



INTERNATIONAL PETROLEUM AND EXPLORATION OPERATING CORP.

178 IBLA 1

Decided June 30, 2009



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

INTERNATIONAL PETROLEUM AND EXPLORATION OPERATING CORP.

IBLA 2008-120

Decided June 30, 2009

Appeal from a decision of the Bureau of Land Management rejecting a request to post a bond pursuant to the Stock Raising Homestead Act. WYW 131797.

Affirmed.

1. Mineral Leasing Act: Generally--Oil and Gas Leases: Stock Raising Homestead Act of 1916--Oil and Gas Leases: Units and Cooperative Agreements--Oil and Gas Leases: Unitization--Patents of Public Lands: Reservations

The surface access granted by the Stock Raising Homestead Act (SHRA) is limited to the right to enter and re-enter and occupy so much of the patented surface as may be necessary to prospect for and remove the minerals severed from the surface estate when title was conveyed. The fact that the reserved mineral estate is included in an exploratory unit where no oil or gas has been discovered does not independently create a right to burden SRHA-patented lands with uses that apparently will benefit only operations to discover or exploit minerals located on other properties within the exploratory unit. A BLM decision declining a request to post a bond under the SRHA is properly affirmed where there has been no showing that the access sought is for the purpose of prospecting for or removing minerals from the mineral estate reserved under the SRHA patent.

APPEARANCES: Thomas F. Reese, Esq., and Orintha E. Karns, Esq., Casper, Wyoming, for appellant; Philip C. Lowe, Esq., Office of the Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

International Petroleum and Exploration Operating Corporation (IPEOC) appeals the February 5, 2008, decision letter issued by the Lander (Wyoming) Field Office, Bureau of Land Management (BLM), advising that IPEOC could not post a bond to cover its proposed use of lands to complete an Application for Permit to Drill (APD) an exploratory gas well.¹ Specifically, IPEOC appeals BLM's determination that the Stock Raising Homestead Act (SRHA) does not authorize the use of a privately-owned road on SRHA-patented lands for the purpose of securing access to unitized lands that do not include the patented tract, because the right of access afforded by the SRHA relates only to the development of the mineral estate underlying the patented lands. For the reasons stated below, we affirm.

Background

IPEOC is the unit operator of the Found Soldier Federal exploratory unit (Unit) pursuant to the Unit Agreement executed by the United States, Wyoming, and private parties for joint operations in the exploration and development of their oil and gas leases in Fremont County, Wyoming. Formed on February 27, 2004, and approved by BLM on March 24, 2004, the Unit encompasses 24,135.02 acres, of which 21,609.51 acres (89.54 percent) are Federal lands, 1,920.00 acres (7.96 percent) are State lands, and 605.51 acres (2.50 percent) are patented lands. Statement of Reasons (SOR), App. A, Unit Agreement. IPEOC's Federal Well #1 is the Found Soldier Unit's test well for the unproven unit area.²

¹ The letter is not captioned as a decision, nor does the body of the letter plainly state it is a decision or include the standard appeals/stay petition paragraph. Instead, the letter states that "[a] person contesting a decision shall request a State Director review" within 20 days of receiving the BLM Authorized Officer's decision. Decision at 2. A "decision" adjudicates the rights of the parties in a given factual context. See *Blackwood and Nichols*, 139 IBLA 227, 229 (1997); see also *Joe Trow*, 119 IBLA 388, 392 (1991), and cases cited. Accordingly, the letter constitutes an appealable decision. 43 C.F.R. § 4.410(a); see *Geo-Energy Partners - 1983 Ltd.*, 170 IBLA 99, 119 (2006). Although the APD, of which the road access is a part, was not rejected, it is clear that BLM will not approve it if IPEOC's access plan remains as submitted.

² IPEOC first submitted a Notice of Staking (NOS) for the Green Mountain Federal #1 Well on May 21, 2003. The proposed well site was in a remote portion of Green Mountain in a designated Area of Critical Environmental Concern, and the company withdrew its NOS. On June 20, 2003, IPEOC submitted a revised NOS for a site in sec. 35, NE $\frac{1}{4}$ NE $\frac{1}{4}$, T. 28 N., R. 91 W., 6th Prime Meridian (6th P.M.), Fremont County, Wyoming. IPEOC submitted its APD on Aug. 22, 2003, but various issues

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The regulation at 43 C.F.R. § 3162.3-1(c) requires a unit operator to file an APD with BLM before any unit operation or production occurs. Among other things, the APD must include a Surface Use Plan of Operations that contains information regarding access to the well and facilities identified in the APD. IPEOC planned to use the existing roads to reach the well location, acquiring the requisite rights-of-way (ROW) over BLM-administered roads. *See* ROW WYW158056. A portion of the proposed access route is the Big Eagle Haul road, which is a private road on N $\frac{1}{2}$ sec. 11, T. 27 N., R. 92 W., 6th P.M., owned by Kennecott Uranium Company/Rio Tinto Energy America (Kennecott).

Kennecott's title to those lands is derived from a patent issued pursuant to the SRHA of 1916, 43 U.S.C. §§ 291-301 (1970), repealed in part by section 702 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, Title VII, § 702, 90 Stat. 2787 (Oct. 21, 1976). Patents issued under the SRHA conveyed the surface estate only; "all the coal and other minerals . . . together with the right to prospect for, mine, and remove the same," were reserved to the United States, creating a "split estate" in such lands, where the surface is privately owned and the reserved minerals are subject to disposal under the public land laws.³ 43 U.S.C. § 299(a) (2006); *see also* Patent 1012082 (Feb. 9, 1928). Consequently, Kennecott owns the surface estate and IPEOC and EnCana Energy lease the Federal mineral estate embraced by that patent.⁴

IPEOC and Kennecott discussed a surface use agreement. Kennecott proposed a bond totaling \$6.225 million dollars to maintain not only the Big Eagle Haul Road, but also the public roads lying to the east and west of Kennecott's property. *See* Memorandum from IPEOC to BLM dated May 23, 2007. Finding the bond excessive, IPEOC submitted an alternate route to BLM which would bypass Kennecott's private road and would require 3.4 miles of new road on adjacent public lands. *See* IPEOC "Proposed Access Road Reroute Green Mountain Fed. #1" dated July 13, 2007. IPEOC contracted for an investigation of the proposed new access road. However, a BLM file search revealed that previous inventories had recorded

² (...continued)

and deficiencies required IPEOC to resubmit the APD on Sept. 8, 2003, Jan. 21, 2004, and Nov. 1, 2007.

³ For an in-depth discussion regarding split estates, *see Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 42-47 (1983) (determining that gravel is not part of the surface estate, but is included in the reserved mineral estate).

⁴ EnCana Energy is listed on Exhibit "B" of the Unit Agreement as a working interest owner of unitized leases on the N $\frac{1}{2}$ NW $\frac{1}{4}$ and the SE $\frac{1}{4}$ NW $\frac{1}{4}$ of sec. 11, T. 27 N., R. 92 W., 6th P.M. IPEOC holds unitized leases on the SW $\frac{1}{4}$ NW $\frac{1}{4}$ and the entire NW $\frac{1}{4}$ sec. 11.

the presence of cultural sites in the area, most of which are considered eligible for inclusion in the National Register of Historic Sites. *See* email from IPEOC to BLM dated Oct. 16, 2007; *see also* email from Chris Krassin, BLM, to Travis Bargsten, Physical Scientist, BLM, Wyoming State Office, dated Jan. 24, 2008. The alternative route therefore was eliminated from consideration because of the significant cultural damage that road construction would cause.⁵

IPEOC wrote to BLM regarding access over Kennecott's private road:

Considering that these lands were patented into private ownership under the Stock Raising Homestead Act and that all minerals were reserved to the United States, . . . IPEOC clearly has the right to use the road crossing the N½ of Section 11 by virtue of the Found Soldier Unit and the fact that these lands are included in and the federal minerals committed to the subject unit - which becomes the lease boundary for unit operations. Pursuant to 43 CFR 3814,^[6] we have the right of re-entry to the surface and absent a negotiated agreement for the use of the road, we can bond our way across these private lands under the provisions of 43 CFR 3814 - which is exactly what [IPEOC] intend[s] to do.

Email from IPEOC to BLM dated Oct. 31, 2007.

On November 1, 2007, IPEOC finalized its APD and, in accordance with the view expressed in its email message of October 31, 2007, proposed to use the Big Eagle Haul Road, but with no evidence that it had come to an agreement with Kennecott to do so. BLM considered that email communication to be a request for a bond approval pursuant to 43 C.F.R. § 3814.1(c). As stated, BLM concluded that

⁵ Krassin is an engineer with BLM's Lander Field Office. He explains that he spent 6 months looking for an alternative route We did come up with a route south of the existing road, which was barely acceptable from a[n] engineering perspective. The problem with the route was when the archaeologist conducted the survey they found almost contiguous buried cultural resources along much of the [proposed] road. The cost and time to mitigate impact to the resources would again be cost prohibitive and would take months if not years to complete the recovery according to the archaeologist. As such[,] this was mostly dismissed as an option."

Email from IPEOC to BLM dated Oct. 16, 2007; *see also* email from Krassin to Bargsten, dated Jan. 24, 2008.

⁶ The regulation at 43 C.F.R. § 3814.1 mirrors the language of the SRHA.

IPEOC could not invoke the rights reserved to the United States under the SRHA to use Kennecott's Big Eagle Haul Road to traverse Kennecott's lands over its objection and despite the lack of an agreement. *See* Decision at 1. Specifically, BLM determined that the SRHA

provides that minerals under patented lands be reserved to the United States and qualified persons holding the lease for these minerals have the right to locate and enter at all times for prospecting and removal of those minerals. For entry, the holder of the lease first must make a good-faith attempt to secure a written consent or waiver from the owner of the private land. If a negotiated agreement cannot be reached, a sufficient bond to the United States for use and benefit of the owner can be executed to allow entry by the holder of the lease to extract the minerals from the patented property.

Although it is true that this tract of land is within the found Soldier Unit and that . . . Federal minerals are committed to the Unit, [IPEOC] contends that IPEOC has the right of entry to use the surface, and absent a negotiated agreement, IPEOC can bond access across the patented private surface. However, this is not true, according to [43 C.F.R. § 3814.1,] — which refers to the disposal of reserved minerals under the SRHA and states “. . . *any person qualified to locate and enter the coal or other mineral deposits, or having the right to mine and remove the same . . . shall have the right at all times to enter upon the lands entered or patented under the Act, **for the purpose of prospecting for the coal or other mineral therein.***” Therefore, the right of entry is provided solely for developing the minerals within the patented lands; right of entry is not provided for access to develop other non-SHRA parcels regardless of whether the minerals under the non-SRHA parcels are committed to the Unit. . . .

Decision at 1-2 (italicized and bold emphasis in the original).

On March 5, 2008, IPEOC requested State Director Review (SDR) of the Lander Field Office's decision, as BLM's decision had instructed. The State Director denied SDR on the ground that 43 C.F.R. Subpart 3814 does not provide for SDR. *See* SDR Decision at 2.⁷ This appeal followed.

⁷ On Apr. 15, 2008, IPEOC appealed the denial of SDR. That appeal was docketed as IBLA 2008-139. IPEOC later moved to withdraw that appeal, a request the Board granted on May 22, 2008. BLM properly notes in its Answer that it addresses only the question of whether bonding under the SHRA is available in the circumstances

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Analysis

The SRHA, *as amended*, states:

All . . . patents issued . . . shall be subject to and contain a reservation to the United States of all the coal and other *minerals in the lands so entered and patented*, together with the right to prospect for, mine, and remove the same. The . . . *mineral deposits in such lands* shall be subject to disposal by the United States. . . . Any person . . . having the right to mine and remove the same under the laws of the United States, shall have the right at all times to *enter upon the lands entered or patented . . .*, for the purpose of prospecting for coal or other *mineral[s] therein*, provided he shall not injure, damage, or destroy the permanent improvements of the entryman or patentee, and shall be liable to and shall compensate the entryman or patentee for all damages to the crops *on such lands* by reason of such prospecting. Any person who has acquired from the United States . . . the right to mine and remove the same, may reenter and occupy so much of the *surface thereof* as may be required *for all purposes reasonably incident to the mining or removal of the . . . minerals*, first upon securing the written consent or waiver of the homestead entryman or patentee; second, upon payment of the damages to crops or other tangible improvements to the owner thereof; or, third, in lieu of either of the foregoing provisions, upon the execution of a good and sufficient bond or undertaking to the United States for the use and benefit of the entryman or owner of the land, to secure the payment of such damages to the crops or tangible improvements of the entryman or owner.

43 U.S.C. § 299(a) (2006) (emphasis added).⁸ As the emphasized language shows, the reserved right to enter and use the surface of SRHA-patented lands relates to exploitation of the mineral estate severed from the surface estate when the United States conveyed title.

⁷ (...continued)

presented in this appeal.

⁸ While this statute was recodified and amended in 1993, its substance remained unchanged. Congress added § 299(b)-(p), in Pub. L. No. 103-23, 107 Stat. 60, 65, on Apr. 16, 1993, for the purpose of adding protections for surface owners. These added protections apply to minerals not subject to disposition under, *inter alia*, the Mineral Leasing Act (MLA), 30 U.S.C. §§ 181-287 (2006). See 43 U.S.C. § 299(p)(1) (2006). Because oil and gas are leasable under the MLA, 30 U.S.C. § 226 (2006), the only portion of the SRHA relevant to this appeal is 43 U.S.C. § 299(a) (2006).

IPEOC nonetheless argues that “where a lease is . . . unitized with other leases, the effect is to combine several interests and leases to permit field wide production of the minerals without regard to separate ownership.” SOR at 6-7. Relying on the MLA, IPEOC further contends that “[s]ince production from any portion of a unit is production from all of the unit, then the surface of any committed parcel can be used to support that production.” *Id.* at 6. Therefore, IPEOC concludes, “[t]he operator of a [F]ederal unit is permitted to post a bond pursuant to 43 C.F.R. § 3814.1 in order to use the patented surface of SRHA land within a [F]ederal unit and committed thereto as reasonably necessary to develop oil and gas in the unit.” *Id.* at 2.

BLM responds that the SRHA’s bonding authority cannot be used to establish a right of access over patented lands to reach its drill site on the unitized leases. Answer at 5-7. BLM further contends that “it does not and cannot guarantee surface access – absent surface owner consent or a regulatory mechanism providing for access.” *Id.* at 7. Nor, it argues, can a unitization agreement provide access rights that the lessee did not possess at the time the unit was formed. *Id.* at 11.

IPEOC’s contrary reasoning is not without support. *See, e.g., Miller v. N.R.M. Petroleum Corp.*, 570 F. Supp. 28, 29, 30 (D.C. W. Va. 1983) (noting that new State pooling and unitization statute “contemplates surface disturbance on adjacent tracts within a drilling unit or pool,” in contrast to the prior rule that the lessee’s right to use the surface in developing the premises “does not allow the use of the surface tracts in connection with production of minerals from other tracts of land.”); *Kysar v. Amoco Production Co.*, 93 P.3d 1272, 1273 (N.M. 2004) (answering questions certified by the U.S. 10th Circuit Court of Appeals in a dispute between private parties that under New Mexico law, “a communitization agreement entered into with the permission of the fee owner supports an implied surface access right over land subject to that agreement but not over land that is not subject to the agreement,” meaning by the phrase *subject to the agreement* “the property actually committed to a joint or pooled operation by inclusion within the relevant unit.”); *Property Owners of Leisure Land, Inc. v. Woolf & Magee, Inc.*, 786 S.W.2d 757, 760 (Ct. App. Tx. 1990) (surface owner of lots in a residential subdivision may be subject to subdivision restrictions imposed after severance of the surface and mineral estates, but an owner’s right to use surface for emergency evacuation route to benefit gas well on other lands included in a unit that also included the severed mineral estate was derived not from surface rights, but its mineral rights); *Delhi Gas Pipeline Corp. v. Dixon*, 737 S.W.2d 96, 98 (Tex. App. 1987) (where lessee had a right to grant a pipeline easement across lessee’s drilling or production unit, which included the mineral estate beneath defendant’s tract, and the pipeline transported only gas produced from the unit across defendant’s surface, as lessee’s assignee the pipeline had the “right to use as much of the surface estate as is reasonably necessary to produce oil and gas from a well located on a production unite with which the tract has been unitized.”); *Nelson v. Texaco Inc.*, 525 P.2d 1263, 1266 (Okla. Ct. App.

1974) (in a case where surface owner owned some of the oil and gas rights unitized by her lessee, the “Unit Operator has the right to use any surface within the unit for the purpose of efficiently carrying out the approved unit plan, so long as such use is reasonable and not unduly burdensome to any particular surface area.”).

Despite the apparent appeal of IPEOC’s reasoning, the question before us is whether anything in the statute that authorized the conveyance and mineral reservation also authorizes use of the patented surface in the circumstances of this case. Clearly, it does not. The SRHA reserves the mineral with a right of ingress and egress only “for purposes of developing and producing minerals *on that patent.*” *2 Law of Federal Oil and Gas Leases* § 22.10[1], Rocky Mountain Mineral Law Foundation (2008) (emphasis added, internal footnote omitted); *see also* Onshore Oil and Gas Order No. 1, 72 Fed. Reg. 10308, 10324 (Mar. 7, 2007) (“The Federal mineral estate is the dominant estate and the BLM and its lessees may enter the lands to perform such operations as are necessary to develop the minerals.”). “A lessee has an absolute right of entry onto its leasehold, so long as the leasehold boundaries are coterminous with the patent that reserved the right.” *2 Law of Federal Oil and Gas Leases* § 22.10[1] (citing *Deborah Reichman*, 173 IBLA 149, 154 (2007)); *see also Susan J. Kayler*, 162 IBLA 245, 257-58 (2004), and cases cited.

There is no similar absolute rule when the lessee must enter upon more than one surface estate within its lease boundaries. *2 Law of Federal Oil and Gas Leases* § 22.10[1]. Where a Federal split estate is involved, the rule is that the statute creating the split estate governs. *See, e.g., Mountain Fuel Supply Co. v. Smith*, 471 F.2d 594, 597 (10th Cir. 1973) (“The statutory authority for issuance of the patents . . . controls the reservation of minerals, and reserves the necessary use of the surface. . . . [D]efendants’ surface may not be used for development and production on lands of others.”); *Bourdieu v. Seaboard Oil Corp.*, 119 P.2d 973 (Cal. Ct. App. 1941) (use of the surface is limited to development of the mineral estate beneath the surface patented under the SRHA and the Agricultural Entry Act of July 17, 1914, and does not include the right to transport production from the mineral estates underlying adjoining patents), *appeal after remand, Bourdieu v. Seaboard Oil Corp.*, 146 P.2d 256, 258 (Cal. Ct. App. 1944) (“[W]e find no provision in the language of any of the acts here involved which in any way grants the mineral lessee any additional right to the free and uninterrupted use of respondent’s homestead in connection with operations involving an entire [oil and gas] field.”).

[1] The surface access granted by the SRHA is by its terms limited to the right to enter and re-enter and occupy so much of the patented surface as may be necessary to prospect for and remove minerals severed from the surface estate when title was conveyed. The fact that the reserved mineral estate is included in an exploratory unit where no oil or gas has been discovered does not independently create a right to burden SRHA-patented lands with uses that apparently will benefit

only operations to discover or exploit minerals located on other properties contained within the exploratory unit. In this case, there has been no showing that access is sought for the purpose of prospecting for or removing minerals from the mineral estate reserved under the SRHA patent. BLM properly declined IPEOC's request to post a bond under the SRHA.⁹

We affirm BLM's decision holding that the SRHA does not authorize a right of access across SRHA-patented lands to conduct operations on other lands and, accordingly, its bonding provisions cannot be invoked to provide access in such circumstances. See Rocky Mountain Mineral Law Foundation, 4 American Law of Mining § 112.02 (2d ed. 1997).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/
T. Britt Price
Administrative Judge

⁹ As BLM states, it has not undertaken to guarantee access to the unitized leases, and nothing in the lease, the Unit Agreement, the MLA, or BLM's regulations compels a contrary conclusion. Accordingly, where an operator cannot demonstrate that it has secured access to the patented surface or has a right under the SRHA, there is no basis for requiring a bond to secure payment of damages to the surface owner's land and improvements. If and when IPEOC proposes to explore for or exploit the reserved mineral estate severed from Kennecott's land, it can then enter and re-enter and occupy so much of the surface as may reasonably be required for its operations, provided it obtains Kennecott's written consent to or waiver of any damages that may result or reaches an agreement to pay for damages to crops and improvements, or, in lieu of either of those options, posts a "good and sufficient" bond for Kennecott's benefit as required by the SRHA. 43 U.S.C. § 299(a) (2006); 43 C.F.R. § 3814.1; see *Adami Ranch LLC*, 173 IBLA 82, 85-86 (2007); *Richard Rudnick*, 143 IBLA 257, 261 (1998).

I concur:

_____/s/_____
James K. Jackson
Administrative Judge