



INTERIOR BOARD OF INDIAN APPEALS

Jimmy D. Fox, Sr. v. Muskogee Area Director, Bureau of Indian Affairs

18 IBIA 444 (09/21/1990)



United States Department of the Interior

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

JIMMY D. FOX, SR.

v.

MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-80-A

Decided September 21, 1990

Appeal from a decision requiring the plugging of an oil well on an Osage lease.

Affirmed.

1. Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Drilling
25 CFR 226.33 prohibits drilling within 300 feet of the boundary of an Osage oil and gas lease without the written permission of the Osage Agency Superintendent.
2. Bureau of Indian Affairs: Administrative Appeals: Generally

After issuing a decision subject to appeal under 25 CFR Part 2, a Bureau of Indian Affairs official may revoke that decision within the time for filing an appeal, provided no notice of appeal has been filed. Once a notice of appeal has been filed, the original deciding official loses jurisdiction over the matter, and jurisdiction is vested in the official who will decide the appeal.

APPEARANCES: Roland V. Funk, Esq., Tulsa, Oklahoma, for appellant; William E. Haney, Esq., Acting Field Solicitor, U.S. Department of the Interior, Pawhuska, Oklahoma, for appellee; Harvey Payne, Esq., Pawhuska, Oklahoma, for Hoyt C. Glenn.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Jimmy D. Fox, Sr., seeks review of a March 13, 1990, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), requiring appellant to plug a well on an Osage oil mining lease. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

On February 20, 1980, appellant and his son, Jimmy D. Fox, Jr., entered into an oil mining lease, Contract No. 14-20-G06-7575, with the Osage Tribe. The lease was approved on April 1, 1980, and covers the SE $\frac{1}{4}$, sec. 24, T. 21 N., R. 8 E., Indian Base and Meridian, Osage County, Oklahoma.

On June 22, 1981, appellant and his son applied for authority to drill a well (Well No. 30) 660 feet from the north line of the lease (FNL) and 330 feet from the east line (FEL). The application was apparently approved at the Osage Agency, BIA. 1/ The well completion report indicates that Well No. 30 was drilled on June 23 and 24, 1981, at the same location described in the application. This report was signed only by Jimmy D. Fox, Jr.

On February 17, 1983, Jimmy D. Fox, Jr., assigned his 50-percent interest in the lease to Hazel I. Fox.

By letter of February 9, 1988, the Osage Agency Superintendent notified appellant that agency personnel had found Well No. 30 to be located about 800 FNL and 170 FEL. Because of the substantial divergence from the location described in the well completion report, the Superintendent requested appellant to have the well resurveyed. The survey was completed on February 16, 1988, and showed Well No. 30 at 815 FNL and 164 FEL. Thus, the well proved to be in violation of 25 CFR 226.33 and Paragraph 4.D of appellant's lease because it was less than 300 feet from the lease boundary. 2/

Following discovery of the violation, appellant proposed alternative solutions--either that the adjacent lessee, Hoyt C. Glenn, be permitted to drill a well 165 feet from the lease boundary on his side of the line or that he (appellant) plug Well No. 30. By letter of November 1, 1988, Glenn indicated he would be willing for appellant to continue operating the well provided appellant paid him \$62,400 for past and future production, that the well not be drilled any deeper, and no further fracturing be allowed. The Superintendent responded by letter of November 10, 1988, stating:

The request for compensation for oil drained from your property from the subject well is a civil matter and would require

1/ A written notation appears at the top of the application, stating "OK Drlg Permit," followed by initials. However, no signature appears in the space for approval by an Osage Agency official. 25 CFR 226.16 provides in relevant part:

"(b) Lessee shall submit applications on forms to be furnished by the Superintendent and secure his approval before:

"(1) Well drilling, treating, or workover operations are started on the leased premises.
* * * * *

"(c) Lessee shall notify the Superintendent a reasonable time in advance of starting work, of intention to drill, redrill, deepen, plug, or abandon a well."

2/ 25 CFR 226.33 provides:

"Lessee shall not drill within 300 feet of boundary line of leased lands, nor locate any well or tank within 200 feet of any public highway, any established watering place, or any building used as a dwelling, granary, or barn, except with the written permission of the Superintendent." Paragraph 4.D of appellant's lease contains the same prohibition.

settlement by agreement between you and [appellant] or a settlement rendered by the court. If you desire to make a formal request that the well be plugged, the Osage Agency will take immediate action to see that this is accomplished since the well was drilled within 300 feet of your lease line without proper authorization of the Osage Agency. It is requested that you notify our office immediately if you feel that the well is draining your reservoir and you desire that the well be plugged.

By letter of January 26, 1989, Glenn requested that appellant be required to plug the well. On February 7, 1989, the Superintendent directed appellant to cap the well immediately and plug it within 90 days. He informed appellant that he could request a hearing. ^{3/} Appellant filed a notice of appeal on March 8, 1989, and a hearing was held before the Superintendent on April 27, 1989. Glenn was not given notice of the hearing and did not attend.

At the bearing, appellant requested that the Superintendent waive the prohibition of 25 CFR 226.33 and allow him to continue using the well. He alleged that Glenn had been aware prior to drilling of the well that it would be within 300 feet of the lease boundary. Further, appellant's son Steve Fox alleged that Jimmy D. Fox, Jr., had arranged the matter with Glenn without the knowledge of appellant. ^{4/}

On August 2, 1989, the Superintendent issued a decision stating:

This office has determined that while [Well No. 30] is productive, in all likelihood it does not drain the adjoining quarter owned by Mr. Hoyt Glenn. Consequently, you will not be required to plug the well.

As a condition to this decision, you will be required to allow Mr. Glenn to drill a well on his lease the same distance from your lease line if he so desires in the future.

Glenn was sent a copy of this decision; he appealed it and requested a hearing. By letter of August 17, 1989, addressed to both appellant and Glenn, the Superintendent scheduled a hearing for September 14, 1989, and

^{3/} 25 CFR 226.44 provides:

“Any person, firm, or corporation aggrieved by any decision or order issued by or under the authority of the Superintendent, pursuant to the regulations in this part, may file with the Superintendent within 30 days an application for modification or revocation of such decision or order. The Superintendent shall give notice of the time and place and conduct a hearing upon the application within 10 days after its receipt by him. If the applicant is not satisfied with the decision of the Superintendent, an appeal may be taken as provided in 25 CFR Part 2.”

^{4/} Appellant stated at the hearing that Jimmy D. Fox Jr., was now employed by Glenn.

withdrew his August 2 decision pending the conclusion of the hearing. However, no hearing was held. Instead, the Superintendent issued another decision on October 25, 1989, stating:

The [August 2, 1989,] decision to allow use of the well while providing Mr. Glenn the right to drill a well the same distance from [appellant's] lease line was made in an attempt to fairly resolve this unfortunate incident between the two parties. Federal Regulation 25 CFR 226.33, however, clearly forbids drilling a well within 300 ft. of a boundary line of lease premises without the Superintendent's prior approval. The Regulations do not allow latitude for factors such as drainage, therefore you are to cease operation of this well, remove production equipment and proceed to plug subject well within 90 days of the date of this letter.

Appellant appealed this decision to the Area Director, who affirmed it on March 13, 1990, giving as reasons:

1. The regulation under 25 CFR 226.33 clearly states that a lessee shall not drill within 300 feet of a boundary line of leased lands except with written permission of the Superintendent. This document was not in the information furnished to this office.
2. An incorrect drilling report was filed at the Osage Agency by Mr. Jimmy Fox, Jr., on June 22, 1981, showing the location of Well No. 30.
3. An attempt [was made] to resolve this matter by means of a hearing held on April 27, 1989; however, a resolution was not obtained.

(Area Director's Decision at 2).

Appellant's appeal from this decision was received by the Board on April 16, 1990. Appellant, appellee, and Glenn filed briefs.

Discussion and Conclusions

Appellant contends that he has acted in good faith in this matter, that he was unaware of the location of Well No. 30 at the time it was drilled, and that Glenn had agreed to the location with Jimmy D. Fox, Jr. He also contends that the well has done no damage to Glenn's leasehold interest. ^{5/}

^{5/} Appellant notes that animosity has developed between Glenn and himself over the years and that two lawsuits between them are now pending in Oklahoma state court. These are Fox v. Glenn, No. C-88-421, and Glenn v. Fox, No. C-89-43, in the District Court for Osage County. No pleadings from these cases are included in the administrative record. However, a Nov. 29, 1989, memorandum from appellant's attorney describes the cases thus:

Further, appellant contends that he voluntarily stopped production in July 1988 and went to considerable expense to put the well back into production after receiving the Superintendent's August 2, 1989, decision. He argues that the August 2 decision was a "final decision" and that the Superintendent's subsequent revocation of that decision, and the procedures followed in connection with the revocation, were unfair to appellant.

The Area Director argues that 25 CFR 226.33 is an absolute prohibition of drilling within 300 feet of the lease boundary, that the Board has no authority to declare the rule invalid, and that appellant bears the burden of proving error in the Area Director's decision. Glenn adopts the Area Director's brief.

[1] Contrary to the Area Director's flat statement, 25 CFR 226.33 clearly allows the Superintendent to authorize drilling within 300 feet of the lease boundary. ^{6/} However, 25 CFR 226.33 must be read in conjunction with section 226.16, which requires that a lessee obtain the Superintendent's approval prior to drilling a well. Appellant concedes that he did not obtain the Superintendent's prior approval to drill within 300 feet of the lease boundary. Because Well No. 30 was drilled in violation of 25 CFR 226.33, the Superintendent was correct in requiring appellant to plug it.

[2] Appellant argues, however, that the Superintendent's August 2, 1989, decision, which authorized appellant to continue producing from the well, was a final decision which the Superintendent had no authority to

fn. 5 (continued)

"Mr. Hoyt Glenn is accusing [appellant] of intentionally inflicting emotional distress upon Mr. Glenn, conversion of oil interests, interference with oil and gas operations and productions on Mr. Hoyt Glenn's property or lease interests, and draining of oil reserves, and affecting the production capabilities of Mr. Glenn's oil leases. [Appellant] is accusing Mr. Glenn of infliction of emotional distress and damage to land."

^{6/} It appears from the record in this case that the agency has defined the circumstances in which the Superintendent will approve such drilling. A Dec. 18, 1989, memorandum from the Chief, Branch of Minerals, Osage Agency, directed to the Area Office, states:

"[O]ur office has an established policy for the Superintendent to authorize the drilling of a well within 300 ft. of the lease boundary line. The following special instructions' are included on the drilling permit issued by the Osage Agency provided that the lessee meets the criteria stipulated:

"1. The consent from offset lessee for the drilling of this well closer to the line than 300 feet is on file. Therefore, this permit is approved pursuant to 25 CFR 226.33.

"2. The adjoining mineral lease is also owned by the mineral lessee tendering this application and consent for the drilling of this well closer than 300 feet from the lease line is given pursuant to 25 CFR 226.33.

"3. Permission is granted to drill a well within 300 ft. of lease line * * * pursuant to 25 CFR 226.33, because offset acreage is not leased."

revoke. Under 25 CFR 2.6(b), 7/ the Superintendent's decision was not final on August 17, 1989, the day he revoked it, because the time to appeal the decision had not expired. Since the appeal period had not run and no notice of appeal under 25 CFR Part 2 had been filed, the Superintendent had the authority to revoke his decision. 8/

Appellant also contends that he was treated unfairly during the proceedings before the Superintendent. Admittedly, the procedures followed by the Superintendent in this matter were less than ideal. Glenn, who was a known interested party, was not given notice or opportunity to be heard at the initial hearing conducted pursuant to 25 CFR 226.44. 9/ While Glenn was furnished with a copy of the decision that resulted from that hearing, and had an opportunity to request a second hearing, this procedure was unduly protracted and burdensome on all parties. The Board finds, however, that these procedures, while awkward, did not result in any deprivation of appellant's due process rights. His right to due process is, in any event, protected by his right to appeal under 25 CFR Part 2. Cf. Mobil Oil Corp v. Albuquerque Area Director, 18 IBIA 315, 331-33, 97 I.D. 215, 223-24 (1990).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Muskogee Area Director's March 13, 1990, decision is affirmed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge

7/ 25 CFR 2.6(b) provides:

"Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed."

25 CFR 2.9(a) provides that a notice of appeal must be filed within 30 days of the appellant's receipt of the decision appealed from.

8/ If a notice of appeal had been filed, however, the Superintendent would have been divested of his jurisdiction over the matter, and only the Area Director could have acted on it. Cf. Tonkawa Tribe v. Acting Anadarko Area Director, 18 IBIA 370, 371 (1990), and cases cited therein.

9/ 25 CFR 226.44 requires that the Superintendent give notice of a hearing to be conducted pursuant to this section. Implicit in this provision is the requirement that such notice be given to all known interested parties.