



INTERIOR BOARD OF INDIAN APPEALS

Billco Energy v. Acting Albuquerque Area Director, Bureau of Indian Affairs

35 IBIA 1 (04/04/2000)



United States Department of the Interior

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

BILLCO ENERGY

v.

ACTING ALBUQUERQUE AREA DIRECTOR,
BUREAU OF INDIAN AFFAIRS

IBIA 99-39-A

Decided April 4, 2000

Appeal from a determination that two oil and gas leases had expired by their own terms.

Affirmed.

1. Board of Indian Appeals: Generally

The regulations of the Board of Indian Appeals require that, when a brief is filed with the Board, a certificate of service also be filed, showing service of the brief on all interested parties. 43 C.F.R. § 4.311. The Board may decline to consider a brief for which no certificate of service is filed.

2. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Suspensions

Under a 1996 revision of 25 C.F.R. Parts 211 and 212, governing leasing of tribal and allotted lands for mineral development, the Secretary of the Interior is authorized to approve suspension of operations for remedial purposes which are necessary for continued production, to protect the resource, the environment, or for other good reasons. 25 C.F.R. §§ 211.44, 212.44.

3. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration--Oil and Gas Leases: Suspensions

For leases issued under 25 C.F.R. Part 211 or Part 212, the provisions in 25 C.F.R. §§ 211.44 and 212.44 control as to when production on a lease in its extended term may be suspended without subjecting the lease to expiration.

APPEARANCES: Richard T.C. Tully, Esq., Farmington, New Mexico, for Appellant; Tonianne Baca-Green, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Acting Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Billco Energy seeks review of a December 7, 1998, decision of the Acting Albuquerque Area Director, Bureau of Indian Affairs (Area Director; BIA), finding that Jicarilla Tribal Oil and Gas Leases 240 and 241 (Leases 240 and 241) had expired by their own terms. For the reasons discussed below, the Board affirms the Area Director's decision.

Background

Lease 240 was approved by the Area Director on August 26, 1958, with Standard Oil Company of Texas as lessee. The lease originally covered 2,560 acres but now covers only 560 acres. It was assigned to Appellant on July 12, 1991.

Lease 241 was approved by the Area Director on August 25, 1958, with Magnolia Petroleum Company as lessee. It originally covered 2,560 acres and now covers 1,280 acres. The present record title holder for Lease 241 is Taurus Exploration U.S.A. Inc. 1/ Operating rights are held by Appellant and, possibly, Burlington Resources Oil and Gas Company. 2/

Both leases state that they are for "a term of 10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land."

Both leases are in their extended terms. There was no production from either lease during the period January through June, 1998.

On September 8, 1998, the Superintendent, Jicarilla Agency, BIA, notified Appellant that the leases had expired by their own terms. Appellant appealed that determination to the Area Director, who affirmed it on December 7, 1998.

1/ Appellant states that Taurus is now known as Energen Resources Corp.

2/ Documents in the administrative record appear inconsistent as to whether Burlington presently has any part of the operating rights. The Board has required service on Burlington on the assumption that it does.

Discussion and Conclusions

In its opening brief, Appellant contended that the wells on the leases were shut in because of bad roads and severe weather conditions. It also contended that Erwin Elote, a tribal oil and gas inspector, orally authorized the shut-ins.

The Area Director filed an answer brief. Attached to the brief was an unsigned declaration prepared for Elote's signature. A handwritten note on the declaration stated that a signed copy was to follow. However, no signed copy was ever received by the Board.

In its reply brief, Appellant contended that neither the Area Director's brief nor the unsigned declaration should be considered in this appeal. It argued that the brief was untimely and that the declaration was not only untimely but invalid.

Appellant produces nothing which proves the date on which the Area Director received Appellant's opening brief. Its contention of untimeliness is based solely on an estimate of the time the mail would normally take to reach the Area Director. In the absence of any actual evidence of untimeliness, the Board declines to find the Area Director's brief untimely.

[1] The Area Director's brief is, however, subject to rejection because it did not include a certificate of service. The Notice of Docketing in this appeal advised all parties that they were required to file certificates of service with their briefs. See also 43 C.F.R. § 4.311, setting out this requirement.

It is apparent that Appellant, at least, received the Area Director's brief. Even so, the Board concludes that, because of the lack of a certificate of service, the Area Director's brief should not be considered here.

Elote's declaration cannot be considered for the additional reason that it is not signed. No explanation was ever given for the failure to submit a signed copy, but it is at least possible that Elote did not agree with the statements made therein.

The Board returns to Appellant's argument on the merits. Appellant contends that an oil transport truck got stuck at the central tank battery during bad weather in October or November 1997. That event, according to Appellant, led Elote to agree that Appellant's leases should be shut in for the winter months of 1997-98.

In late June 1998, Appellant's owner, Dave Tentler, discussed the leases with Allen Buckingham, a Bureau of Land Management (BLM) employee. In a July 1, 1998, letter to Appellant, Buckingham stated:

Mr. Tentler * * * stated he had talked (telephone) to Mr. Harold TeCube, Bureau of Indian Affairs, some time in January or February 1998, to inform him that [Appellant] was shutting in the wells because of the severe road conditions. The well shut-ins were also mentioned to Mr. Erwin Elote, Jicarilla Oil & Gas Inspector.

BLM sent copies of this letter to BIA and the Jicarilla Apache Tribe. Both TeCube and Elote called Buckingham to dispute the statements made by Tentler. These calls are described in a July 8, 1998, Conversation Record prepared and signed by Buckingham:

[TeCube] called regarding my 1 Jul 98 Ltr to Dave Tentler, * * *. In that ltr to a statement from Dave Tentler that he had called sometime in Jan or Feb 1998 informing [TeCube] that the wells on [Leases] 240 and 241 were to be shut-in because of roads and weather conditions. [TeCube] said he DID NOT talk to Dave Tentler. He did talk to Dave about six weeks ago on a DIFFERENT matter.

* * * * *

* * * Erwin Elote called me (ref his copy of my ltr of 1 Jul 98) to state that Dave Tentler HAD NEVER talked to him about shutting in the wells.

On July 10, 1998, the Superintendent wrote to Appellant, conveying TeCube's denial that Tentler had spoken to him in January or February 1998. No written denial from Elote appears in the record.

In its appeals to the Area Director and the Board, Appellant omits any allegation that Tentler spoke with TeCube or any other BIA employee concerning the shut-ins. Accordingly, Appellant is deemed to have abandoned that contention. Appellant continues to allege that Tentler spoke with Elote about the shut-ins and that Elote authorized them orally. Appellant suggests, but does not specifically argue, that it relied on statements allegedly made by Elote when it shut in the wells.

Appellant also suggests that it relied on Board cases. It cites a 1993 Board decision, Citation Oilfield Supply & Leasing v. Acting Billings Area Director, 23 IBIA 163 (1993), and contends that its shut-ins were authorized under that decision.

In Citation, the Board discussed the general rule concerning expiration of Indian oil and gas leases)) i.e., that a lease expires if, during its extended term, production ceases. The Board went on to hold that a lease does not expire because of a temporary shut-in caused by a mechanical breakdown or accident, as long as the shut-in does not continue beyond the time reasonably necessary to make repairs and resume production.

In Citation and related cases, 3/ the Board looked for guidance to the body of law governing private oil and gas leasing, insofar as so-called "temporary" cessations of production were addressed therein. The Board took this step because, at the time of the Board decisions, BIA's oil and gas leasing regulations had no provision authorizing suspensions of operations or otherwise addressing the question of the circumstances under which production might be suspended without incurring lease expiration.

[2] In July 1996, BIA published a comprehensive revision of the mineral leasing regulations in 25 C.F.R. Parts 211 and 212. 61 Fed. Reg. 35634 (July 6, 1996). Part 211, concerning leasing of tribal lands for mineral development, is applicable to the leases at issue here. 4/

The revised Part 211 contains a provision specifically authorizing suspension of operations. 25 C.F.R. § 211.44 provides:

(a) After the expiration of the primary term of the lease the Secretary may approve suspension of operations for remedial purposes which are necessary for continued production, to protect the resource, the environment, or for other good reasons. Provided, that such remedial operations are conducted in accordance with 43 CFR part 3160, subpart 3165 and under such stipulations and conditions as may be prescribed by the Secretary and are conducted with reasonable diligence. Any suspension shall not relieve the lessee from liability for the payment of rental and other payments as required by lease provisions. [5/]

3/ See, e.g., Citation Oilfield Supply & Leasing, Ltd. v. Acting Billings Area Director, 27 IBIA 210 (1995); Duncan Oil, Inc. v. Acting Navajo Area Director, 20 IBIA 131 (1991).

4/ Part 212 concerns leasing of allotted land for mineral development. Parts 211 and 212 both state that they do not apply to leasing and development governed by regulations in 25 C.F.R. Part 213 (Members of the Five Civilized Tribes of Oklahoma), Part 226 (Osage), and Part 227 (Wind River Reservation). 25 C.F.R. §§ 211.1(e), 212.1(e).

5/ 25 C.F.R. § 211.44(b), not directly relevant here, concerns suspensions for economic or marketing reasons.

The reasons for adding sec. 211.44 to the mineral leasing regulations were discussed in the preamble to the proposed regulations published in 1991:

"This provision would clarify the Department's position on suspension of operations. The Department believes that suspension of operations and production for remedial work on a well or mine to enhance or sustain gas production, to prevent damage to the mineral resource, or to prevent environmental damage is not only appropriate, but is also required as part of the

See also 25 C.F.R. § 212.44, making § 211.44 applicable to leases of allotted land under Part 212.

As a result of the addition of this provision, lessees holding leases under 25 C.F.R. Parts 211 and 212 may now seek permission to suspend operations at the time they perceive a need to do so. The provision constitutes a substantial benefit to lessees because it offers them a means of ensuring that their leases will not expire because of an unauthorized suspension. Further, the provision should promote better decisions by Departmental officials because the decisions would be made at the time a suspension is sought, thus allowing a more accurate assessment of the surrounding circumstances than is possible when the issue is not addressed until much later, *i.e.*, during an appeal from a BIA expiration decision. ^{6/}

25 C.F.R. § 211.44(a) does not specifically set out the procedures for obtaining approval of a suspension of operations. However, it states that remedial operations must be conducted in accordance with BLM regulations in 43 C.F.R. Part 3160, Subpart 3165. 43 C.F.R. § 3165.1(a) describes the requirements for applying for a suspension: "Applications for relief from either the operating or the producing requirements of a lease, or both, shall be filed with the authorized officer [a BLM official], and shall include a full statement of the circumstances that render such relief necessary." Subsection 3165.1(b) provides that actions on applications

fn. 5 (continued)

lessee's implied covenants in the mineral lease. Failure to allow such suspensions without risk of lease termination would encourage irresponsible and possibly destructive behavior by lessees which are not ultimately in the best interests of the Indian owner. However, the lessee must use reasonable diligence during the period of suspension and must comply with the BLM procedures in 43 CFR.

"Applications for suspensions for economic reasons would not be approved. However the lessor and lessee may agree in writing to such a suspension which, if approved by the Secretary, would amend the lease and would not cause the termination of the lease."

56 Fed. Reg. 58734, 58736 (Nov. 21, 1991).

^{6/} Judging by the cases which have come before the Board, lessees have often made determinations to shut in a well without consulting either BIA or BLM. In such a case, the lessee may not submit its reasons for shutting in the well until it files an appeal from a BIA expiration decision, which may not be made until many months after production has ceased. (In this case, for instance, production from Leases 240 and 241 ceased in Jan. 1998, and the Superintendent's expiration decision was made in Sept. 1998.) Given the time delay, it may be difficult to reconstruct the facts necessary to make an accurate assessment of the circumstances that existed at the time of the shut-in.

are to be taken by the authorized officer. ^{7/} Despite the lack of detailed application information in 25 C.F.R. § 211.44(a), there is enough information to put a lessee on notice that it should refer to the BLM regulations or inquire of BLM or BIA as to the procedures to be followed.

[3] Because the regulations in Parts 211 and 212 now provide for suspensions of operations, those regulations control as to when a lessee may temporarily cease production on a lease in its extended term without subjecting the lease to expiration. As noted above, the determination as to whether a shut-in is justified will henceforth be made at the time approval of a suspension is granted or denied. The determination as to whether a lease has expired, in the case of a shut-in, can be based upon whether or not approval was given to a suspension of operations. Thus, in appeals from lease expiration decisions concerning leases issued under Parts 211 and 212, there should no longer be a need to resort to a Citation-type analysis.

The revised Part 211 was in effect in January 1998, when Appellant shut in Leases 240 and 241. Under those regulations, Appellant should have applied for permission to suspend operations. It contends, however, that it was not aware of any requirement to file an application for suspension of operations and was not advised of any such requirement by Elote.

As a person doing business on Indian land, Appellant was responsible for familiarizing itself with duly promulgated regulations governing its activities. Under well-established law, Appellant is deemed to have knowledge of regulations published in the Code of Federal Regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Narconon Chilocco New Life Center v. Acting Anadarko Area Director, 25 IBIA 273, 277 (1994), and cases cited therein.

Further, the fact that Elote may not have advised Appellant of the procedures for seeking a suspension and, perhaps, may have led Appellant to believe that he was orally approving a shut-in, is of no consequence here. Even if Elote had been a BIA or BLM employee and had given Appellant erroneous advice, it would not relieve Appellant of its responsibility for complying with the regulations. Erroneous advice given by an employee of the Federal Government does not grant rights not authorized by law. E.g., DuBray v. Acting Aberdeen Area Director, 30 IBIA 64, 67 (1996), and cases cited therein.

^{7/} This is consistent with a statement in the preamble to the 1996 revision of 25 C.F.R. Part 211: "[T]he suspension of operations is at the discretion of the Secretary, although the suspension action will likely be issued by the authorized officer for § 211.44(a) and for § 211.44(b) by the area director or superintendent, under authority delegated by the Secretary." 61 Fed. Reg. at 35647.

Appellant failed to obtain approval for a suspension of operations. Thus, the shut-ins were not excused, and Leases 240 and 241 expired when production ceased in January 1998.

Even if it were to consider this appeal under a Citation analysis, the Board would reach the same conclusion. Appellant alleges that weather and road conditions were so severe that continued production would have resulted in environmental damage. However, it furnishes absolutely no proof that such severe conditions actually existed, even during the winter months of 1997-98, let alone throughout the six-month period ending June 30, 1998. Further, Appellant fails to show how those conditions would excuse Appellant's non-production under the principles established in Citation and related cases.

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 Area Director's December 7, 1998, decision is affirmed.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge