Creek Corporation (Cross Creek) has appealed from the April 22, 1992, decision of the New Mexico State Office, Bureau of Land Management (BLM), affirming a February 12, 1992, order by the Farmington (New Mexico) Resource Area (FRA), BLM, requiring it to plug and abandon five wells located on Indian oil and gas lease 14-20-603-716. 1/

1/ The five wells are within the Teec Nos Pos Field, situated in Apache County, Arizona, within the Navajo Indian Reservation.

At all relevant times, Cross Creek was the lessee of record under the lease, by virtue of a 1987 assignment of record title from BHP Petroleum (Americas), Inc., which was approved effective January 25, 1990, by the Bureau of Indian Affairs (BIA). ^{2/} Sometime in late 1989 or early 1990, Cross Creek sought BIA's approval of a February 15, 1989, assignment of record title to Dry Mesa Corporation (Dry Mesa), its designated operator. However, BIA never approved the assignment, despite the August 29, 1989, favorable recommendation of the lessor, Navajo Tribe of Indians (Tribe).

The facts, which are not disputed by Cross Creek, are as follows. Throughout the relevant time period, the subject lease, which had originally been issued effective December 22, 1954, was in its extended term, and thus held by production. That is, the lease continued so long as oil and/or gas was being produced in paying quantities. *See* 25 U.S.C. § 396a (1988); 25 CFR 211.10. Where a lease is held by production, the lease terminates by operation of law if production ceases during the extended term. *See Mobil Oil Corp. v. Albuquerque Area Director, BIA*, 18 IBIA 315, 331, 97 I.D. 215, 223 (1990).

For some time prior to the FRA's February 1992 order, none of the five wells on the leased lands was producing oil or gas (Decision at 1; *see also* Memorandum from the Chief, Branch of Mineral Resources, FRA, to BIA, dated Apr. 17, 1990). ^{3/} This was despite the fact that, by letter dated June 19, 1991, BIA had required Cross Creek to "commence production activities" within 30 days, test each well within 5 months, and either produce or plug and abandon each well, and thereafter to "diligently operate all active wells." In addition, BIA had warned that "[d]isruption of lease production for any reason without prior approval of the appropriate regulatory agencies will result in automatic termination of the lease without any further notification to the lessee." *Id.*

BIA notified Cross Creek by letter dated November 27, 1991, that the lease had "expired by its own terms effective November 19, 1991, for failure to produce the wells" (Decision at 1; *see also* Letter to BIA from the Director, Minerals Department, The Navajo Nation, dated Oct. 30, 1991). So far as we are aware, no appeal was taken by Cross Creek from BIA's November 1991 notification of termination of the lease.

^{2/} Jurisdiction regarding lease matters, including the approval of any assignment of record title to the lease, resided with BIA. *See* 25 U.S.C. §§ 1a, 2, 396a (1988); 25 CFR Part 211.

^{3/} The Board has obtained the five well files, which indicate that one of the wells is a salt water disposal well (No. 2) and the other four wells are, according to Dry Mesa, "played out" (Letter to BLM from Dry Mesa, dated Sept. 4, 1990). In particular, Dry Mesa reports that well Nos. 4 and 5 have been shut in since 1985, well No. 3 was producing less than three barrels of oil when it was shut in in 1987, and well No. 1 produced between three and five barrels of oil when it was last produced in 1987-88. *See* "Teec Nos Pos Proposed Plugging Program," attached to Letter to BLM from Dry Mesa, dated Sept. 4, 1990.

The FRA subsequently issued its February 1992 order, requiring Cross Creek to plug and abandon the wells on the subject lease. ^{4/} On March 13, 1992, Cross Creek requested the BLM State Director to review that order, pursuant to 43 CFR 3165.3(b). Cross Creek contended that Dry Mesa, not Cross Creek, was liable for plugging and abandoning the wells since, although BIA had not approved the pending assignment of the lease to Dry Mesa, both BIA and BLM had recognized Dry Mesa as the de facto lessee. Alternatively, Cross Creek asserted that, if it were properly required to plug and abandon the wells, it should first have a reasonable opportunity to return the lease to production.

In its April 1992 decision, the State Office concluded that, in the absence of BIA's approval of the pending assignment of record title to Dry Mesa, Cross Creek remained ultimately liable for compliance with the terms of the lease, including the requirement to plug and abandon wells on the lease following its termination on November 19, 1991. Thus, it affirmed the FRA's February 1992 order requiring Cross Creek to plug and abandon the wells. Cross Creek has appealed from that decision.

In its statement of reasons for appeal (SOR), appellant repeats its contentions that BLM improperly required it to plug and abandon the wells and that (in any case), before doing so, appellant should have a reasonable opportunity to return the lease to production.

[1] We start with appellant's second contention, which can be viewed as an attack on the validity of BIA's decision declaring that the lease terminated, since appellant plainly cannot have an opportunity to produce from the lease if the lease was properly declared terminated. That is, the only way that appellant's argument could prevail is if BIA had improperly determined that the lease had terminated, thus preserving lessee's rights to further produce from the lease.

So far as we are aware, appellant did not seek administrative review of BIA's decision that the lease had terminated. In the absence of a timely appeal, the propriety of that termination is not properly subject to further review in the Department, but is barred by the doctrine of administrative finality. See Daymon D. Gililand, 108 IBLA 144, 147 (1989).

^{4/} The February 1992 order was preceded by other letters, dated Oct. 21, and 23, 1991, in which the FRA noted that the wells had long been approved for plugging and abandonment as a result of sundry notices approved by BLM on Oct. 3, 1990. The FRA required Dry Mesa to notify it, within 30 days, whether that had occurred and either submit the appropriate report or indicate when such activity was scheduled to be performed. Noting that Dry Mesa had failed to comply, BLM issued its February 1992 order, which specifically required Cross Creek, as the lessee of record, to notify BLM when the wells were scheduled to be plugged. The allowed time for compliance with that notice was 30 days from receipt of the letter.

In any event, BLM lacked authority to review questions regarding the termination noted by BIA, since the leased lands are tribal lands situated within an Indian reservation. See 43 CFR 3100.0-3(a). Rather, that matter was committed entirely to BIA. See 25 U.S.C. §§ 1a, 2, 396a (1988); 25 CFR Part 211. Thus, any questions regarding termination were not properly presented to BLM in appellant's March 1992 SDR request. By the same token, this Board may not adjudicate any question regarding lease termination, as we have no jurisdiction to review the BIA decision regarding lease termination. See 25 CFR 2.3 and 2.4; e.g., Mobil Oil Corp. v. Albuquerque Area Director, BIA, 18 IBIA at 332 n.14, 97 I.D. at 224 n.14. We, therefore, do not reach questions regarding whether BIA properly declared the lease terminated. 5/

[2] The authority to require that the wells be plugged and abandoned resides with BLM. 43 CFR 3160.0-1, 3160.0-2, 3161.1(a), 3161.2, and 3162.3-4; Everett Hall, 101 IBLA 362 (1988). BLM was authorized, in these circumstances, to require that any wells that had already been drilled be plugged and abandoned. Daymon D. Gililand, supra at 147. Appellant does not dispute that authority, but argues that BLM improperly required it, rather than Dry Mesa, to plug and abandon the wells.

Absent BIA's approval of the assignment of record title from appellant to Dry Mesa, appellant, as holder of record title, remained ultimately liable for compliance with the terms of the lease. 43 CFR 3106.7-2. 6/

BIA correctly notified appellant that, in the event of termination of the lease, it would be appellant's responsibility "to plug and abandon all wells on the lease" (Letter to Appellant from Acting Area Director, Navajo Area Office, BIA, dated June 19, 1991). Further, it is established that the lessee of record's liability extends after expiration of the lease. See Glen Morgan, 122 IBLA 36, 44 (1992).

Appellant contends that, as a result of certain actions by BLM and BIA, Dry Mesa became the "de facto lessee" and was therefore liable under the

5/ We do note that, as stated above, BIA's authority to declare a lease held by production terminated by operation of law when production ceases is well established. See Mobil Oil Corp. v. Albuquerque Area Director, BIA, 18 IBIA at 331, 97 I.D. at 223.

It is also established that BIA was not required to give appellant notice or an opportunity to reestablish production prior to termination: "Unlike 30 U.S.C. § [226(f)], the [Indian Mineral Leasing Act] does not require that notice be given before leases may expire by their own terms." 18 IBIA at 332, 97 I.D. at 224.

6/ BIA is the designated representative for management of Indian leases. An applicable regulation requires approval of assignments by the Secretary, and his designated representative for Indian leases is BIA. See 25 CFR 211.26(a). We express no opinion on whether BIA should have approved the pending assignment of record title to the lease from appellant to Dry Mesa prior to the November 19, 1991, expiration of the lease.

lease. 7/ Appellant also notes that both BIA and BLM acknowledged Dry Mesa to be the operator under the lease and knowingly permitted it to conduct operations, including producing and selling oil and gas from the lease (see Letter to State Director, dated Mar. 9, 1992, at 2). 8/ Nothing that BIA and BLM permitted Dry Mesa to do was inconsistent with its role as operator under the lease. At the same time, BLM and BIA did nothing to indicate that Dry Mesa held record title. 9/

The assignment of operating rights under a lease has long been distinguished from the assignment of record title to the lease. 10/ Harry L. Bigbee, 2 IBLA 23, 25, 27 (1971). Thus, although BIA and BLM may recognize that operating rights have been assigned to a particular party and allow those rights to be exercised (even going so far as to "approve" the

7/ Appellant also raises certain arguments regarding another Indian oil and gas lease, 14-20-603-4190, principally that it has been denied the benefits of that lease (see Letter to State Director, dated Mar. 9, 1992, at 2, 3). That lease was not the subject of BLM's April 1992 decision, and thus is not properly before the Board.

8/ Appellant also states that, when deciding to terminate the lease, BIA notified Dry Mesa, rather than appellant (see Letter to State Director, dated Mar. 9, 1992, at 2). It appears that BIA's Nov. 27, 1991, notification of termination was sent to appellant (see Decision at 1). We also attribute no significance to any notice that might have also been sent to Dry Mesa, who was the operator under the lease.

9/ Appellant states that, by assertedly permitting Dry Mesa to act as the lessee, BIA and BLM acted in violation of their regulations (Letter to State Director, dated Mar. 9, 1992, at 4). No regulations are cited. We find no substance to this charge.

Appellant indicates that no bond was required of Dry Mesa in connection with its operations on the lease (see id. at 2). The record indicates that appellant had, prior to acquiring record title to the lease, properly submitted a surety bond that covered operations on the lease (see Letter to Appellant from Acting Assistant Area Director, Navajo Area Office, BIA, dated Oct. 25, 1988). Since Dry Mesa was not the lessee of record,

it was not required to submit a bond to conduct operations. See 25 U.S.C. § 396c (1988); 25 CFR 211.6(a).

The fact that Dry Mesa paid no bond actually supports the conclusion that Dry Mesa was never the lessee of record. The fact that appellant did pay the bond shows that it was the lessee of record.

10/ In particular, it appears that the assignment of operating rights does not require BIA approval. Appellant has provided a copy of a Sept. 30, 1988, letter from BIA, which states that, as of August 1987, it will no longer process assignments of operating rights. The assignment of record title does require BIA approval. See 25 U.S.C. §§ 1a, 2, 396a (1988); 25 CFR 211.26(a).

assignment of operating rights), that action neither constitutes recognition that the party is the record title holder nor effects an approval of the assignment of record title to that party. See id. at 27.

The assignment of record title requires BIA approval. See 25 U.S.C. §§ 1a, 2, 396a (1988); 25 CFR 211.26(a). Since the assignment of record title, unlike the assignment of operating rights, gives rise to a contractual relationship between the lessor and the lessee's assignee, in order to effect a change in the holder of record title, the agency must affirmatively approve an assignment of record title, in order to bring the assignee under the prevailing terms of the contract with the lessor. See Alaska Statebank, 111 IBLA 300, 308 (1989). ^{11/} As appellant acknowledges, BIA never did so (see Letter to State Director, dated Mar. 9, 1992, at 2). Thus, appellant remained liable under the contractual terms of the lease and regulation.

Appellant also argues that the liability for plugging and abandoning a well stems only from operations conducted on a leasehold and that, since it has not undertaken any operations since January 1989, it cannot be made to plug and abandon (see Letter to State Director, dated Mar. 9, 1992, at 4). We disagree. It is established that, regardless of whether the lessee of record drilled or reworked the wells or produced from them, it is still ultimately responsible for plugging and abandoning them as the lessee of record, even if it did not profit from the earlier production. 43 CFR 3106.7-2; see Ralph G. Abbott, 115 IBLA 343, 346 (1990).

BLM and BIA were not required to wait until appellant and Dry Mesa sorted out their differences before taking action under the lease. Rather, they were entitled to look to appellant, as the lessee of record, for compliance with the production requirements of its lease, and, in the absence of any production, for compliance with the requirement to plug and abandon wells upon the termination of the lease. We, therefore, conclude that the State Office properly affirmed the FRA's 1992 order requiring appellant to plug and abandon the wells on Indian oil and gas lease 14-20-603-716. ^{12/}

^{11/} As we held in Alaska Statebank, supra, this procedure protects the government, by allowing it to determine whether the assignee is acceptable as a lessee.

^{12/} We also note that appellant is under the erroneous impression that BLM was prevented from requiring Dry Mesa to plug and abandon the wells, having failed to obtain a bond from it, and as a result proceeded against appellant (see Letter to State Director, dated Mar. 9, 1992, at 2). It would appear not only that BLM could have required Dry Mesa, as the designated operator, to plug and abandon the wells (see Glen Morgan, supra at 48; Ralph G. Abbott, supra at 346), but that it actually sought to do so. In any event, appellant is not absolved from its obligations as lessee of record because BLM might also have required Dry Mesa to comply.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

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