



INTERIOR BOARD OF INDIAN APPEALS

John Harper v. Rocky Mountain Regional Director, Bureau of Indian Affairs

60 IBIA 129 (03/18/2015)



# 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

JOHN HARPER,	)	Order Vacating Decision and
Appellant,	)	Remanding
	)	
v.	)	
	)	Docket No. IBIA 12-154
ROCKY MOUNTAIN REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	March 18, 2015

John Harper (Appellant) appealed to the Board of Indian Appeals (Board) from a July 24, 2012, decision (Decision) by the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirming a decision by BIA’s Blackfeet Agency Superintendent (Superintendent), to increase Appellant’s bond requirement for oil and gas leases on tribal and allotted lands located on the Blackfeet Indian Reservation. The Superintendent’s decision increased the bond requirement from \$10,000 to \$75,000 for an unspecified number of leases in which Appellant holds an interest. The Regional Director affirmed the Superintendent’s decision, reasoning that a \$75,000 bond was sufficient to meet the potential liability from plugging and abandoning the one existing well on Appellant’s leased property and any future wells Appellant may drill. Appellant contends that the administrative record is not sufficient to support the proposed bond increase and that the Regional Director did not adequately explain the rationale for the Decision.

Although we review BIA’s decision under a deferential standard, we conclude that the Decision to increase Appellant’s bond requirement from \$10,000 to \$75,000 is not supported by substantial evidence or adequately explained and must therefore be vacated and remanded for further consideration and explanation.

## Background

Appellant, as the owner of Roland Oil and Gas Co., holds an interest in 12 leases on the Blackfeet Reservation. Decision, July 24, 2012, at 1-2 (unnumbered) (Administrative

Record (AR) Tab 1).<sup>1</sup> Appellant provided BIA with a \$10,000 bond for these leases.<sup>2</sup> Time Certificate of Deposit, Feb. 25, 2009 (AR Tab 15).<sup>3</sup> There is currently one well on Appellant's leased property and it first went into production on March 24, 2010. Decision at 2 (unnumbered).

On June 28, 2011, the Superintendent informed Appellant that he was required to provide a \$75,000 bond for the wells he held in production and the leases in which he held a 12.5% interest.<sup>4</sup> Notice of Bond Requirement for Oil and Gas Mining Lease, June 28, 2011 (Superintendent's Decision) (AR Tab 12).

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<sup>1</sup> The Regional Director's decision lists 12 leases held, in whole or in part, by Appellant and indicates that Appellant assigned an 87.5% interest in 10 of these leases to Newfield Exploration. Decision at 1-2 (unnumbered). Appellant asserts that he initially held 74 leases on the Blackfeet Reservation and assigned all rights to 62 of those leases to Newfield RMI, LLC, a.k.a. Newfield Exploration (Newfield). Opening Brief (Br.), Nov. 14, 2012, at 1-2. The remaining 12 leases were also assigned to Newfield, with Appellant reserving a 12.5% interest in the leases. *Id.* at 2. While the leases were approved by BIA between March 25, 2009, and March 7, 2011, at the time of the Decision, there was only one producing well on the 12 leases. Decision at 2.

<sup>2</sup> Appellant contends that Newfield, the majority interest owner in the leases at issue, holds a nationwide bond of \$150,000 pursuant to 25 C.F.R. § 211.24(c). Appellant's Statement of Reasons (SOR), Sept. 9, 2011, at 2 (AR Tab 4); Opening Br. at 2.

<sup>3</sup> Copies of two other bonds, with payment authority assigned to the State of Montana and the U.S. Bureau of Land Management (BLM), respectively, are provided in the record. *See* Time Certificate of Deposit, Apr. 14, 2009 (AR Tab 15) (Montana bond); Time Certificate of Deposit, July 1, 2009 (AR Tab 15) (BLM bond). We are concerned only with the bond that authorizes BIA to demand immediate payment.

<sup>4</sup> The Superintendent does not specify the number of leases to be covered by the increased bond amount demanded of Appellant nor does he refer to leases held exclusively by Appellant. Rather, he lists two categories of leases in which Appellant holds a 12.5% interest. Superintendent's Decision. The Board is unable to resolve any discrepancy in Appellant's relative leasehold interest in the listed leases as the record contains copies of only 8 of Appellant's leases and 4 of the assignments. *See* Appellant's Leases and Assignments (AR Tab 18). The lease assignments suggest, without expressly stating, that Appellant retained a 100% interest in oil and gas produced from the Rierdon Formation on those leases where this reservation was made, and assigned 87.5% of his interest to minerals produced in all formations below the Rierdon Formation. *See, e.g.*, Assignment of Mining Lease, Lease No. 14-20-0251-8486, Contract No. 7084860914 (AR Tab 18) (recording that the owner of the lease assigns 87.5% of its 100% right, title, and interest in the lease, (continued...))

Appellant timely appealed to the Regional Director, arguing that the increase in the bonding requirement was arbitrary and capricious and an abuse of discretion. *See* Notice of Appeal to Regional Director, Aug. 12, 2011 (AR Tab 9); SOR at 1-4. He stated that the Superintendent offered no justification for the increase in the bond amount and that the increase, when added to Appellant's existing bond,<sup>5</sup> exceeded the amount established for a statewide bond, pursuant to 25 C.F.R. § 211.24(b), and was therefore unreasonably high. SOR at 3-4.

The Regional Director upheld the Superintendent's decision. Decision at 2 (unnumbered). He grounded the Decision in part on an estimate provided by the Bureau of Land Management (BLM) indicating that it would cost the government approximately \$26,000 to plug and abandon the one existing well, should Appellant fail to do so. *Id.* at 2-3. Because Appellant's "twelve leases provide the authority for [Appellant] to drill on these properties any time throughout the life of the lease," the Regional Director "anticipate[d] that [Appellant] will drill again on these properties." *Id.* at 3. The Regional Director concluded that the \$75,000 bond was "sufficient" to insure that there were no "untended liabilities upon trust property" from expanded drilling. *Id.*

Appellant timely appealed the Regional Director's decision to the Board.

### Regulatory Framework

BIA regulations govern the bonding requirements for the leasing of tribal and allotted lands for mineral development:

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"limited to all formations lying below the base of the Rierdon Formation"). Leasehold ownership is relevant to the determination of the party ultimately bearing the legal responsibility for liabilities such as environmental damage, unpaid royalties, fees, and well plug and abandonment costs. *See, e.g.*, 25 C.F.R. § 211.53 (responsibility for assignor's prior obligations and liabilities under the lease).

<sup>5</sup> Although Appellant appears to have interpreted the Superintendent's decision to require posting a bond of \$75,000 in addition to Appellant's existing bond, *see* SOR at 2, that decision notified Appellant that the "bond requirement" was set at \$75,000. Superintendent's Decision. Any uncertainty was removed by the Regional Director's decision. Decision at 2 (unnumbered) ("It is the decision of this office to increase your bond amount from the current \$10,000 to \$75,000.").

(a) The lessee, permittee or prospective lessee acquiring a lease, or any interest therein, by assignment shall furnish with each lease, permit or assignment a surety bond or personal bond in an amount sufficient to ensure compliance with all of the terms and conditions of the lease(s), permit(s), or assignment(s) and the statutes and regulations applicable to the lease, permit, or assignment. . . .

(b) An operator may file a \$75,000 bond for all geothermal, mining, or oil and gas leases, permits, or assignments in any one State, which may also include areas on that part of an Indian reservation extending into any contiguous State. Statewide bonds are subject to approval in the discretion of the Secretary.

(c) An operator may file a \$150,000 bond for full nationwide coverage to cover all geothermal or oil and gas leases, permits, or assignments without geographic or acreage limitation to which the operator is or may become a party. Nationwide bonds are subject to approval in the discretion of the Secretary.

25 C.F.R. § 211.24 (bonding requirements on tribal lands); *see also* 25 C.F.R. § 212.24 (making the provisions of § 211.24 applicable to leases on allotted lands). The regulations also permit BIA to increase bond amounts: “The required amount of bonds may be increased in any particular case at the discretion of the Secretary.” *Id.* § 211.24(e).

### Standard of Review

We have previously established a standard of review for BIA decisions concerning bond amounts for leases of restricted land in Oklahoma owned by members of the Five Civilized Tribes. *See McPhail, d.b.a. Macro Oil Co. v. Acting Muskogee Area Director*, 18 IBIA 353, 355-56 (1990); *GMG Oil and Gas Corp. v. Muskogee Area Director*, 18 IBIA 187, 190 (1990). While this case concerns the increase of a bond requirement for mineral development leases on tribal and allotted lands subject to the more broadly applicable regulatory regime provided under 25 C.F.R. Parts 211 and 212, the specific provisions pertinent to bonding are not substantially different.<sup>6</sup> Under both regimes, the decision to

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<sup>6</sup> With regard to leases of land belonging to members of the Five Civilized Tribes, 25 C.F.R. § 213.15(c) provides, in pertinent part, “The right is specifically reserved to increase the amount of bonds . . . in any particular case when the officer in charge deems it proper to do so. The nationwide bond may be increased at any time in the discretion of the Secretary of the Interior.” The provision applicable to the leases at bar provides, “The

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increase the bond requirement is left to BIA's discretion. We will therefore review the Regional Director's decision in this case under the same standard as that established in *GMG Oil and Gas Corp.*

A BIA decision to increase the amount of a bond "requir[es] the exercise of both expertise and judgment." *McPhail*, 18 IBIA at 356 (quoting *GMG Oil and Gas Corp.*, 18 IBIA at 190). In reviewing a BIA decision establishing a bond amount for oil and gas leases on Indian trust or restricted land, the Board's role is "to determine whether BIA's decision was reasonable, that is, whether it is supported by law and by substantial evidence." *GMG Oil and Gas Corp.*, 18 IBIA at 190. The Board will not substitute its judgment for BIA's. *Id.* Appellant bears the burden of showing that BIA's decision is unreasonable. *Id.* However, where the administrative record does not support the decision, the decision must be vacated. *Id.*; *see also McPhail*, 18 IBIA at 357.

### Discussion

Appellant contends that the increase in the amount of the bond required by BIA from \$10,000 to \$75,000 constituted an abuse of discretion and was not supported by substantial evidence in the record. Opening Br. at 6-8. Appellant also argues that he was not given notice prior to the Regional Director's decision that the basis for the bond increase was the cost of plugging and abandoning wells.<sup>7</sup> *Id.* at 7. While the Regional Director's decision provided an estimate of the cost of carrying out the plugging and abandonment of the one existing well based on BLM guidance, the underlying basis for calculating that amount was not provided prior to the Decision. *Id.* It was not until the administrative record was produced for the appeal to the Board that Appellant learned of the basis for the estimated cost. Appellant also challenges the "purely speculative assumption" that Appellant will drill on the remaining 12 leases as the basis for increasing the bond amount to \$75,000. *Id.* at 9. Finally, Appellant argues that both the Superintendent and the Regional Director failed to consider and address the effect of Newfield's bond on these same leases when increasing the bond amount required of Appellant. *Id.*

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required amount of bonds may be increased in any particular case at the discretion of the Secretary." 25 C.F.R. § 211.24(e).

<sup>7</sup> Furthermore, Appellant notes that the Superintendent's decision made no reference to the cost of plugging and abandonment as a factor for increasing the amount of the bond, nor was any basis for establishing that cost provided in that decision. Opening Br. at 8.

As we have explained, BIA's decision to increase a bond requirement pursuant to 25 C.F.R. § 211.24(e), must be supported by law and by substantial evidence in the administrative record. *See GMG Oil and Gas Corp.*, 18 IBIA at 190. Additionally, the decision and the record must provide support for an increase in the amount of the bond for the "particular case" before BIA, rather than a generalized need for increased bonds. *McPhail*, 18 IBIA at 356 n.2 ("[The Regional Director] must give reasons for the bond increase in the 'particular case' before him."). Here, the Regional Director explained that his decision was based on two factors: (1) the cost estimate provided by BLM for plugging and abandoning the specific type of well currently in production, and (2) the likelihood that Appellant would drill additional wells on his remaining leases. Decision at 3 (unnumbered). BLM estimated the cost of plugging and abandonment of the existing "Cut Bank" well to be approximately \$26,000, including contract costs. Email from BLM Engineer to BIA, Nov. 29, 2011 (AR Tab 2).<sup>8</sup> While on appeal, Appellant does not specifically dispute the reasonableness of the \$26,000 figure for the existing well. However, the Decision and the record fail to show how BIA arrived at the final \$75,000 bond amount or why the increase was the responsibility of the minority owner of the leases.

Because all of the leases in which Appellant holds a minority interest were apparently in their primary term, *see* Decision at 1-2 (unnumbered) (listing date of lease approval), with the exception of Lease No. 201 7084860914, which was held by production from the existing well, *id.* at 2 (unnumbered), it was not unreasonable for the Regional Director to assume that additional wells will be drilled on Appellant's leases. Indeed, failure to bring the leases into production within the primary term set out in each of the leases (5 years for those provided in the administrative record at AR Tab 18) would result in expiration of the leases by their own terms, unless they were part of a unit or communitization agreement. *See* 25 C.F.R. § 211.27. Some increase in the bond amount in relation to increased drilling would, therefore, be reasonable under the circumstances. However, neither the Decision nor the record explains why the bond was set at \$75,000, although we note that this is the amount established in the regulations for a statewide bond. *See* 25 C.F.R. § 211.24(b). A higher, or lower, amount could also have been required based on the exercise of expertise and judgment by the BIA official making the decision. *McPhail*, 18 IBIA at 356.

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<sup>8</sup> Appellant is correct that he was entitled to receive and comment on this information prior to the Decision on his appeal from the Superintendent's decision. *See* 25 C.F.R. § 2.21(b) ("When the official deciding an appeal believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided.").

In light of the fact that Appellant holds only a 12.5% interest in 12 leases, or 10 of the 12 as the Decision seems to indicate, and there is only one well on the leases identified in the Decision, the Regional Director must explain the rationale for any increase in Appellant's bond and for increasing the bond requirement for Appellant's minority interest in the leases, rather than allocating some or all of any increase to Newfield as majority interest owner.<sup>9</sup> By vacating the decision and remanding the matter, the Board expresses no opinion on the appropriate amount of any bond or on which party to the leases should bear the cost. As we ruled in *McPhail*, the amount of a bond may be increased where the BIA official gives reasons for the increase in the "particular case" before him and provides substantial evidence for so doing. 18 IBIA at 356.

### 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 vacates the Regional Director's decision and remands the matter to the Regional Director for further consideration.

I concur:

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// original signed  
Robert E. Hall  
Administrative Judge

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//original signed  
Thomas A. Blaser  
Administrative Judge

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<sup>9</sup> In a letter to Newfield, the Superintendent acknowledged that Appellant was informed that if it was to continue its operations, it must increase the bond amount for the leases in which Newfield holds an 87.5% interest. Letter from Superintendent to Jason Dean, Newfield, Aug. 23, 2011, at 1 (unnumbered) (AR Tab 8). The Superintendent assured Newfield that, "This however, does not mean that your majority interests in these wells are in jeopardy." *Id.* at 1 (unnumbered). The letter concludes, "Newfield . . . is currently in full compliance and as long as it remains so, their holdings in the lease contracts are secure." *Id.*