



INTERIOR BOARD OF INDIAN APPEALS

Richard Watts, Personal Representative of the Estate of Jim Whisman,
d/b/a Rainbow End Ranch v. Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

53 IBIA 160 (04/29/2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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RICHARD WATTS, Personal)
Representative of the Estate of Jim)
Whisman, d/b/a Rainbow End Ranch,)
Appellant,)
)
v.)
)
)
Docket No. IBIA 09-068)
)
)
EASTERN OKLAHOMA REGIONAL)
DIRECTOR, BUREAU OF)
INDIAN AFFAIRS,)
Appellee.)
April 29, 2011

Appellant Richard Watts, acting in his capacity as the personal representative of the Estate of Jim Whisman (Whisman or Decedent), appealed to the Board of Indian Appeals (Board) from a February 20, 2009, decision of the Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to cancel an oil and gas mining lease held by Whisman for failure to operate the lease with proper protection of natural resources and failure to conduct operations in a workmanlike manner. Because Appellant has not shown that the Regional Director abused her discretion in cancelling the lease, we affirm.

Background

In 1994, BIA approved the assignment of oil and gas mining lease no. 69481 (contract no. G02C1420-7529) to Whisman.¹ The lease was past its primary term of 5 years and into its extended term, pursuant to which the lease would endure so long as oil or gas is produced in paying quantities. The lease contained the following stipulation:

¹ The lease conveyed a 1/2 undivided mineral interest in Tract #35, located in the S¹/₂ of the SW¹/₄ of Section 36, T. 14 N., R. 9 E., in Creek County, Oklahoma. The lessor was a Creek Indian, whose tribe is one of the Five Civilized Tribes of Oklahoma, and thus the lease of his mineral interests is governed by 25 C.F.R. pt. 213. According to BIA, the remaining half of the undivided ownership of Tract #35 is held in fee. *See* Regional Director's answer brief at 2 n.1. The fee owner(s) of Tract #35 apparently leased their mineral rights to Kemmerer Co., Inc. (Kemmerer). *Id.*

“The lessee certifies that development and operation of this lease will be carried out in such a manner as to minimize . . . [any] detrimental effect . . . on the human environment as specified in the National Environmental Policy Act of 1969.” Lease at 1 (Administrative Record (AR), Exh. 1). In addition and with the exception of any regulations that effected a change in the royalty rate or annual rental, the lessee agreed “[t]o abide by and conform to any and all regulations of the Secretary of the Interior [Secretary] now or hereafter in force relative to such leases, including 30 CFR 221.”² *Id.* at ¶ 3(g).

During Whisman’s operation of the lease, the Bureau of Land Management (BLM) identified repeated oil and saltwater spills that had contaminated not only land immediately around the tank battery³ but had also contaminated land in the Deep Fork Wildlife Management Area.⁴ BLM sent several letters to Whisman from December 2000 to September 2001 demanding corrective action. When Whisman failed to respond, BLM assessed penalties against Whisman in September 2002, which were sustained by BLM on appeal.⁵ Whisman took no action to cure the environmental damage, apparently due to illness, and he died sometime thereafter. In November 2004, Appellant became the court-appointed personal representative of Decedent’s estate.

Because the environmental damage was not remediated, BLM shut down the two wells on the lease in September 2004. AR, Exh. 13. In or prior to 2007, Appellant contacted the Department to determine how production might be reestablished under the

² Part 221 is now found at 43 C.F.R. pt. 3160. *See* 48 Fed. Reg. 36,583 (Aug. 12, 1983).

³ The U.S. Environmental Protection Agency defines a tank battery as a collection of equipment used to separate, treat, store, and transfer crude oil, condensate, natural gas, and produced water. A tank battery typically receives crude oil, condensate, natural gas, or some combination of these extracted products from several production wells for accumulation and separation prior to transmission to a natural gas plant or petroleum refinery. 40 C.F.R. § 63.761.

⁴ In 1983 and with the exception of royalty management, responsibility within the Department of the Interior (Department) for onshore minerals management functions became the responsibility of BLM. *See* 48 Fed. Reg. 8,982 (Mar. 2, 1983).

⁵ These penalties are not before us in this appeal.

lease.⁶ By letter dated February 26, 2007, an attorney with the Department's Field Solicitor's Office in Tulsa, Oklahoma, advised Appellant that BIA was considering cancelling the lease, but that BIA would consider allowing Appellant to bring the wells back into production if a variety of terms and conditions, spelled out in the letter, were satisfied within 30- and 60-day time periods. Among other terms and conditions, the letter identified several remediation requirements to bring the lease back into compliance with federal regulations. Several months passed without action by Appellant in response to the Field Solicitor's letter.

Through a telephone conversation on June 1, 2007, between Appellant's counsel and BIA, Appellant confirmed his interest in reestablishing production of the lease. And, on June 19, 2007, Appellant wrote to BIA, stating that he had engaged a reputable operator who had been on-site and who had reviewed the terms and conditions in the Field Solicitor's letter. Appellant committed to submitting additional information within 2 weeks, but did not follow through.

On July 13, 2007, BIA provided Appellant 30 days to comply with 4 requirements: (1) provide evidence of Appellant's appointment as the personal representative of Whisman's estate, (2) submit proof of filing all delinquent monthly oil and gas operations reports (Form MMS-4054), (3) post a bond in the amount of \$15,000, and (4) contact BLM to initiate remediation and submit a restoration and remediation plan. BIA's letter also informed Appellant that his failure to comply with BIA's requirements could result in cancellation of the lease. Again, no documentation was provided within the 30-day time period.⁷ Thereafter, in October 2007, Appellant became aware that Kemmerer had obtained a pooling order from the Oklahoma Corporation Commission (OCC) that purported to include the oil and gas lease belonging to Appellant's decedent.⁸ Apparently,

⁶ The record does not reflect any communication between BIA or BLM and Whisman or Appellant between April 2003, when BLM attempted to collect the penalties from Whisman, and February 2007.

⁷ After the 30-day time period ended, Appellant submitted a bond to cover his anticipated operations on the lease and a copy of his testamentary letters for Decedent's estate, which were approved by the local court in 2004.

⁸ Pooling orders provide for the extraction of oil and gas where several mineral owners or lessees have rights to a single common mineral source or "pool." *See, e.g.*, 52 Okl. St. Ann. § 87.1(e). Pooling orders, also referred to as communitization agreements, that include
(continued...)

Appellant and Kemmerer then engaged in negotiations for Kemmerer to purchase Decedent's lease. During the course of these negotiations, Appellant acknowledged BLM's "concern that the environmental issues be addressed expeditiously" and noted that because "time is slipping away," Appellant had retained an environmental firm to prepare a remediation plan. Letter from Appellant to Kemmerer, Feb. 11, 2008 (AR, Exh. 39). Appellant submitted a remediation plan to BLM for review in March 2008 that BLM approved on March 25, 2008. The plan contains no estimated start or completion dates. Although the plan was approved by BLM, the record does not show when or to what extent Appellant began to implement the plan.⁹

In July 2008, Appellant notified BIA that he and Kemmerer had agreed to a sale in principle of Whisman's lease to Kemmerer, the terms of which would require Kemmerer to remediate the lease site. In November 2008, Kemmerer withdrew its purchase offer.

On February 20, 2009, the Regional Director canceled Whisman's lease for violating 25 C.F.R. §§ 213.31(a) and 213.33.¹⁰ In particular, the Regional Director found that Appellant had failed to comply with outstanding and repeated orders from BLM to remediate the damage to the environment caused by oil and salt water spills, and that Appellant failed to meet the deadlines set in BIA's July 13, 2007, letter.

Appellant appealed the Regional Director's decision to the Board in a two-page letter. Appellant did not file an opening brief. The Regional Director filed an answer brief to which Appellant did not respond.

⁸(...continued)

Indian-owned trust mineral interests, have no force or effect unless and until approved by the Department. *See* Pub. L. No. 80-336, § 11, 61 Stat. 734 (Aug. 4, 1947); *Scrimner v. Eastern Oklahoma Regional Director*, 44 IBIA 147, 147 (2007). The pooling order obtained by Kemmerer from the OCC apparently was not approved by the Department at any time relevant to this appeal.

⁹ It is undisputed that remediation was incomplete when BIA canceled the lease.

¹⁰ Section 213.31(a) authorizes the Secretary to impose restrictions on the drilling of wells as well as on production from wells to "protect[] . . . the natural resources of the leased land and in the interest of the lessor." Section 213.33, which is repeated almost verbatim in Decedent's lease (*see* AR, Exh. 1 at ¶ 3(f)), spells out the lessee's diligence and duty to prevent waste, including the duty to "carry on all operations in a good and workmanlike manner in accordance with approved methods and practice."

Discussion

We affirm the Regional Director's decision to cancel the lease assigned to Appellant's decedent. The Regional Director found — and Appellant only confirms — that Appellant failed to remediate longstanding environmental damage despite numerous orders from BLM and instructions from BIA to do so. It is this failure that the Regional Director addresses in her answer brief, for which reason we do not address the untimeliness of Appellant's compliance with additional requirements in BIA's July 13, 2007, letter.¹¹ To the extent that Appellant purports to argue that the Regional Director's decision is not wholly supported by the record or that the delay in remediating the damage should be excused, such arguments do not undercut the Regional Director's decision or meet Appellant's burden of showing error.

1. Standard of Review

The Board has held consistently that appellants bear the burden of establishing that the Regional Director's decision was in error or was not supported by substantial evidence. *Van Gorden v. Acting Midwest Regional Director*, 41 IBIA 195, 198 (2005). An appellant who has not made an allegation of error has not met his burden of proof. *Johnson v. Rocky Mountain Regional Director*, 38 IBIA 64, 67 (2002). The Board may affirm the Regional Director's decision where the notice of appeal does not identify any error in the decision being appealed and the appellant submits no brief or other statement of reasons in opposition to the Regional Director's decision. *DeNobrega v. Acting Northwest Regional Director*, 40 IBIA 223, 234 (2005).

2. Appellant's Notice of Appeal

Appellant did not submit an opening brief, but apparently elected to rest on statements made in his notice of appeal. Therein, Appellant maintains that he “endeavored,

¹¹ Although neither Appellant nor the Regional Director address the bond requirement or the proof of Appellant's appointment as the personal representative of Whisman's estate, the record shows that Appellant did eventually satisfy these two requirements albeit outside of the 30-day compliance period. With respect to the requirement of filing operation reports, it appears that no reports may be required where no operations are being conducted on the lease. *See, e.g.*, 30 C.F.R. § 210.102(a). It appears — from both Appellant's Notice of Appeal and from the Regional Director's answer brief — that the parties understood the primary impetus for the lease cancellation is the failure to remediate the environmental damage.

in good faith, to cooperate with . . . BIA and [BLM] in remediating all deficiencies,” which he claims is “[c]ontrary to the findings” necessary to support the Regional Director’s decision. Notice of Appeal at 1. Appellant describes Kemmerer as an “interloper,” and argues that Kemmerer “interfered in the operations of [the lease],” which Appellant claims led to “substantial confusion as to the legal rights to proceed with . . . the lease.” *Id.* at 2. He argues that Kemmerer’s “active interference” and the “tacit approval” of BLM and BIA somehow “prohibited” Appellant from timely completing the required remediation. *Id.* We are not persuaded by these vague allegations.

Vague and unsupported allegations are insufficient to support Appellant’s burden of showing error in the Regional Director’s decision. *U & I Redevelopment LLC v. Acting Northwest Regional Director*, 49 IBIA 256, 266 (2009). In fact, the one specific assertion made by Appellant does not aid him: Appellant concedes that, at the time of his March 26, 2009, Notice of Appeal, remediation and restoration of the lease site still remained incomplete. Notice of Appeal at 2 (“The property is very close to being totally remed[i]ated at this time.”). Therefore, we affirm the Regional Director’s decision on the grounds that he fails to show any error in her decision.

Even if we address Appellant’s vague assertions — i.e., that he “cooperated with” BIA and BLM and that Kemmerer somehow interfered — we are still compelled to affirm. First, we see no evidence of cooperation per se in the record, only evidence of delay. Whisman was well aware before his death of the need to cure the environmental damage; Appellant has known about the required remediation since at least February 26, 2007, when the Field Solicitor outlined the remediation work that was necessary, and gave him 60 days to comply.¹² Second, undefined good faith efforts, without more, fail to satisfy Appellant’s burden of complying with BLM’s remediation orders. Finally, we are left to speculate how Kemmerer interfered with Appellant’s ability to comply with BLM’s remediation orders, and what BLM or BIA “tacitly approved” and how any such “approval” interfered with

¹² Although the Regional Director’s cancellation decision did not make specific reference to the Field Solicitor’s February 26, 2007, letter, she did refer to BLM’s numerous remediation orders and Appellant understood — as demonstrated in his notice of appeal — that his failure to remediate the environmental damage was the outstanding issue leading to cancellation of the lease. Moreover, Appellant could have responded — but chose not to respond — to the Regional Director’s answer brief in which the Field Solicitor’s letter was discussed in detail. A copy of the Field Solicitor’s letter was appended to the answer brief.

Appellant's compliance responsibilities.¹³ Even if somehow Kemmerer could be found to have impeded Appellant's ability to comply with BIA's requirements, Kemmerer's involvement came after a long period of forbearance by BIA and Kemmerer's involvement ended 3 months prior to the Regional Director's cancellation letter.¹⁴ Thus, Appellant had ample time both before and after Kemmerer's alleged interference to comply with BIA's requirements.¹⁵

At the end of the day, we have an extensive record that demonstrates repeated demands by BLM and by BIA to Whisman and to Appellant to clean up the environmental damage to the site and we have a concession by Appellant that, *at best*, the environmental clean up was in progress *after* the Regional Director issued her decision to cancel the lease. BIA provided ample time not only to Appellant to correct the deficiencies and re-establish production, but provided Appellant's decedent ample time prior to his death. The failure to cure the environmental damage caused by Appellant's decedent is a violation of both the terms of the lease¹⁶ and 25 C.F.R. § 213.33. Therefore, even if we give Appellant's Notice

¹³ The only support provided by Appellant for the alleged "tacit approval" of BLM and BIA is a letter from Appellant's attorney to BLM, which confirms a meeting with Kemmerer and Appellant at BLM's offices and in which BLM's "thoughts" on the discussion with Kemmerer are invited by Appellant. Notice of Appeal, Tab C. The fact that BLM may have arranged a meeting or offered a conference room for a meeting does not suggest inappropriate involvement by BLM and none by BIA. Kemmerer held an oil and gas lease from the fee owner(s) of the allotment and had obtained a pooling order that affected Appellant's oil and gas lease and impacted the Indian lessor to whom the Department owes a fiduciary responsibility. Therefore, the Department had an interest in resolving the conflict posed by the OCC pooling order and by the dual mineral leases — Whisman's and Kemmerer's — for Tract #35.

¹⁴ Nothing in the record suggests that there was any communication from Appellant to BIA in the 3 months following Appellant's notification to BIA of Kemmerer's withdrawal of its purchase offer.

¹⁵ And even if Appellant were to surrender the lease to BIA, it remained his responsibility, as Whisman's personal representative, to cure the environmental damage caused to the land by Whisman's operations. *See* 25 C.F.R. § 213.40(b)(4) (lessee must "make a satisfactory showing that full provision has been made for conservation and protection of the property" before surrendering the lease to BIA); *see also* Lease, ¶ 5 (AR, Exh. 1) (same).

¹⁶ Appellant's Decedent failed to conduct his operations in a workmanlike manner, causing damage to the surface and, possibly, the subsurface of the land and failed to remediate the
(continued...)

of Appeal great latitude, we conclude that Appellant has not met his burden of showing that the Regional Director abused her discretion in cancelling Decedent's lease.

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 February 20, 2009, decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹⁶(...continued)

damage, all of which violates ¶ 3(f) of the lease, which requires him to prevent waste and conduct operations in a workmanlike manner, and violates the clause on the first page of the lease, which requires the lessee to minimize any detrimental effect on the environment. Finally, the environmental damage itself and the failure to remediate violate 43 C.F.R. § 3162.5-1.

In addition, we note that the lease likely expired by its own terms inasmuch as there has been no production in paying quantities by Whisman or Appellant for a number of years. Although the two wells on the property were shut-in by BLM, the shut-in was due to Appellant's failure to remediate the environmental damage, which at any time was within Appellant's power to cure.