



INTERIOR BOARD OF INDIAN APPEALS

Elk Petroleum, Inc. v. Rocky Mountain Regional Director, Bureau of Indian Affairs

56 IBIA 78 (12/19/2012)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ELK PETROLEUM, INC.,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 11-035
ROCKY MOUNTAIN REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	December 19, 2012

On October 6, 2010, the Bureau of Indian Affairs (BIA), through its Rocky Mountain Regional Director (Regional Director), canceled an Indian Mineral Development Act (IMDA) lease (Lease) between the Crow Tribe of Indians (Tribe) and Appellant Elk Petroleum, Inc., based on Appellant’s failure to remit bonus money and rentals that were due August 1, 2008.¹ Appellant appealed the cancellation decision to the Board of Indian Appeals (Board), arguing that there was no valid and enforceable lease to cancel (and thus no bonus money or rent for which it is liable). Alternatively, Appellant argues that if the Lease is valid and enforceable, BIA’s cancellation is defective because no notice and opportunity to cure was provided to Appellant. We disagree with Appellant’s arguments, and we affirm the Regional Director’s decision.

Under the terms of the Lease, Appellant agreed to pay a bonus as well as rental fees for oil and gas rights on Tribal land. These funds became due 2 days after BIA approved the Lease executed by Appellant and the Tribe. Appellant concedes that BIA approved the Lease but argues that the approval was “conditional,” that the Lease therefore was not binding and enforceable, and no funds could have become due until such time as BIA’s approval was unconditional. And, Appellant argues, because it repudiated the Lease in October 2008, there no longer was a lease to which BIA could give unconditional approval and no lease to cancel. Appellant errs. At no time did the Regional Director attach conditions to his approval, nor did the approval itself state that it was conditional. The

¹ The Regional Director’s decision also demanded payment of the bonus money, first year rent, and interest thereon. Appellant has not appealed from the Regional Director’s assessment of bonus money, first year rent, or accrued interest.

Lease was fully enforceable and binding when the Regional Director approved it on July 30, 2008.

In the alternative, Appellant argues that the Lease cancellation is void because BIA did not provide Appellant with notice that the Lease would be canceled for nonpayment of rent and bonus money and an opportunity to cure the violation. We are not persuaded. Appellant knew that the Lease was subject to cancellation for nonpayment of rent and bonus money, and Appellant presented its arguments to BIA for why it should not be liable. Thus, the purpose of notice and opportunity to cure has been satisfied. Especially where, as here, Appellant repudiated the Lease in clear and unambiguous written terms, Appellant has waived any requirement of providing formal notice and opportunity to cure.

Background

In March 2008 and pursuant to the IMDA, 25 U.S.C. §§ 2101-2108, the Tribe and Appellant executed the Lease (No. 14-20-0252-5162), which provided Appellant with the exclusive right to explore, develop, and produce oil and gas on approximately 88,420 acres of Tribal land on the Crow reservation.² After execution, the Lease was sent to BIA on March 31, 2008, for approval. BIA responded to the Tribe, and advised that “30 days from the receipt of this letter, it is our intent to approve this [Lease].” Letter from Regional Director to Tribe, June 26, 2008, at 2 (unnumbered) (AR Tab 15). BIA also suggested certain clarifications that the parties may wish to make, but was “satisfied that the contents of this [Lease] are not adverse to the [Tribe’s] social, economic, and environmental [well-being].” *Id.*

Following the Regional Director’s letter, the Tribe and Appellant agreed to certain clarifications, while others were not addressed. A copy of the executed clarification was provided to BIA on July 25, 2008. AR Tab 14. Five days later, on July 30, 2008, the Regional Director approved the Lease by signing and dating the following statement:

THE FOREGOING OIL AND GAS LEASE BETWEEN THE CROW
TRIBE OF INDIANS AND ELK PETROLEUM APPROVED AND
AGREED TO.

Lease at 34. The Lease was recorded as Document No. 202-7051620813 with BIA’s Land Titles and Records Office. The Regional Director returned an original of the approved and

² Subsequently and as anticipated in the Lease, BIA informed Appellant that the actual leased area consisted of 89,561.549 acres. Letter from BIA to Appellant, Mar. 24, 2009 (Administrative Record (AR) Tab 13); Lease, § 5.1 (AR Tab 14).

recorded Lease to the Tribe and to Appellant with a cover letter that began, “This is our approval of the [Lease].” Letter from Regional Director to Tribe, July 30, 2008, at 1 (AR Tab 14). The Regional Director noted that certain matters were not addressed in the Lease, but notwithstanding these concerns, he reiterated that the Lease was approved. *Id.* at 2 (“A clarification letter . . . has been made a part of *the approved [Lease]*”; “You are hereby provided an original copy of *the approved [Lease]*.” Emphasis added.).

Under the terms of the Lease, the payment of a bonus to the Tribe as well as the first year’s rental was due on or before the “effective date” of the Lease, Lease at § 5.1, and the effective date was defined as “the first day of the month following the date of approval of this Lease by the Secretary [of the Interior (Secretary)],” *id.*, §§ 1.3, 1.12. The Lease also provided that it would be governed by the laws of the Tribe as well as the laws of the United States, and Appellant expressly agreed “to abide by and conform to any and all applicable [F]ederal and [T]ribal laws and regulations now or hereafter in force relative to this Lease, including but not limited to the conservation, production or marketing of [o]il and [g]as.” *Id.* at § 21.

As provided in the Lease, Appellant posted a bond. Appellant also sent notices of staking to BLM that identified locations where Appellant intended to drill four wells. Appellant apparently assisted in determining the total acreage available under the Lease for mining. Appellant did not pay any portion of the bonus or first year’s rent.

On January 22, 2009, BIA issued two invoices to Appellant, one for the bonus payment and one for the first year rental amount. Both invoices reflected the due date as July 30, 2008,³ and warned that “[l]ate payment may result in . . . cancellation of your lease.” Invoices, Jan. 22, 2009 (AR Tab 13). Appellant did not respond. On March 24, 2009, BIA sent a letter to Appellant again demanding payment of the bonus and first year’s rental. AR Tab 13.

In April 2009, Appellant advised BIA and the Tribe, apparently for the first time, that Appellant viewed BIA’s approval of the Lease as “conditional” and, thus, Appellant had no duty to act under the Lease. Letter from Appellant to BIA and to the Tribe, Apr. 16, 2009, at 1 (unnumbered) (AR Tab 11). Appellant characterized the Regional Director’s concerns and suggestions about the Lease to be “requirements” and, therefore, concluded that the approval of the Lease could not be other than conditional inasmuch as the parties had not amended or clarified the Lease to address the “requirements.” *Id.* at 2. The

³ This date was erroneous. The due date was 2 days later, on August 1, 2008: The Regional Director approved the Lease on July 30, 2008, and the first year’s rent and bonus money was due two days later in accordance with §§ 1.3, 1.12, and 5.1 of the Lease.

Regional Director responded to Appellant and stated that BIA's "approval [of the Lease] was not conditional and is considered final for the [D]epartment [of the Interior]." Letter from Regional Director to Appellant, May 26, 2009 (AR Tab 10).

In May 2009, Appellant informed BLM that it was "unsure of [its] plans for the . . . wells [for which four notices of staking had been submitted] and that the onsites were on hold." Letter from BLM to Appellant, Sept. 25, 2009 (AR Tab 9).⁴ In September 2009, after no further communication from Appellant, BLM returned the notices to Appellant. *Id.*⁵

In October 2009, Appellant sent a letter to the Tribe and to BIA in which it advised that Appellant "no longer wishes to pursue development of minerals on Crow [T]ribal lands." Letter from Appellant to BIA and the Tribe, Oct. 14, 2009, at 1 (AR Tab 8). Appellant acknowledged that "BIA stated [that] its approval was final and unconditional," but asserted that BIA "did not remove or waive its requirement" and thus Appellant "was left with an 'approval' letter still requiring further action be taken in amending the lease, but no amendment was permitted or provided by the . . . Tribe which was acceptable to the BIA." *Id.* at 2.⁶

On June 15, 2010, Appellant declined to renew the bond that it had obtained pursuant to the Lease. In an affidavit that accompanied the declination, Appellant's president, Christopher F. Mullen, testified that Appellant "has acquired no interest in Crow Reservation oil and gas leases on Tribally . . . owned land." AR Tab 4.⁷

Appellant has not paid either the bonus money due or any rental amount.

⁴ "Onsites" apparently refers to on-site inspections. *See, e.g.*, BLM's "Oil and Gas Road Guidelines for Applications for Permit to Drill," June 2007, at 1 (<http://www.blm.gov/pgdata/etc/medialib/blm/wy/field-offices/buffalo/ogdocs.Par.50798.File.dat/roadguidelines.pdf>).

⁵ BLM subsequently informed the Tribe that it had conducted a review of the Lease to determine whether the development requirements had been met. BLM concluded that no drilling had occurred to date. Letter from BLM to Tribe, Apr. 29, 2010 (AR Tab 7).

⁶ This statement by Appellant is inexplicable. Nothing in the record suggests that any amendments were submitted to BIA. It may be a reference to a meeting that occurred between Appellant, the Tribe, and BIA in late July 2009 "to try to reach resolution on a way forward." *Id.* at 3. According to Appellant, "no solution was provided" at the meeting. *Id.*

⁷ Mullen executed the Lease on behalf of Appellant.

By letter dated June 16, 2010, the Tribe requested BIA to cancel the Lease and collect the outstanding bonus, rentals, and interest. Thereafter, the Regional Director canceled the Lease based on Appellant's failure to remit the bonus and rental funds, and demanded payment of these funds plus interest thereon. Decision, October 6, 2010 (AR Tab 3). This appeal followed.

Discussion

We affirm the Regional Director's decision. The Regional Director's approval was unconditional, and the Lease was fully enforceable and binding as of July 30, 2008. Appellant fails to advance any convincing arguments that show that the approval was anything less than final and unconditional. We also conclude that, given BIA's notices to Appellant for the past due funds and given Appellant's clear repudiation of the Lease and its obligations, the Regional Director was not required under these circumstances to provide Appellant with notice of the Lease violation and an opportunity to cure the breach.

I. Standard of Review

It is well-established that appellants bear the burden of showing error in regional directors' decisions. *See McCann Resources Inc. v. Acting Eastern Oklahoma Regional Director*, 48 IBIA 84, 89 (2008); *Tallgrass Petroleum Corp. v. Acting Eastern Oklahoma Regional Director*, 39 IBIA 9, 9 (2003); *Smith Energy Corp. v. Acting Muskogee Area Director*, 34 IBIA 123, 124 (1999). We review legal determinations *de novo*. *Navajo Nation v. Navajo Regional Director*, 40 IBIA 108, 115 (2004).

II. The Lease was Fully Enforceable and Binding

Appellant argues that the Lease never became an effective or enforceable agreement because, it contends, BIA's approval was conditioned upon the Tribe and Appellant including certain additional terms to which Appellant never agreed. Therefore, Appellant argues, there was no "meeting of the minds," no enforceable lease, and nothing for BIA to "cancel." We disagree. Nothing in any of the communications between BIA and the parties to the Lease or in BIA's approval of the Lease suggests that BIA's approval was, in any way, conditional or contingent. We therefore affirm the Regional Director's decision to cancel the Lease.

The IMDA, 25 U.S.C. §§ 2101-2108, enacted in 1982, authorizes Indian and tribal landowners to enter into agreements, subject to the approval of the Secretary, for all matters related to mineral resources on lands held in trust, from exploration through extraction and other development of such resources. *See* 25 U.S.C. § 2102(a). The Secretary's role is to determine whether the minerals agreement is in the best interest of the Indian landowner by

considering the economic benefit to the landowner; the potential social, environmental, and cultural effects; and the provisions in the agreement for conflict-solving. *Id.* § 2103(b). This evaluation by the Secretary is not expected to be onerous. He need not conduct any studies as part of his determination, except as may be required by the National Environmental Policy Act. *Id.* Any disapproval of an IMDA agreement can only be made by the Assistant Secretary - Indian Affairs (Assistant Secretary) or the Secretary himself. *Id.* § 2103(d). Following his receipt of an IMDA agreement, the Secretary must either approve or disapprove it within 180 days or 60 days after compliance with any applicable Federal laws (whichever date is later). *Id.* § 2103(a).⁸

The Regional Director first informed the Tribe that “it is [BIA’s] intent to approve this agreement.” Letter from Regional Director to Tribe, June 26, 2008, at 2 (unnumbered) (AR Tab 15). One month later, the Regional Director affixed his signature directly beneath the statement, “THE FOREGOING OIL AND GAS LEASE BETWEEN THE CROW TRIBE OF INDIANS AND ELK PETROLEUM APPROVED AND AGREED TO.” Lease at 34. He provided the parties with a copy of the approved Lease with a cover letter that affirmed, “This is our approval of the [IMDA] Agreement.” Letter from Regional Director to Tribe, July 30, 2008, at (unnumbered) (AR Tab 14).

Appellant argues that the parties agreed to a proposed lease, presented to BIA for review and approval, and that suggestions for clarifications to the Lease made by the Regional Director when he approved the Lease “effectively changed the transaction by imposing additional terms on the [parties].” Opening Br. at 7. This argument is specious. BIA unequivocally approved the Lease, and when Appellant purported—9 months later—to believe that the approval was “conditional,” BIA reiterated that the approval was *unconditional*. See Letter from Regional Director to Appellant, May 26, 2009 (AR Tab 10) (“approval was *not* conditional and is considered *final* for the [D]epartment.” Emphasis added.). Unwilling to take “yes” for an answer, Appellant later characterized BIA’s final and unconditional approval as failing to “remove” requirements for additional language in the Lease. See Letter from Appellant to BIA and the Tribe, Oct. 14, 2009, at 2 (AR Tab 8).

Certainly, the Regional Director made suggestions to the parties for language that could clarify certain terms of the Lease. However, none of these suggestions are expressed as requirements or demands. And most if not all of the suggestions already are covered in various Federal regulations that are binding on the parties by the terms of the Lease. See Lease, § 21. For example, the Regional Director noted “concerns” with production and

⁸ If a decision is not rendered within this timeframe, either party may compel a decision by seeking a writ of mandamus pursuant to 28 U.S.C. § 1361. See 25 U.S.C. § 2103(a).

sales as well as with methods and reporting because these items were not addressed in the Lease. Letter from Regional Director to Tribe, July 30, 2008, at 1 (AR Tab 14). Appellant describes these concerns as “significant and material.” Opening Br. at 3. But, these concerns are addressed in several Federal regulations, *see, e.g.*, 43 C.F.R. §§ 3162.4-1, 3162.4-3, 3162.7-1, 3162.7-3, and 3164, and thus are binding on the parties. Any such clarification to address these concerns, by way of amendment to or modification of the Lease, would potentially avoid misunderstandings between the parties but the absence of any such provisions does not undermine the Lease.

Thus, not only is there no hint that the Regional Director’s approval of the Lease was conditional, there was no need to make the approval conditional because the concerns brought up by BIA are addressed in various Federal regulations. Indeed, if the Regional Director believed that the items he identified in his letter needed to be addressed before he could approve the Lease, he need not have signed the Lease at all: At the time he did approve the Lease, the Regional Director still had at least 2 months remaining in which to make a final decision to approve the Lease or, alternatively, the Assistant Secretary could disapprove the Lease. *See* 25 U.S.C. § 2103(a).

The bottom line is this: Appellant and the Tribe negotiated a 32-page, single-spaced Lease. The Lease was signed by both parties. Thereafter, it was presented to the Regional Director for approval. The Regional Director concluded that the Lease was beneficial for the Tribe, and he approved it unconditionally. Whether the parties opted to act on the suggestions made by the Regional Director was their call, but the Regional Director did not suggest that his recommendations in any way affected his approval of the Lease or the validity or enforceability of the Lease once he approved it.

III. Notice and Opportunity to Cure Violation

Appellant argues that if the Lease was enforceable, the Lease cancellation is ineffective because the Regional Director failed to give Appellant notice and an opportunity to cure the alleged lease violation. BIA’s failure to do so, according to Appellant, requires us to vacate the Regional Director’s cancellation. We disagree for two reasons. First, Appellant received notice that it was delinquent in its payments and that cancellation of the Lease could result from nonpayment. Appellant responded by explaining in detail its failure to pay and expressly repudiating the Lease. Thus, Appellant received notice and responded prior to the actual decision to cancel the Lease. Second, even assuming Appellant did not receive the notice to which it was entitled, any such failure either was waived by Appellant or excused by Appellant’s repudiation of the Lease.

Section 18.2 of the Lease authorizes the Secretary to cancel the Lease, so long as Appellant is “provided notice and a reasonable opportunity to cure to the extent allowable

under federal law.” Lease, § 18.2. Under Federal law and prior to cancelling an IMDA lease, BIA may issue a notice of proposed cancellation that “shall set forth the reasons why cancellation is proposed,” *or* BIA may issue a notice of noncompliance, followed by an order of cessation. 25 C.F.R. § 225.36. It is undisputed that BIA did not comply with the literal terms of § 225.36. BIA did, however, provide notice to Appellant on its invoices that the Lease could be canceled if payment of the entire amount due was not received.

More importantly, however, Appellant clearly recognized the gravity of its decision not to pay the funds due and sent not one, but two letters in which it sought to excuse its nonpayment by arguing that the Lease was ineffective and denying that any payment was due. The opportunity to present such arguments is the point and purpose of notice and opportunity to cure, and Appellant provided detailed arguments. Thus, it protected its interests and no injury resulted to it from the failure to receive notice pursuant to § 225.36. The Regional Director responded to Appellant’s arguments in his decision. For BIA then, in the wake of receiving these detailed arguments from Appellant, to issue a notice of proposed cancellation or notice of noncompliance and order of cessation would elevate form over substance. Certainly, Appellant did not then and does not now profess to remain interested in pursuing the Lease,⁹ nor does Appellant advance any arguments it claims it would have made had it received formal notice.

Even assuming that notice in accordance with § 225.36 was otherwise required, we conclude that in repudiating the Lease, Appellant waived its right to notice or, alternatively, excused BIA’s noncompliance with § 225.36. Appellant’s repudiation was unequivocal: “Elk Petroleum, Inc. no longer wishes to pursue development of minerals on Crow tribal lands.” Letter from Appellant to BIA and Tribe, Oct. 14, 2009, at 1 (AR Tab 8). The same letter purports to explain that Appellant “does not believe it can wait any longer to obtain a marketable lease from the Tribe,” *id.*, and “sees no alternative but to cease all activities,” *id.* at 3. In June 2010, Appellant sought the return of the bond that it had posted and its president, who was the same individual who signed the Lease on behalf of Appellant, asserted in his affidavit in support that Appellant “has acquired no interest in Crow Reservation oil and gas leases [nor does it have any] present plans or intent to negotiate for an interest in Crow Reservation oil and gas leases.” Mullen Affidavit at ¶¶ 4, 7 (AR Tab 4). In the face of Appellant’s clear statements of repudiation, which came after BIA had made clear its position that Appellant is liable for the bonus payment and first year’s rent, Appellant essentially waived its right to notice of cancellation or excused any such requirement by BIA.

⁹ Faced with the consequences of nonpayment if its argument was proven wrong, Appellant could have but did not attempt to offer payment, e.g., in escrow, or to seek additional time to cure.

We have considered the arguments raised by Appellant, and we conclude that the Lease was fully enforceable and binding on July 30, 2008. We further conclude that, in the wake of BIA's receipt of Appellant's detailed position concerning the ineffectiveness of the Lease coupled with Appellant's unambiguous repudiation of the Lease, BIA was not required to give Appellant formal notice of its intent to cancel the Lease or any further opportunity to cure.

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 October 6, 2010, decision.¹⁰

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

¹⁰ Given our disposition of Appellant's appeal, we conclude that a hearing would not assist the Board. Our decision is rendered on facts that are undisputed. The parties differ in how they may characterize those facts, e.g., whether the Regional Director's approval of the Lease was conditional or unconditional based upon his identification of items not addressed in the Lease, but the underlying facts are based on written documents that are, themselves, the best evidence of their content. We therefore deny Appellant's motion for an evidentiary hearing.