



INTERIOR BOARD OF INDIAN APPEALS

McCann Resources, Inc. v. Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

53 IBIA 278 (7/25/2011)



United States Department of the Interior

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

McCANN RESOURCES, INC.,)	Order Vacating Decision and Remanding
Appellant,)	
)	
v.)	
)	Docket No. IBIA 09-066
EASTERN OKLAHOMA REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	July 25, 2011

McCann Resources, Inc. (MRI), appeals from the February 2, 2009, decision (Decision) of the Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which she affirmed the December 6, 2005, decision of the Superintendent of BIA's Osage Agency (Superintendent) to cancel 14 oil and gas leases owned by MRI. We vacate the Regional Director's decision, and remand this matter to her as we conclude that BIA (1) failed to give adequate notice to MRI of the grounds for cancelling each of its leases and an opportunity to respond; (2) failed to address certain responses by MRI to the notice that was given; (3) failed to evaluate the leases individually or explain the en masse cancellation of all 14 leases; and (4) the record fails to support the Regional Director's decision.

Facts

MRI is the assignee of the following 14 oil and gas leases located in Osage County, Oklahoma; the Osage Nation (Nation) is the lessor:

CULVER (Consolidated)		
NE/4 of Section 20, T28N, R10E	O&G lease	Lease no. G06-17183-0
NW/4 of Section 20, T28N, R10E	O&G lease	Lease no. G06-17985-0

WHITMIRE (Consolidated)		
NE/4 of Section 04, T27N, R11E	O&G lease	Lease no. G06-18032-0
SE/4 of Section 33, T28N, R11E	O&G lease	Lease no. G06-17694-0
BOCKIUS #1 (Individual)		
SE/4 of Section 25, T27N, R11E	O&G lease	Lease no. G06-18033-0
BOWRING UNIT, HULAH, DIXON (Consolidated)		
SE/4 of Section 09, T28N, R11E	O&G lease	Lease no. G06-18123-0
SW/4 of Section 10, T28N, R11E	O&G lease	Lease no. G06-18124-0
NW/4 of Section 21, T28N, R11E	O&G lease	Lease no. G06-18229-0
SE/4 of Section 21, T28N, R11E	O&G lease	Lease no. G06-17696-0
NW/4 of Section 27, T28N, R11E	O&G lease	Lease no. G06-17692-0
SE/4 of Section 27, T28N, R11E	Oil lease	Lease no. G06-17690-0
NE/4 of Section 28, T28N, R11E	O&G lease	Lease no. G06-17697-0
SW/4 of Section 28, T28N, R11E	O&G lease	Lease no. G06-17693-0
PARKER #2 - DEWEY FIELD UNIT		
Fr. SW/4 of Section 15, T27N, R12E	Blanket oil	Lease no. G06-1151
SE/4 of Section 16, T27N, R12E		

On June 7, 2005, the Superintendent issued a notice (Superintendent's Notice) to MRI, advising that, based upon the complaint filed against MRI on September 28, 2004, by the United States Environmental Protection Agency (EPA) in *United States v. McCann Resources, Inc.*, No. 04CV744K(M) (N.D. Okla.), the above-identified 14 leases would be canceled unless MRI showed cause within 15 days why they should not be canceled. The Superintendent stated that the

complaint [in *United States v. McCann Resources, Inc.*] alleges that [MRI] has repeatedly violated [F]ederal environmental laws during oil and gas operations in Osage County. Thus, [MRI] appears to be in violation of the terms of [its] leases. . . . The allegations [of the complaint] indicate that [MRI] is in violation of 25 CFR § 226.22 which requires operations [to be conducted] in a manner to prevent pollution. In addition, it appears that [MRI] is in violation of 25 CFR § 226.37 which prohibits the waste of oil and gas[,] and 25 CFR § 226.41 which requires reports of all accidents on

any lease property. These allegations reveal a pattern of violation of [F]ederal law which is specifically prohibited by Paragraph 5.F of the leases.^[1]

Superintendent's Notice at 2 (emphasis added). The Superintendent did not identify any factual findings but relied on the complaint filed by EPA.

The EPA Complaint set forth detailed allegations with respect to the following leases: Lease nos. G06-17183-0 (Culver), G06-18032-0 (Whitmire), G06-18229-0 (Bowring #3),² and G06-1151 (Parker). Allegations in the EPA Complaint also concern a fifth lease identified as "Bowring Lease" but while the allegations focus on the Bowring tank battery, which MRI states is located on Bowring Lease No. G06-17697-0, *see* Opening Brief at 60, the Complaint identifies the location of the Bowring Lease as SE/4 of Section 25, T27N, R11E, *see* EPA Complaint at ¶ 102, which is the site of MRI's Bockius Lease.³ No mention is made of MRI's remaining leases in the EPA Complaint. The allegations in the EPA Complaint fall into three general categories: the lack of mechanical integrity of three wells (one well on the Parker Blanket Lease, and two wells on the Culver Lease); the discharge of produced water⁴ on all five leases; and the inadequacy of MRI's Spill

¹ MRI's leases are identical, except for Bowring Lease No. G06-17690-0 (oil lease only) and Parker Blanket Lease. In the uniform oil and gas lease for 12 of MRI's leases and in the oil lease, Paragraph 5.F provides:

F. Force Majeure - All express or implied covenants of this lease shall be subject to all Federal laws, Executive Orders, Rules or Regulations, and this lease shall not be terminated, in whole or in part, nor lessee held liable in damages, for failure to comply therewith, if compliance is prevented by, or if such failure is a result of, any such Law, Order, Rule or Regulation.

The Parker Lease does not contain any subparagraphs under paragraph 5.

² The EPA Complaint refers to Lease No. G06-18229-0 as the Dixon-Rock Lease, which MRI agrees is also known as the Bowring #3 lease. *See* Opening Brief at 35. We will refer to this lease as the Bowring #3 lease.

³ It is not clear from the record whether the EPA Complaint intended to refer to the tank battery on the Bockius Lease or the tank battery for the consolidated Bowring leases.

⁴ The EPA Complaint defines "produced water" as brine water that is a byproduct of oil production and heavily laden with salts and other materials. EPA Compl., ¶ 54. According
(continued...)

Prevention Control and Countermeasure (SPCC) plans for the Culver Lease and the misidentified lease. MRI filed an answer to the Complaint in which it admitted several significant factual allegations.⁵

MRI provided a timely and detailed response to the Superintendent. MRI denied the allegations in EPA's Complaint; argued that even if the alleged violations occurred, they had been cured; and argued that EPA's Complaint made no allegations with respect to nine leases and misidentified a tenth. Letter from MRI to Superintendent, June 21, 2005. Thereafter, on December 6, 2005, the Superintendent canceled the 14 leases (Superintendent's Decision). The Superintendent found MRI's response was insufficient because MRI denied the allegations of the EPA Complaint without showing "that [MRI's] operations were conducted, or are now being conducted[,] in a workmanlike manner." Superintendent's Decision at 2. The Superintendent addressed and rejected MRI's responses concerning the three wells that lacked mechanical integrity, and observed that the lack of an adequate SPCC plan "clearly indicates that [in]sufficient time and attention has been paid to the prevention of oil and salt water spills[, which is] further evidence of the failure to maintain the premises in a workmanlike manner." *Id.* at 3. The Superintendent also addressed the discharge of produced water:

The problem is not that on individual wells some particular equipment failed or that [MRI] has cleaned up, to the best of its ability, the harm caused by [the] spills. Rather, the problem is that [MRI] has consistent and repeated spills of salt water onto the surface of the land. The numerous spills evidence [MRI's] consistent failure to adequately maintain its equipment in a manner so to prevent spills.

⁴(...continued)

to the EPA, produced water is highly corrosive, and is a "pollutant" within the meaning of the Clean Water Act, 33 U.S.C. § 1362(6), when discharged into waters of the United States. *Id.*, ¶¶ 55-56.

⁵ MRI admitted that EPA inspectors observed "recent or ongoing discharge of produced water" from the tank batteries on the Culver and misidentified lease, the Culver 9 injection well, a well annulus for Parker wells 0-69 and 0-58, and a flow line failure on the Whitmire Lease. Answer, filed June 22, 2005, *United States v. McCann Resources, Inc.*, at ¶¶ 39, 41, 45, 49, and 51. MRI further admitted that on the latter occasions the EPA inspectors observed the produced water and, in one instance, oil entering a tributary of the Caney and Verdigris Rivers in Osage County, Oklahoma. *Id.*

Id. The Superintendent concluded by stating that “the explanations given by [MRI] do not evidence the maintenance of the leased premises in a workmanlike manner.” *Id.* The Superintendent did not address MRI’s argument that the EPA Complaint did not mention nine of MRI’s leases nor did the Superintendent address MRI’s argument concerning the lease that was misidentified in the Complaint. MRI appealed the Superintendent’s decision to the Regional Director. In its appeal, MRI argued that lease cancellation could not be based upon mere allegations that it denied or deficiencies that it had cured, that EPA’s allegations did not even mention 9 of MRI’s 14 leases, and that the consolidation of several leases did not permit cancellation of all of the leases based on violations on a few leaseholds. MRI also noted that it had reached a tentative settlement with EPA under which MRI would make no admission of liability.

During the pendency of MRI’s appeal before the Regional Director, EPA and MRI finalized the consent decree, which was entered by the District Court on February 2, 2007, to resolve EPA’s enforcement suit against MRI. Under the terms of the consent decree, MRI agreed *inter alia* to take certain corrective actions and pay a civil penalty of \$11,000. Pursuant to its provisions, the consent decree is to remain in effect until such time as MRI has complied fully with the requirements of the consent decree, including the payment of civil penalties; has maintained satisfactory compliance with the terms of the consent decree for a period of 2 years following the entry of the decree; and files a “Motion for Termination of Consent Decree.” Consent Decree at ¶ 68.⁶

On February 2, 2009, exactly 2 years after the district court approved the consent decree and 3 years after receiving MRI’s appeal from the Superintendent’s Decision, the Regional Director affirmed the Superintendent’s Decision. On the first page of her decision, the Regional Director identified the 14 leases that were being canceled. The second page of her decision consists of a list of the statutory and regulatory violations that she held to have been committed by MRI: 33 U.S.C. § 1311; 25 C.F.R. §§ 226.14, 226.19(a), 226.22(a), 226.34, 226.38, and 226.41; and 40 C.F.R. §§ 112.3(a), 147.2903(b), 147.2905, 147.2916, 147.2920(b), and 147.2925(a). The third and final page of her decision lays out the following findings and analysis in support of her decision to cancel the 14 leases:

The Administrative Record shows that the violations cited to MRI with respect to the 14 leases include consistent and repeated spills, unreported

⁶ A check of the District Court’s docket reveals that, to date, no Motion for Termination of Consent Decree has been filed by MRI.

spills, unmarked wells and tank batteries, unreported tank levels, operating without a division order, noncompliant operation of injection wells, improperly abandoned injection wells, pollutant discharges into waters of the United States, and deficient spill prevention protocols. [BIA] has used available means, including meetings, telephone calls, regulatory orders, and site inspections to work with MRI over several years in an effort to address the violations. However, MRI failed to correct the violations leaving lease cancellation as the last available option to provide an acceptable level of protection to human health and the environment.

Decision at 3. The Regional Director rejected MRI's argument that the Consent Decree entered in *United States v. McCann Resources, Inc.* — which contained no admission of liability by MRI and no factual determinations — deprived the Superintendent's Decision of any factual basis for cancelling the leases. The Regional Director did not respond to any other argument raised by MRI in its appeal to the Regional Director, e.g., whether violations on one lease subject all leases in a consolidation to cancellation and whether the record supports the existence of violations on each lease.

This appeal followed.

Discussion

The record in this appeal demonstrates that MRI has been far from a model lessee. The record reflects that there have been unreported spills that have seeped into and polluted waterways, spills that remain unremediated years later, inadequate signage on wells and tanks, roads that have not been maintained, and the list goes on. But, MRI was not provided the process to which it is entitled from BIA: It was not given notice of the grounds for canceling each lease, and, as a result, no opportunity to respond. Ultimately, the Regional Director took an unorthodox and unsustainable approach to deciding the appeal before her. She treated the 14 leases as if they were a single lease, listed a number of regulations that had been violated, and cursorily listed the nature of the events that gave rise to one or more regulatory violations. She undertook no lease-by-lease analysis, and completely ignored MRI's arguments that BIA could not rely solely on the allegations made by EPA in the Complaint — particularly when the case had settled without MRI admitting liability — and that because the Superintendent's notice relied on the EPA Complaint, BIA could not cancel leases for which no violations were alleged in that complaint. Because the Decision does not conform to the legal prerequisites of giving MRI adequate notice and an opportunity to respond, and because the Decision fails to provide a reasonable explanation for canceling each of MRI's leases or address the arguments raised by MRI and is

inadequately supported by the administrative record, we must vacate the Decision and remand this appeal to the Regional Director.

1. Standard of Review

The Regional Director is vested with discretion in deciding whether to cancel a lease in response to a lessee's violation of the Osage oil and gas regulations or the terms of its lease. *See C. E. McClurkin v. Eastern Oklahoma Regional Director*, 44 IBIA 125, 129 (2007). Where the Regional Director satisfies the necessary legal prerequisites, we defer to her exercise of that discretion, and will review her decision to "determine whether the Regional Director considered Appellant's arguments, whether she explained her reasoning, and whether any material facts relied upon to support the decision are supported by the record." *Cougar Oil Company v. Eastern Oklahoma Regional Director*, 53 IBIA 246, 249 (2011). However, where as here, BIA's notice of the grounds for cancellation is inadequate and BIA fails to address a lessee's responses to the notice that was given, BIA has failed to satisfy the legal prerequisites for making a discretionary decision. When we conclude that a BIA decision is procedurally flawed or its findings unsupported by the record, we will not substitute our judgment for that of BIA, but will remand the matter for further consideration. *A C Building & Supply Company v. Western Regional Director*, 51 IBIA 59, 72 & n.21 (2010).

2. Due Process

The Superintendent gave MRI adequate notice, through her incorporation by reference of the EPA Complaint, of the grounds for cancelling 4 of MRI's 14 leases, but she gave no or inadequate notice of the grounds for cancelling the remaining 10 leases. The Regional Director then added new grounds to support her decision to affirm the cancellation of the 14 leases but failed to give notice of these additional grounds to MRI and an opportunity to respond to the new grounds. Thus, we must vacate the Regional Director's decision and remand this matter to her for correction of these deficiencies.

Due process requires that prior to a deprivation of, *inter alia*, a property right such as an oil and gas leasehold, notice must be provided to the lessee. "Notice" consists not only of informing the lessee of the nature of the proposed adverse action (e.g., cancellation of the lease), but also informing the lessee of the reasons for the proposed action, and providing the lessee an opportunity to respond. If the reasons for the proposed action change after notice has been given or new reasons are added, the lessee must be given both notice of the newly added or changed reasons and a new opportunity to respond before any

decision is made to impose the proposed action. *See Superior Oil Co. v. Devon Corp.*, 604 F.2d 1063, 1069-70 (8th Cir. 1979); *see also A C Building & Supply Company*, 51 IBIA at 73-74 (citing *Chissoe v. Acting Muskogee Area Director*, 25 IBIA 146, 151 (1994)). Implicit in the Constitutional right of procedural due process is the right to be heard on the merits of the proposed deprivation and to receive a reasoned decision after consideration of any arguments made in opposition.

Here, the Superintendent gave notice of her intent to cancel all 14 of MRI's leases based on MRI's failure to conduct operations in a workmanlike manner, failure to prevent pollution, failure to report accidents, and failure to prevent the waste of oil and gas. Superintendent's Notice. However, in support of these violations, the Superintendent cited only to the allegations found in the EPA Complaint, and that Complaint only addressed five leases. The allegations of the EPA Complaint broadly consisted of loss of mechanical integrity of three wells (Parker Lease and Culver Lease); discharges on all five leases of produced water into tributaries of the Caney and Verdigris Rivers; and deficient and insufficiently implemented SPCC plans ("Bowring" and Culver Leases). The Superintendent's Notice concluded that "the allegations reveal a pattern of violation of federal law which is specifically prohibited by Paragraph 5.F of the leases." Superintendent's Notice at 2. Paragraph 5.F, which appears in 13 of the 14 leases, is a Force Majeure provision. The Superintendent's Notice concluded with advising MRI that it could show cause within 15 days why the leases should not be canceled.

The Superintendent provided adequate notice for the cancellation of 4 of MRI's leases (Culver Lease No. G06-17183-0, Dixon-Rock Lease No. G06-18229-0, Parker Blanket Lease No. G06-1151, and Whitmire Lease No. G06-18032-0). But, there was inadequate notice to MRI of the reason(s) for BIA's proposed cancellation of the remaining ten leases. The EPA Complaint gave an erroneous legal description for the "Bowring" Lease and the record does not reflect that this misidentification was resolved. And assuming that BIA intended to cancel MRI's remaining leases based on "a pattern of violation. . . prohibited by [the Force Majeure provision of the leases]," *id.*, this notice fails for two reasons. First, BIA misapplied the Force Majeure provision, which is intended to protect the lessee and absolve it of any duty to perform a condition of the lease if to do so would contravene any Federal law, Executive order, rule, or regulation. It does not create a duty on the part of the lessee, nor does it set forth a basis on which a lease may be canceled. Second, even if we were to disregard the reference to the Force Majeure clause and rely exclusively on BIA's finding of "a pattern of violation," we are not aware, nor does BIA cite to any law, that permits mass cancellation of all of a lessee's leases based on a pattern established on a few of the lessee's leases.

Moreover, as MRI points out, it may be that BIA treated the consolidation of the two Culver leases, the two Whitmire leases, and the eight Bowring leases (including the Dixon-Rock lease) as merging these leases into three single leases. MRI argues that there is no basis for treating the consolidated leases as single leases for cancellation and no notice that consolidated leases would be treated as a single lease for purposes of consolidation. In support of its argument, MRI has provided the letters in which the Superintendent approved consolidation for the purpose of allowing MRI to collect oil from the consolidated leases into a single tank battery. These letters do not state that the consolidation effected a merger of the leases into a single lease nor do they warn that violations that occur on one lease would necessarily provide a basis for cancellation of all leases in a consolidation.

Therefore, for the foregoing reasons, we conclude that the Superintendent's Notice to MRI is defective as to the following leases: Culver Lease No. G06-17985-0, Whitmire Lease No. G06-17694-0, Bockius Lease, and all of the Bowring Leases except the Dixon-Rock Lease No. G06-18229-0.

But there is an additional reason relating to notice and opportunity to respond that mandates our vacation of the Regional Director's decision. Recognizing, perhaps, the deficiencies in the Superintendent's Notice and the fact that the EPA Complaint on which the Superintendent's Notice and Decision were based had been settled, the Regional Director expanded the grounds for cancelling the 14 leases in her decision. The additional grounds cited by the Regional Director include unreported spills, unmarked wells and tank batteries, unreported tank levels, operating without a division order, and improperly abandoned injection wells. But, the Regional Director failed to give MRI notice of these *additional* grounds for cancelling the leases, and MRI was given no opportunity to provide a response for the Regional Director to consider before she decided MRI's appeal from the Superintendent's decision. Therefore, we are compelled to vacate the Regional Director's decision and remand this matter to her for further consideration.

3. The Regional Director's Decision

Even if we could overlook the notice deficiencies, the Decision is flawed. The Regional Director's litany of regulatory violations followed by her litany of conclusory facts, and the absence of a reasoned lease-by-lease analysis, including a failure to address many of MRI's arguments, simply fails as a matter of law. MRI holds a separate lease or contract for each of its 14 leaseholds, and credibly argued to the Regional Director that consolidation

effected an administrative and operational convenience, but did not merge the leases into one. The Regional Director utterly failed to address this argument.⁷ BIA must evaluate MRI's conduct with respect to each lease and determine whether, in light of its conduct on that lease, cancellation of the lease is warranted. If a common set of operative facts is relevant to multiple leases that are consolidated (e.g., SPCC plan, or spills from a tank battery that serves several leases), BIA must explain the relevance of those facts with respect to each lease.

The cases cited by the Regional Director, *Tiger Outdoor Advertising, Inc. v. Eastern Area Director*, 22 IBIA 280 (1992), and *Mast v. Aberdeen Area Director*, 19 IBIA 96 (1990), do not suggest anything to the contrary. Those cases concerned the lessees' failure to provide a performance bond (*Tiger Outdoor Advertising*) or letter of credit (*Mast*), as required by their respective leases, to secure their obligation to pay rent for their leases and to cover certain other costs that may arise. The failure to tender the security was the single contention that affected the single lease in *Tiger Outdoor Advertising* and the ten grazing leases in *Mast*. In both cases, BIA gave the lessees repeated extensions of time to cure their default, and ultimately canceled their leases after the lessees failed to produce the required bonds. In particular, with respect to the ten leases in *Mast*, the lessee's failure to produce a bond was as to all ten leases, not just to one of the ten. Although the Board alluded in its decision to the lessee's "tendency to violate the leases in other ways," the Board held that consideration of this "tendency" was appropriate in considering whether to grant the appellant a further extension of time for producing a bond. *Mast*, 19 IBIA at 99. Our decision did not suggest that it was appropriate to consider the lessee's violations of one lease in determining whether to cancel a different lease also held by the same lessee.⁸

⁷ If BIA is proceeding on such a theory, both in law and in fact, it must be prepared to provide support for this theory (e.g., documentation relating to the lease consolidations and an analysis of why violations on one lease justify the cancellation of all leases in a consolidation). *Comp., e.g., Parker Blanket Lease No. G06-1151 at ¶ 20* (lease specifically states that the separate leases comprising the blanket lease "shall be deemed consolidated with *and merged into the single leasehold estate covered hereby. . . .*" Emphasis added.).

⁸ We do not suggest that it would be inappropriate for BIA to consider a lessee's prior poor performance on another lease to support its decision to cancel. A lessee's prior commitment of the same or similar violations — and notice to a lessee that it has committed violations of applicable regulations or lease terms — may show a pattern of disregard that BIA may consider when exercising its discretion to determine the appropriate penalty. But, as a
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Furthermore, with respect to its assertion that MRI is not conducting its operations in a workmanlike manner, *see* 25 C.F.R. § 226.19(a), MRI correctly notes that BIA offers no evidence of what it understands this standard to be. If BIA relies upon a lack of workmanlike conduct to cancel a lease, BIA must identify the facts on which it relies for making this determination, and then must explain how those facts show that the workmanlike standard has not been met. And if a reasonable dispute exists over how “workmanlike manner” is defined or applied in a given case, BIA must articulate its standard. BIA has not done that here.

Turning now to the sufficiency of the administrative record, we find that several aspects of the Regional Director’s decision are unsupported. For example, it appears that the Decision is predicated upon MRI’s “fail[ure] to correct the violations[,] *leaving lease cancellation as the last available option* to provide an acceptable level of protection to human health and the environment.” Decision at 3 (emphasis added). The Regional Director asserts that BIA used “available means,” *id.*, to bring MRI into compliance with its lease terms, such as meetings, telephone calls, and lease violation notices. And while the lease violation notices communicate appropriate information concerning the violation(s), the record does not provide the details of meetings or telephone calls. Plus, to the extent that the Regional Director asserts that “lease cancellation [was] the last available option,” we note that the Decision came 2 years after the district court approved the consent decree with EPA. At a minimum, the Regional Director needed to explain why cancellation — in addition to the consent decree — was necessary to protect human health and the environment with respect to the five leases covered by the consent decree. In addition, nothing in the record shows that monetary penalties were assessed against MRI by BIA nor does the Regional Director explain why monetary penalties would not be a lesser, viable option to bring MRI into compliance. *See* 25 C.F.R. §§ 226.42-226.43.⁹ If, in the exercise

⁸(...continued)

threshold matter, BIA must determine whether the lessee has violated the regulations or the terms of the lease. It is only then, in considering the appropriate penalty, that BIA may consider the existence of a pattern of violations. But the existence of a pattern does not absolve the Regional Director of her responsibility to evaluate each lease separately and to explain her decision to cancel each lease.

⁹ If the Regional Director contends that the fine paid by MRI pursuant to the consent decree somehow demonstrated that monetary sanctions were ineffective in obtaining an acceptable level of performance from MRI, the Regional Director must explain why and must include documentation in the record to support any facts on which she relies in determining that cancellation “is the last available option.” Decision at 3.

of its discretion, BIA concludes that cancellation “is the last available option,” Decision at 3, the grounds for that finding either need to be explained or must be readily apparent in the record. Neither one is evident here.

Finally and to the extent that the Superintendent grounded her decision to cancel on “allegations” contained in the EPA Complaint, the burden rests at all times with BIA to ensure that its record includes evidentiary support for these allegations. Although allegations raised in a pleading filed by a sister agency in a court proceeding may be sufficient for providing adequate notice of a proposed adverse action, BIA may not rely on mere allegations to support a cancellation decision. *See* Regional Director’s Answer Brief at 38 (“the allegations of the EPA are reliable and, indeed, have been verified by the [Osage] Agency on *some* occasions.” Emphasis added.). At a minimum, the record should contain copies of the sister agency’s evidence in support of its allegations, a copy of the pleading on which BIA relies for its allegations, and any responsive pleading filed by the appellant.

Conclusion

Because we find that insufficient notice was afforded to MRI of the grounds for canceling all of its leases, because the Regional Director failed to address the arguments raised by MRI or evaluate the leases separately (or, alternatively, identify any authority for treating the consolidated leases as merged into single leases), and because the record fails to support the Regional Director’s decision, we vacate her Decision and remand this matter for further consideration. In so doing, we emphasize that our decision is not to say that BIA may not cancel these leases, only that BIA must do so in a transparent way. MRI is entitled to notice of each and every ground on which BIA predicates any decision to cancel an oil and gas lease as well as an opportunity to respond to any or all of those grounds.¹⁰

¹⁰ MRI relies on the Board’s decision in *Delgado v. Acting Anadarko Area Director*, 27 IBIA 65, 80 (1994), for the proposition that unless a lease provides otherwise, a lessee under a lease of Indian oil or gas has the right to cure lease violations, and once the violations are cured, the lessee is considered to be in good standing and the violations cannot serve as a basis to cancel the lease. MRI reads *Delgado* too broadly. In *Delgado*, an Indian lessor challenged a BIA decision *declining* to cancel an oil and gas lease and the Board held, in the context of that case, that the specific violations at issue, all of which had been cured, could not serve as bases to cancel the lease. *Id.* We do not construe *Delgado* as holding that a lessee may engage in an endless game of cat-and-mouse, repeatedly violating the terms of a lease and then curing those violations on the eve of a BIA cancellation decision. Where, as
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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 vacates the Regional Director's February 2, 2009, decision and remands this matter to her for further consideration and the issuance of a new decision.¹¹

I concur:

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Debora G. Luther
Administrative Judge

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Steven K. Linscheid
Chief Administrative Judge

¹⁰(...continued)

with the Osage oil and gas leasing regulations, there is no regulatory requirement to afford a lessee an opportunity to cure a lease violation before subjecting the lease to penalties, including cancellation, we will not infer from the lease a right on the part of the lessee to abuse privileges it might otherwise have to cure a violation to avoid cancellation.

¹¹ Given our disposition of the appeal, a hearing is unnecessary and we dismiss MRI's motion for hearing as moot. We have not otherwise considered the arguments contained in the supplemental briefing received from counsel retained by MRI after briefing in this appeal concluded.