



INTERIOR BOARD OF INDIAN APPEALS

Citation Oil & Gas Corp. and Citation 2004 Investment Limited Partnership, and Navajo Nation v. Acting Navajo Regional Director, Bureau of Indian Affairs

57 IBIA 234 (08/06/2013)



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

CITATION OIL & GAS CORP. AND)	Order Affirming Decision
CITATION 2004 INVESTMENT)	
LIMITED PARTNERSHIP, and)	
NAVAJO NATION,)	
Appellants,)	
)	Docket Nos. IBIA 11-103
v.)	IBIA 11-113
)	
ACTING NAVAJO REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	August 6, 2013

Citation Oil & Gas Corp. (Citation O&G), Citation 2004 Investment Limited Partnership (Citation 2004) (collectively, Citation) and the Navajo Nation (Nation) appeal from a March 21, 2011, decision (Decision) by the Acting Navajo Regional Director (Regional Director), Bureau of Indian Affairs (BIA), concerning the assignment to Citation O&G of six oil and gas leases on the Nation’s Reservation. Citation appeals from that portion of the Decision in which the Regional Director declined to approve the assignment of Lease No. NOG-9904-1324 (Lease 1324), Docket No. IBIA 11-103; the Nation appeals from the Regional Director’s decision to approve the assignments of the remaining five leases (collectively, Assignments), Docket No. IBIA 11-113. Each of these leases is located on a portion of the Nation’s Reservation in Utah. We affirm the Decision.

The Regional Director properly declined to approve the assignment of Lease 1324 when the Nation informed him that it would not consent to the assignment. That lease expressly requires the consent of the lessor to assignments of the lease. Contrary to Citation’s arguments, we conclude that the Nation is the lessor, not the United States.

With respect to the remaining five assignments, we reject the Nation’s arguments. First, we are not persuaded by the Nation’s procedural concerns: Citation O&G had authority to seek approval of the Assignments as the lessee’s designated *agent* even if it was not yet approved as the lessee’s designated *operator*, the failure to submit the Assignments

within 5 days of execution is not fatal to their consideration by BIA, and the issue concerning Citation's authority to do business on the Nation's Reservation is mooted by Citation's evidence to the contrary.

Second, we are not persuaded by the Nation's arguments on the merits. We agree with the Regional Director that neither the leases nor Federal regulations provide the Nation with a right of first refusal or require BIA to determine the applicability of or enforce the Nation's laws with respect to a Tribal right of first refusal. As to the Nation's argument that its best interests are not served by the approval of the Assignments, the Nation has failed to meet its burden of proof. The Nation accuses Citation O&G of causing a decline in oil production but did not identify how Citation O&G is responsible for the decline nor did the Nation identify any lease or regulatory provisions that Citation O&G has violated. And, even if the Assignments were disapproved, nothing would change: The assignor would remain the lessor (and the entity ultimately responsible for complying with the lease terms) and Citation O&G, which had been designated and approved as the operator of the leases, would remain the operator. On the other hand, approval of the Assignments merges these responsibilities in Citation O&G, and effects a change that may ameliorate the Nation's concerns.

History

The six oil and gas leases at issue in this appeal are all located on the Nation's Reservation on land held in trust by the United States for the Nation in Utah. Apparently, some or all of the leases are located within an oil field known as the Ismay-Flodine Park Unit (IFPU). Five of the six leases were granted "for and on behalf of the Navajo Tribe of Indians, designated herein as lessor," and were executed and approved in the 1950's (Lease Nos. I-149-IND-8840, I-149-IND-9123, I-149-IND-9124, 14-20-603-2055A, and 14-20-603-2058). Administrative Record (AR) Tabs 12(A), 35. Each of these five leases was approved in due course by BIA and each contains the following provision: "Assignment of lease—Not to assign this lease or any interest therein by an operating agreement or otherwise nor to sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior." Leases, § 3(h) (AR Tab 12(A)).¹

The remaining lease, Lease 1324 affects a parcel of land designated as Parcel No. 343. At the time Lease 1324 was executed, these minerals were owned by the State of

¹ Each of these five leases is a standard BIA lease, Form 5-157, albeit slightly different versions (Lease No. I-149-IND-8840 was executed on a June 1929 form, while the remaining four were executed on November 1947 forms).

Utah and it was the State that executed Lease 1324 (then designated as Mineral Lease No. 3713) as lessor on January 2, 1952.² *See* Lease 1324 (AR Tab 35). On December 9, 1998, by Exchange Patent No. 19220, the State of Utah granted all of its interest in the minerals of Parcel No. 343 to the “UNITED STATES OF AMERICA, IN TRUST FOR THE NAVAJO TRIBE OF INDIANS,” subject to Lease 3713. AR Tab 33.³ Lease 1324 states in relevant part that the “LESSOR will not permit any assignment of this lease . . . unless and until such assignment . . . is approved by the LESSOR.” Lease 1324, § 12 (AR Tab 35).

All six leases have been assigned to new lessees several times over the past 50 years. Currently, the leases are held by Journey Acquisition-I, L.P., and Journey 2000, L.P. (collectively, Journey). On June 9, 2006, Journey executed two sets of documents, one set that assigned its interests in the six leases to Appellant Citation 2004 and the other set that designated Appellant Citation O&G as the operator of the leases. Under the terms of the Designation of Operator (Designation), Appellant Citation O&G is authorized to act “as [Journey’s] operator and local agent, with full authority to act in [its] behalf in complying with the terms of the lease and regulations applicable thereto.” AR Tab 12(C).

On or about December 7, 2006, Citation O&G submitted the Assignments and the Designations to the Regional Director for approval.⁴ On February 6, 2007, the Nation notified BIA that it had “no objections” to BIA’s approval of the designation of Citation O&G as operator of the leases. Letter from Nation to Regional Director, Feb. 6, 2007

² It is not clear from the record who owned the surface of Parcel No. 343, but we presume that at the time the mineral interest transferred from the State of Utah to the United States in trust for the Nation, the United States already held the surface interest in trust.

³ The patent was part of a comprehensive land and minerals exchange between the United States and Utah. *See* Agreement to Exchange Utah School Trust Lands Between the State of Utah and the United States of America (Agreement), May 8, 1998 (AR Tab 34); *see also* Utah Schools and Lands Exchange Act of 1998 (USLEA), Pub. L. 105-335, 112 Stat. 3139 (Oct. 31, 1998) (incorporating Agreement). Section 5(D) of the Agreement confirms that “[a]ny lands and interests acquired by the United States within the exterior boundaries of the Navajo Indian Reservation pursuant to section 2(A) are taken into trust and held for the benefit of the Navajo Nation, and are hereby declared to be part of the Navajo Indian Reservation in the State of Utah.” Agreement at 4 (AR Tab 34). Section 2(A) identifies the mineral interests of Parcel No. 343 as among the interests to be conveyed by Utah to the United States in trust. *Id.* at 1.

⁴ Citation explains that the Assignments previously were submitted to BIA, albeit to the wrong agency and were resubmitted to the correct BIA agency.

(AR Tab 12(E)). Thereafter, on February 26, 2007, BIA approved the Designations, and Citation O&G became and remains the operator of the six leases.⁵

BIA notified the Nation of the six assignments by letter dated January 5, 2007, and requested the Nation's recommendations for approving or disapproving them. However, for reasons that are not entirely clear, the Nation declined to provide a response to BIA's requests, and BIA did not act on Citation's request for approval until 2011. By letter dated February 25, 2011, the Nation detailed its objections to the six assignments and urged BIA to disapprove them. First, the Nation contended that it is the lessor for all six leases and, therefore, its consent is required for any assignment to be valid.

The Nation also objected to the Assignments because the Nation has determined that it is better, for "the larger long-term benefit of the . . . Nation and its citizens," if the Nation's oil and gas company develops the leases instead of Citation. Letter from Nation to Regional Director, Feb. 25, 2011, at 2 (AR Tab 10). To that end, the Nation maintained that Tribal law grants it a right of first refusal for assignment of oil and gas leases on Tribal lands, which it attempted to exercise and Citation refused to accept even though the Nation would match the terms and conditions under which Citation obtained the Assignments.

The Nation also argued that the Assignments must be disapproved because they were not timely submitted within 5 working days, as required by 25 C.F.R. § 211.53(c), nor, according to the Nation, did Citation have authority to seek approval of the Assignments as an unapproved assignee. *Id.* In addition, the Nation contended that Citation is not qualified to be a lessee because it is not authorized to do business on the Nation's lands and therefore cannot show that it is "qualified to hold the lease under existing rules and regulations," citing 25 C.F.R. §§ 211.23(b)(2) and 211.53(a). *Id.* The Nation argued that § 211.53(a) requires BIA to notify the Nation of any proposed assignments and "[t]he only reason for such notification is to permit the affected tribe to determine if the proposed assignment is in its interest and to advise its trustee accordingly." *Id.* The Nation argued that BIA should deny any assignment that "is not desired by the tribal beneficiary for economic reasons or otherwise." *Id.*

In March 2011, the Nation supplemented its objections. It argued that oil production on the leases had declined since Citation O&G became the operator, and urged BIA to decline approval of the Assignments on this additional ground.

⁵ The Nation also had "no objections" to BIA's approval of Citation O&G as the successor operator to Journey of the IFPU. *See* Letter from Nation to Regional Director, June 6, 2007 (AR 12(G)).

On March 21, 2011, the Regional Director issued the Decision, declining to approve the assignment of Lease 1324 and approving the remaining five Assignments. The Regional Director declined to approve the assignment of Lease 1324 because that lease contained a specific provision requiring the approval of any assignment of the lease by the “lessor.” The Regional Director reasoned that since the mineral interest was acquired by the United States for the benefit of the Nation, the Nation “is therefore the Lessor whose consent is required for any ‘assignment.’” Decision at 4 (unnumbered). Because Citation had been unable to secure the Nation’s consent to the assignment, the Regional Director held that he lacked authority to approve this assignment.

As to the remaining Assignments, the Regional Director observed that the lease provisions did not require the consent of the Nation to the Assignments. The pertinent regulation, 25 C.F.R. § 211.53(a), only required BIA to determine whether to approve the Assignments after giving notice to the Nation of the proposed Assignments. He further held that Citation was “qualified” under current rules and regulations to hold the leases and that Citation had provided a satisfactory bond. Decision at 3 (unnumbered).

The Regional Director also addressed the Nation’s objections to the Assignments. With respect to the Nation’s right to exclude nonmembers from its lands, the Regional Director asserted that that right is an “incidence[] of sovereignty [that is] not based upon or limited by federal regulations governing lease assignment[s].” *Id.* at 4 (unnumbered). As to the Nation’s assertion that it would best be able to manage the Nation’s mineral resources and is entitled to exercise a right of first refusal, the Regional Director stated that with the exception of Lease 1324 the leases simply did not require the Nation’s consent to the Assignments nor did the leases provide for a right of first refusal. The Regional Director informed the Nation that it could insert such provisions in future leases or negotiate with Citation concerning the management or ownership of the leases. Last, the Regional Director observed that until the Assignments are approved, Journey remained responsible for production, but once the leases transferred to Citation, Citation would then succeed to Journey’s responsibilities, obligations, and liabilities. He noted that although the Nation claimed that oil production had declined under Citation O&G’s management, Citation asserted that the delay in approval of the Assignments had hindered its development of the Leases and recovery of oil. Ultimately, the Regional Director concluded that he would approve the remaining five Assignments.

The appeals to the Board followed. Citation moved to dismiss the Nation’s appeal as untimely filed, which was denied by the Board after briefing was received from the parties. Thereafter, the parties briefed the merits of their respective appeals. Citation and the Nation have filed opening and reply briefs as well as answer briefs in response to each other’s opening briefs; the Regional Director filed an answer brief in response to the two opening briefs. Subsequent to its reply brief, the Nation filed supplemental authorities to

which Citation responded. Citation also included additional documents consisting of minutes from the Nation's tribal council meetings. The Nation filed a response to Citation's reply to the Nation's supplemental authorities.

Discussion

We affirm the Regional Director's decisions. With respect to Lease 1324, there simply was no action for the Regional Director to take: The lease requires the consent of the lessor, the Nation is the lessor, and the Nation declined to approve the assignment of the lease. BIA's role, as trustee, is to determine whether to approve the assignment. With consent lacking from the beneficial owner, essentially no action is required from BIA.

With respect to the remaining five leases, nothing in their terms requires the lessor's consent to their assignment. The Assignments require only the approval of BIA. We reject the procedural arguments raised by the Nation, i.e., that Citation lacked authority or standing to submit the Assignments for approval, that the Assignments were untimely submitted, and that Citation 2004 is not authorized to do business on the reservation. We also reject the Nation's arguments on the merits, i.e., that BIA should not approve the leases until Citation O&G complies with the Nation's laws, which require the Nation to have an opportunity to exercise a right of first refusal (and which the Nation has chosen to exercise), and that the best interests of the Nation are not served by approving the Assignments. BIA is not charged with enforcing tribal laws nor has the Nation shown that its best interests will be adversely affected by the approval of the leases.

I. Standard of Review

Whether to grant approval of a lease assignment is a discretionary determination that we will not disturb unless it fails to comport with the law, is not supported by the evidence, or is otherwise arbitrary or capricious. *See Birdbear v. Acting Great Plains Regional Director*, 56 IBIA 87, 89 (2012). The burden rests at all times with appellants to show how the Regional Director has erred in rendering his decisions. *Id.* We review *de novo* the sufficiency of the evidence and questions of law, including the interpretation of leases. *Id.*

II. Lease 1324 (Citation's Appeal, Docket No. 11-103)

The Regional Director held that he "lack[ed] the authority to approve the assignment of [Lease 1324]" because the Nation is the lessor, the terms of the lease require the consent of the lessor to any assignment of the lease, and the Nation had declined to consent. Decision at 4 (unnumbered). We affirm.

It is not disputed that—*on behalf of the Nation*—the United States holds legal title to the mineral interests on Parcel No. 343, which is the situs of Lease 1324. Indeed, the Exchange Patent (No. 19220), the USLEA, and the Agreement are replete with references to the United States accepting the mineral interests *in trust for the Nation*. Thus, the Nation holds most of the bundle of sticks comprising ownership of the minerals. And, as recognized by Congress as long ago as 1938, this ownership means that the Nation has authority to lease its land and minerals. See 25 U.S.C. § 396a; *Poaffybitty v. Skelly Oil Company*, 390 U.S. 365, 372 (1968);⁶ see also *Wilson v. U.S. Dep't. of the Interior*, 799 F.2d 591, 592 (9th Cir. 1986) (*per curiam*) (applying *Poaffybitty* to lease of tribal mineral interests held in trust by the United States); *Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director*, 21 IBIA 45, 48 (1991). As the Supreme Court held, “Although the approval of the Secretary is required [to lease trust land for mining purposes], *he is not the lessor* and he cannot *grant* the lease on his own authority.”⁷ *Poaffybitty*, 390 U.S. at 372 (emphasis added) (footnote omitted). This is why, for example, it is the Nation that is the designated lessor on the face of the remaining five leases, which lands and minerals are also held in trust by the United States. It would be inconsistent and contrary to law for the United States now to claim to be, or be designated as, the lessor of Lease 1324. The United States is the trustee, not the beneficial owner of the mineral interests; the beneficial ownership of the mineral interests rests with the Nation.

Citation argues that because Lease 1324 originally was executed between the State of Utah and a private citizen, it was not and is not subject to 25 C.F.R. Part 211. We agree with Citation that Lease 1324 was not entered into pursuant to Part 211.⁸ However, for the reasons we stated above, we do not agree that the United States, rather than the Nation, is the lessor. The United States’ trust responsibility to and for the Nation’s trust interests is a creature of Federal law. Thus, in the context of determining who is the lessor where the United States holds land in trust for a tribe, Federal law defines who the lessor is as between the trustee (United States) and the beneficial owner (Nation). If, under Federal law, the tribe is the lessor for purposes of entering into a lease of its trust mineral interests, it is entirely consistent to construe the tribe as the lessor for purposes of consenting to an

⁶ The Secretary does have authority in certain circumstances to lease mineral interests on individually allotted trust lands. *Poaffybitty*, 390 U.S. at 372 n.10; 25 C.F.R. § 212.21.

⁷ In so stating, the Court was construing 25 U.S.C. § 396, which is the companion statute to § 396a and which governs the leasing of mineral interests on individually allotted lands.

⁸ We need not address whether Part 211, in whole or in part, applies to the United States’ administration of the lease. It is irrelevant to the inquiry before us, which is limited to the issue of whether the Nation’s consent must be obtained before BIA may approve—pursuant to its trust responsibilities—the assignment of Lease 1324.

assignment of its mineral interests even where the underlying lease was not entered into pursuant to Federal law.⁹

Citation also argues that the change in lessor constituted a “unilateral change” in the terms of the lease and objects on this ground. *See* Citation’s Opening Br. at 5, 6. As we understand Citation’s argument, Citation does not claim that the State of Utah may not transfer its interest to the United States in trust for the Nation;¹⁰ rather Citation claims that the United States *is* the lessor and that the United States has “deemed” the Nation to be the lessor without the consent of the lessee or, alternatively, has granted the Nation a right of first refusal, and therefore is attempting to unilaterally alter the terms of Lease 1324. Again, we disagree. The United States has not “deemed” the Nation to be the lessor nor has it granted the Nation any right of first refusal or transferred legal title to the mineral estate to the Nation. The Nation received its interest when the United States accepted title as trustee of the mineral estate for the Nation, and the State of Utah transferred its interest in Lease 1324. And where the lease requires consent to the assignment by the lessor and the lease concerns interests held in trust by the United States for a tribe, a two-part process applies that consists first of the tribe’s agreement or *consent* to the assignment and second of the United States’ approval of the assignment. *See* 25 U.S.C. § 396a; *see also Poaffpybitty*, 390 U.S. at 373. Thus, as the beneficial owner, the Nation is entitled to decide in the first instance if it favors the assignment. And as trustee with a fiduciary responsibility to the Nation for the prudent management of its mineral interests, the United States also must ensure that the assignment serves the interests of the Nation, but only after, in this instance, the Nation has consented to the assignment.

⁹ Citation argues that “[t]o suggest that the . . . Nation could become the lessor of minerals not leased pursuant to [F]ederal law and regulation is inaccurate,” Citation’s Opening Brief (Br.) at 7, but provides no authority for this proposition. That is, Citation fails to provide any law pursuant to which the United States, in the context of holding mineral interests in trust for an Indian tribe, would be held to be the lessor of those interests rather than the beneficial owner, i.e., the tribe.

¹⁰ And to the extent that Citation may be arguing that there can be no assignment of the lessor’s interest to the United States without the consent of the lessee, Citation points to no provision in the lease that would prohibit the transfer that occurred between the State of Utah and the United States in its role as trustee for the Nation. Although the lease identifies the State of Utah as the lessor, nothing in the terms of the lease precludes the transfer of the lessor’s interest in the mineral estate. That is, the terms of the lease do not provide the lessee with any interest in the identity of the lessor or whether the lessor may or may not transfer its interest in the mineral estate. Thus there has been no change, unilateral or otherwise, in the terms of the lease.

Finally, Citation asserts that “the Agreement states that the United States will hold leases for the Nation’s benefit, and act as the lessor of the leases.” Citation’s Opening Br. at 7, citing §§ 4(B) and 5(D) of the Agreement. The Agreement does not contain any such statements. Section 4(B) explains that the conveyances made by the State of Utah “shall be subject only to [*inter alia*] those valid existing surface and mineral leases.” Agreement, § 4(B); *see also* Exchange Patent No. 19220 at 3. And § 5(D) states that the “lands and interests acquired by the United States . . . pursuant to § 2(A) are taken into trust . . . for the benefit of the . . . Nation” The only “interests” identified in § 2(A) are *mineral* interests, specifically including the mineral interests on Parcel No. 343. We find nothing in the Agreement, the Exchange Patent, or the USLEA that remotely identifies who steps into Utah’s shoes as lessor (as between the United States and the Nation), much less any explicit statement that identifies the United States as the lessor of Lease 1324 in place of the State of Utah.

Therefore, for the reasons we set forth above, we affirm the Regional Director’s decision that, in the absence of the Nation’s agreement to the assignment of Lease 1324, he may neither independently consent to the assignment nor may he approve the assignment.

III. Remaining Leases (Nation’s Appeal, Docket No. IBIA 11-113)

We affirm the Regional Director’s approval of the Assignments to Citation O&G of the remaining five leases. The Nation raises three procedural arguments to bar Citation from seeking approval of the Assignments, none of which we find persuasive. First, the Nation maintains that the record is devoid of any evidentiary support showing that Citation’s status was anything other than an unapproved assignee at the time that the Assignments were submitted for approval and that, as an unapproved assignee, Citation lacks “standing” to seek BIA’s approval of the Assignments. The Nation also argues that the proposed Assignments were untimely submitted to BIA and, therefore, must be rejected. Finally, the Nation argues that because neither Journey nor Citation is authorized by the Nation to conduct business on the Nation’s land or to hold the subject oil and gas leases, BIA must reject the Assignments.

As to the Nation’s arguments on the merits, they are rejected. BIA is not charged with enforcing the Nation’s laws with respect to its mineral leases and therefore the Nation must determine how best to enforce its asserted Tribal right of first refusal for the Assignments. As to the Nation’s claim that the Assignments are not in the Nation’s best interests, we conclude that the Nation has not shown how its best interests would be adversely affected by BIA’s approval inasmuch as Citation O&G will remain the operator on the leases regardless of BIA’s approval. In approving the Assignments, Citation 2004 will now be the assignee/lessee and therefore required to abide by the lease terms and regulations; otherwise, Journey (and the current status quo) will remain in place.

A. Procedural Challenges

We are not persuaded by the Nation's procedural arguments. Citation clearly had authority to seek approval of the Assignments as Journey's designated agent and although approval was not sought from BIA within 5 days of execution of the Assignments, we conclude that this fact is not fatal to BIA's consideration. The Nation's final procedural concern—that Citation is not authorized to do business on the Nation's Reservation—is moot.

1. Citation's "Standing" to Seek Approval of the Assignments

The Regional Director did not make an express determination in his Decision on the question of Citation's authority to seek approval of the Assignments. Because standing is a legal question that we review *de novo* when the underlying facts are undisputed, *see, e.g., Trenton Indian Service Area v. Great Plains Regional Director*, 54 IBIA 298, 303 (2012), we address it here and hold that Citation O&G had standing as Journey's designated agent to submit the Assignments to BIA and seek approval for the Assignments.¹¹

The Designation, as well as the Assignments, were submitted simultaneously to BIA by Citation O&G in December 2006. Therefore, the Nation argues that Citation O&G, as an as-yet unapproved operator, lacked standing, i.e., authority, to submit the Assignments for approval and the Nation argues that this lack of standing cannot be cured through subsequent approval of Citation O&G's operator status. According to the Nation, only Journey has standing to submit the Assignments to BIA for approval. We disagree.

The Designations each identify Citation O&G as Journey's "operator *and local agent*, with full authority to act in his behalf in complying with the terms of the lease and regulations applicable thereto." AR Tab 12(C) (emphasis added). The applicable regulation requires only that BIA approval be secured for agreements that transfer, *inter alia*, "the *use* of [a] lease," through any means. 25 C.F.R. § 211.53(b) (emphasis added). The designation of an operator is the designation of someone other than the lessee to *use* the lease; the designation of an agent, on the other hand, is a grant of authority that permits another party to stand in a legal capacity for the designator (in this case, to act on behalf of Journey in matters relating to the leases and regulations that do not concern the *use* of the leases). Nothing in the regulations requires BIA's approval of a lessee's designation of an agent, for which reason Journey's designation of Citation O&G as its agent became

¹¹ The Nation is correct that only Citation O&G is designated as Journey's agent for the subject leases and, thus Citation 2004 lacks standing to seek approval of the lease assignments. We do not understand Citation or the Regional Director to argue otherwise.

effective on the day the Designations were executed in June 2006. The language in the Designations—granting Citation O&G “full authority to act in [Journey’s] behalf in complying with the terms of the lease and regulations applicable thereto”—is broad enough to authorize Citation O&G to submit the Assignments to BIA on Journey’s behalf in compliance with both the Lease terms and regulations requiring BIA approval of assignments. For this reason, we conclude that Citation O&G has standing to seek approval of the Assignments.¹²

2. Untimely Submission

The Nation also argues that the untimely submission of the Assignments renders them ineffective. The Nation hinges its argument on the use of the word “shall” in 25 C.F.R. § 211.53(c), which provides that assignments of leases “*shall* be filed with the superintendent within five (5) working days after the date of execution.” Emphasis added. The Nation maintains that Citation O&G’s failure to submit the Assignments within 5 working days is fatal to its request for approval and, presumably, fatal to BIA’s jurisdiction to consider the submitted assignments. We disagree. This provision is intended to encourage prompt presentation of assignments to BIA for consideration. It would be utterly impractical to state that assignments “may” or “should” or “ought to” be presented within 5 working days. Prompt presentation enables BIA to maintain accurate records concerning authorized users of trust lands, obtain necessary bonds from the assignee, and determine whether the assignee is qualified to assume the lease. The requirement also protects the assignee: In the absence of approval and assuming that the assignee has assumed operation of the lease from its predecessor, prompt presentation avoids charges of trespass. No consequence is spelled out in the regulation in the event assignments are untimely presented, but it is evident that failure to comply can place the assignments at risk of rejection by BIA for untimely presentation if the delay, e.g., has prejudiced BIA or the landowner in some way.

We agree with the Nation that “shall” ordinarily is a mandatory directive, *see Manistee County Board of Commissioners v. Midwest Regional Director*, 53 IBIA 293, 297 n.3

¹² Even if BIA’s approval were required for Citation O&G to act as Journey’s agent, the Nation consented to the Designation of Citation O&G as operator for all six leases on February 6, 2007, and BIA approved the Designations on February 26, 2007, less than 3 months after the Assignments were submitted by Citation O&G and well before the Regional Director’s 2011 Decision. We do not believe the parties would be served by overturning matters at this late stage only to have Citation and Journey re-execute the forms and resubmit them. Therefore, we would still conclude that Citation O&G properly submitted the forms for review.

(2011), but, in *Manistee County* as well as in *Danks v. Fields*, 696 F.2d 572 (8th Cir. 1982), both cited by the Nation, the directive compelled BIA to take action on which others were dependent. For example, in *Manistee County*, Congress had directed BIA to take certain lands into trust on behalf of a tribe if certain conditions were met. Once the conditions were satisfied, the statute stated that the Secretary “shall . . . accept any real property” in Mason or Manistee Counties in trust for the tribe. 25 U.S.C. § 1300k-4(b) (emphasis added). Similarly, in *Danks*, the grazing permits at issue stated that the “grazing fees shall be re-evaluated . . . by August 1.” 696 F.2d at 576. Again, the benefit from this mandatory instruction flowed to the ranchers to enable them “to make intelligent and informed decisions concerning the [upcoming] grazing season.” *Id.* (footnote omitted). As we have explained, the benefit of prompt presentation primarily benefits BIA and indirectly benefits the assignee. And we note that the Nation has not identified any injury to it as a result of the 6-month delay in presentation.

Here, the Regional Director determined that “the delay [in presentation of the assignments for BIA’s approval] had no [e]ffect on the operation of the leases or on the continuing obligation and liability of the lessee of record, Journey, [whose] obligations remained in full force and effect.” Decision at 2 (unnumbered) n.1. The Nation does not disagree with these reasons. In fact, the Nation consented to Journey’s designation of Citation O&G as its operator and did not raise any objections to the Assignments or their untimely presentation until more than 4 years had elapsed from their presentation for approval and after at least two requests from BIA for the Nation’s response to the Assignments. Therefore, we see no reason to reverse the Decision on this ground.¹³

3. Citation’s Authority to Transact Business on the Nation’s Reservation

The Nation maintains that, as a matter of Tribal law, neither Citation nor Journey were authorized to conduct business or qualified to hold leases on the Nation’s Reservation. The Nation cites 25 C.F.R. §§ 211.23(b)(2) and 211.53(a) as requiring the Regional Director to consider Citation’s standing under Tribal law. The Regional Director urges us to determine that these provisions do not require assignees to comply with Tribal law.

¹³ The Nation also argues, for the first time in its reply brief, that the Purchase and Sale Agreement between Journey and Citation reposed title to the lease in Journey if the Assignments were not approved within 180 days. Ordinarily, we do not consider arguments raised for the first time in a reply brief, *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 219 (2011), and we see no reason to depart from this rule other than to observe that the Nation is not a party to the Purchase and Sale Agreement and therefore is not a proper party to enforce the provisions of this Agreement.

We conclude that we need not determine whether §§ 211.23(b)(2) and 211.53(a) require compliance with Tribal law because, in response to the Nation's argument, Citation has produced a copy of Citation 2004's authority to transact business within the Nation's Reservation as a foreign corporation. Apparently, after the Nation raised this argument before the Regional Director, Citation 2004 applied and received its Certificate of Authority, which is dated March 4, 2011. In its reply brief, the Nation does not respond to or address this proffer by Citation. We do not address it further inasmuch as it is moot.¹⁴

B. Merits

1. Compliance with the Nation's Laws

The Nation argues that BIA should decline to approve the Assignments because, in accordance with Tribal law, the Nation sought to exercise its statutory right of first refusal to purchase the Assignments, which effort apparently was rebuffed by Citation. The Nation maintains that, given this noncompliance with Tribal law, BIA should decline to approve the Assignments. We disagree.

As the Regional Director explained, nothing in the leases or in the regulations imposes an obligation on BIA to enforce Tribal law by requiring Citation to accede to a request from the Nation to exercise its Tribal right of first refusal for the Assignments or, alternatively, requiring the Nation's consent to the Assignments.¹⁵ The leases do not

¹⁴ For the first time on appeal to the Board, the Nation raises the issue of Journey's authority to do business on the Nation's Reservation and thus we need not consider it. *See Seminole Tribe*, 53 IBIA at 219. Moreover, nothing in the record supports the Nation's argument nor do these consolidated appeals concern Journey or the assignment of the leases to Journey. Therefore, we decline to consider this issue further.

¹⁵ The Nation argues that 25 C.F.R. § 211.29—which authorizes Part 211 to be superseded by the laws of those tribes organized under certain specific statutes, including the Indian Reorganization Act (IRA), 25 U.S.C. § 461 *et seq.*, so long as tribal law does not supersede the requirements of Federal law applicable to Indian mineral leases—requires BIA to enforce the Nation's right of first refusal even though it is not organized pursuant to the IRA (i.e., a non-IRA tribe). The Nation cites *Akiachak Native Community v. Salazar*, ___ F. Supp. 2d ___, 2013 WL 1292172 (D.D.C. Mar. 31, 2013), in support of its contention that 25 U.S.C. § 476(g) prohibits BIA from distinguishing between IRA and non-IRA tribes in applying § 211.29.

The Nation failed to develop this particular argument—that § 476(g) requires BIA to apply § 211.29 to all tribes—before the Regional Director. Although the court's decision in *Akiachak* did not issue until this appeal was pending before the Board, §§ 476 and

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require compliance with the Nation's laws, and Courts consistently have rejected past efforts by BIA to enforce tribal law where it was not required by Federal law, regulation, or contract. See *Tenneco Oil Co. v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572, 575-76 (10th Cir. 1984) (observing that an oil and gas lease on the tribe's reservation was not subject to tribal law); *United Nuclear Corp. v. United States*, 912 F.2d 1432, 1438 (Fed. Cir. 1990) (construing the imposition of tribal consent for mining plan, where the leases required none, as an unconstitutional taking). In fact, the Leases themselves require the lessees "[t]o abide by and conform to any and all regulations of the Secretary" Leases, § 3(g) (emphasis added); see also *id.* § 11 (lessee shall abide by Federal law and regulations governing conservation, production, or marketing of oil and gas); cf. § 3(b) (the drilling and production of certain wells shall be pursuant to "applicable law or regulation"). As a whole, the leases speak only of compliance with Federal laws and regulations, and do not mention Tribal law. Finally, as the Regional Director points out, the 1996 preamble to the revised Indian mineral leasing regulations notes that "[t]ribal administrative and judicial remedies will often be the appropriate means for redressing violations of tribal laws and regulations." 61 Fed. Reg. 35634, 35650 (July 8, 1996). Therefore, we agree with the Regional Director that BIA was not required to decline approval based on either the Tribe's exercise of a Tribal right of first refusal or the absence of the Tribe's consent to the Assignments.¹⁶

2. Best Interests of the Nation

The Nation argues that BIA's consideration of the Assignments is flawed because BIA failed to consider whether it was in the Nation's best interest to approve them. Therefore, according to the Nation, we should vacate the Regional Director's decision and remand this matter to him to expressly consider the Nation's best interests. We disagree.

The Nation maintains that its interests are ill-served by assigning the leases to Citation. It argues that since Citation O&G took over as operator of the leases, production

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211.29 have been in existence for many years, and, thus, the Nation could have made the argument in their objections to the Regional Director but did not. We see no reason to consider this argument now. See *Seminole Tribe*, 53 IBIA at 219.

¹⁶ Citation argues that the Nation failed to exercise its right in a timely manner; the Nation argues that the time for submitting a first refusal did not accrue until the Nation received a *completed* application and that it then timely exercised its right. The Nation also argued that, even if it had exercised its right outside of the prescribed timeframe, it is not bound by these time constraints, citing *Brock v. Pierce County*, 476 U.S. 253, 256-60 (1986). We see no basis for us to resolve these issues of Tribal law.

has declined significantly, “much more than a normal decline in production.” Declaration of Wilson Groen (Groen), ¶ 5 (AR Tab 8). Groen, the chief executive officer of the Nation’s oil and gas company asserts that “[t]he sharp decline in production must logically be attributed to Citation, as no external cause has ever been asserted nor is any such other cause known to me.” *Id.* Groen further asserts that a prudent operator would have been making “investments in the field.” *Id.* According to Groen, the oil field “will be worthless in about 2014 and likely uneconomic to produce after 2013.” *Id.* The Nation overlooks several issues.

First, the Nation has not argued that any provisions in the leases or in the regulations have been violated, nor does the Nation assert that it has ever requested the government to cancel the leases or issue any notices of noncompliance prior to the submission of its objections to the Regional Director. *See* Leases, § 6; Letter from Paul E. Frye, Esq., to Regional Director, Mar. 10, 2011 (AR Tab 8); *see also* 25 C.F.R. § 211.54. As part of its objections to the Assignments, the Nation asserted that “the production data suggest that [BIA] should, in its trustee capacity, determine if the lessee is in compliance with section 3(f) of the [L]eases . . . , requiring the lessee to exercise reasonable diligence in operating the wells.” Letter from Paul E. Frye, Esq., to Regional Director, Mar. 10, 2011 (AR Tab 8). Thus, the Nation stops well short of asserting that there is any actual violation of the Leases. For its part and after consulting with the Bureau of Land Management (BLM), BIA asserts that it is unaware of any notices of noncompliance that have issued to either Citation or Journey.¹⁷

Second, the Nation has not explained what it is that Citation failed to do that should have been done or what Citation did that should not have been done on these or any other leases. That is, the Nation has not identified any specific act(s) or inaction by Citation that would enable BIA to determine whether the Nation’s best interests are served by approving the Assignments to Citation, i.e., whether Citation is knowledgeable in oil and gas mining, is a careful and prudent lessee, etc.

Third, if, as the Nation seems to argue, Citation is not performing as it should, disapproving the Assignments will *not* change the status quo. The precise situation that the Nation wants to change would not change: Journey will remain the lessee and Citation will remain the operator. On the other hand, as the Regional Director observed, approval of

¹⁷ The Regional Director explains that BLM bears responsibility for inspecting Indian mineral leases and issuing written orders and notices of noncompliance where appropriate. Regional Director’s Answer Br. at 30 n.6 (citing 25 C.F.R. § 211.4); *cf.* 25 C.F.R. § 211.54 (BIA may issue notices of noncompliance when a lessee has failed to comply with the terms of its lease or applicable laws or regulations).

the Assignments will effectively merge the responsibility for developing the leases with the operation of the leases in one entity, which is Citation. *See* Decision at 5 (“With the assignment of the five leases from Journey to Citation, Citation accepts all of the assignor’s responsibilities and prior obligations and liabilities.”). Thus, with complete responsibility for the leases reposed in Citation 2004 instead of Journey, the Nation’s concerns may well be assuaged.¹⁸

For these reasons, we affirm the Decision to approve the Assignments. The Nation has not shown how its best interests are adversely affected by approval of the Assignments and there is no dispute that Citation O&G has otherwise satisfied the regulatory requirements of § 211.53 to qualify for the Assignments.

Conclusion

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 March 21, 2011, decision of the Regional Director.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

¹⁸ The Regional Director argues that Journey, not Citation, is the lessee and, therefore, Citation cannot be held responsible for violations of the leases or regulations, if any there be. While this may be true under the terms of the leases, it is also true that Journey gave Citation “full authority to act in [its] behalf in complying with the terms of the lease and regulations applicable thereto.” Designations. Thus, even though Citation cannot be held liable for any violations of the lease or regulations, there nevertheless is good reason for the Nation to consider Citation’s performance as Journey’s operator in evaluating whether Citation should be approved as a lessee or operator on the Nation’s lands. The problem with doing so *here*, however, is—as the Regional Director points out—disapproving the Assignments will not effect any change whereas approving the Assignments at least merges the liability for performance with the actual operation of the leases.