INTERIOR BOARD OF INDIAN APPEALS

Jeff Rixleben v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs

63 IBIA 4 (04/07/2016)

United States Department of the Interior

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

JEFF RIXLEBEN,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 15-024
ACTING EASTERN OKLAHOMA	)	
REGIONAL DIRECTOR, BUREAU	)	
OF INDIAN AFFAIRS,	)	
Appellee.	)	April 7, 2016

Jeff Rixleben (Appellant), as the lease operator, and on behalf of a working interest owner, the Estate of Patti B. Rixleben, appealed to the Board of Indian Appeals (Board) from a September 16, 2014, Expiration Notice issued by the Acting Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), for Oil and Gas Lease No. 601-2418 (54323), Jim Davis Allotment, Seminole County, Oklahoma.[1] The Regional Director determined that the lease had expired by its own terms for failure to produce oil and/or gas in paying quantities. The evidence in the record is sufficient to support the Regional Director's determination, and Appellant has not met his burden of proof to show that the lease was producing in paying quantities when BIA determined that it had expired. Therefore, we affirm the Regional Director's decision.

Background

The lease was executed in 1930 by Jim Davis, Seminole Allottee 624, and after the primary 10-year term, as relevant here, continued "as much longer thereafter as oil . . . is produced in paying quantifies from said land by lessee." Lease ¶ 2 (Administrative Record (AR) 1). Appellant's mother, Patti Rixleben, who died in 2013, held a 5/9 lessee interest, which previously had been held by Appellant's father, and before him, Appellant's grandfather. Appellant has been the operator of the lease since 1990. Opening Brief (Br.), Feb. 27, 2015, ¶ 14; *See* AR 5, 10.

[1] The lease is for a 40-acre tract covering the NW¼NW¼ of Section 28, Township 6 North, Range 6 East, Seminole County, Oklahoma.

In November 2013, unknown to BIA at the time, Appellant sent a letter to the working interest owners of the lease, advising them that the sole well on the lease was "currently broken and shut-in."[2] Letter from Appellant to Jim Davis Working Interest Owners, Nov. 8, 2013 (AR 15). Appellant solicited interest in buying out his ownership share in the lease, summarizing the production for the lease from 2008 through 2012. Appellant stated that he had exhausted his business credit lines trying to repair the well, and did not have the resources to drill a replacement well, noting that he would be searching for other solutions over the next few months while the lease "remains down." *Id*.

In August of 2014, after being informed by Vision Bank that it might be cancelling a letter of credit issued to Patti Rixleben, a BIA employee checked activity on the lease as recorded in BIA's Mineral Royalty Accounting Distribution (MRAD) System, which indicated that the last royalty payment had occurred in 2013. AR 2. Additional information and reports gathered by BIA indicated that the last sale, of 2.15 barrels, had occurred in May 2013, that the only sales in 2013 had taken place in January and May, and that no sales had been made in 2014. *See* Office of Natural Resources Revenue (ONRR)[3] Data Warehouse Report, Aug. 6, 2014, (AR 3); MRAD Report, Aug. 8, 2014 (AR 9). According to a report by IHS Inc., the lease had produced 129 barrels in January 2013, none in February–April 2013, and 41 barrels in May 2013. IHS Inc. Detailed Production Report, Aug. 6, 2014 (AR 4). The report identified the last production date as May 31, 2013. *Id*.

BIA issued a show cause letter to Appellant,[4] copies of which were sent to other working interest owners. The letter advised Appellant that according to ONRR, the last royalties credited to the lease were paid in August 2013 for sales in May 2013, and no Sundry Notice indicating temporary cessation of production had been filed with the Bureau of Land Management (BLM) regarding the lease.[5] Letter from Jenkins to Appellant,

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[2] A "shut-in well" generally refers to a well that is or may be mechanically capable of producing but is not presently producing. BLM Resource Management Handbook H-3107-1 (AR 25).

[3] ONRR is the agency within the Department of the Interior that manages revenue from energy and mineral leases on public lands, and, in conjunction with BIA, provides revenue management services for mineral leases on Indian lands.

[4] The letter was sent to the Estate of Patti Rixleben, c/o Appellant.

[5] A "Sundry Notice" refers to a BLM form on which a written request is submitted to perform work not covered by another type of permit, or to change operations in a previously approved permit.

Aug. 8, 2014 (AR 11). The letter advised Appellant that he had 30 days to show cause why BIA should not proceed with lease cancellation for failure to produce. *Id*.

The Trust Company of Oklahoma, which had received the show cause letter on behalf of other working interest owners, informed BIA that its records showed the last production was in May 2013, and it provided BIA with a copy of Appellant's November 2013 letter to the working interest owners. Musick Memo to File, Aug. 15, 2014 (AR 14); Email from Rogers to Musick, Aug. 15, 2014, & Attachment (Attach.) (AR 15). A follow-up report from a field inspection conducted by BLM concluded that the well was shut in, found that the tubing and rods lay on the ground in the vicinity in a "severe" deteriorated condition, and stated that it "does not look like any maintenance has been performed this season." BLM Report, undated, at 1-2 (unnumbered) (AR 19). A fiberglass oil storage tank had recently been removed from the site. *Id*.

In early September 2014, Appellant responded to BIA by providing handwritten Oil and Gas Operations Reports (OGORs) for the lease for the period between July 2013 and July 2014. AR 20, 21. The July 2013 OGOR shows an inventory of 15 barrels of oil, with no well production that month. The remaining OGORs show well production of 1 barrel in August 2013, 1 barrel in October 2013, and 1 barrel in January 2014, resulting in an inventory of 18 barrels. No other well production was reported, but the OGOR for July 2014, which Appellant completed on August 30, 2014, reported a sale of 15 barrels "on manual pay" by the operator "near August 13, 2014." AR 21. On appeal, Appellant states that he purchased 15 barrels of oil for the Estate of Patti Rixleben, and manually paid the royalty. Opening Br. ¶ 19. The record indicates that Appellant remitted a royalty check to BIA, received on August 14, 2014, for $10.31, which BIA returned based on its investigation into whether the lease had expired. AR 13; Notice of Appeal, Oct. 14, 2014, Attach. The OGOR for July 2014 shows an ending inventory of 3 barrels.

On September 16, 2014, the Regional Director issued his decision, advising Appellant that the lease had expired for failure to produce oil and/or gas in paying quantities. Letter from Regional Director to Appellant, Sept. 16, 2014 (Expiration Notice) (AR 23). The Regional Director noted that the official records of ONRR showed that the last production for the lease had occurred in May of 2013, and that the records provided by Appellant showed a last production date of February 2014.[6] The Regional Director also noted that BLM's field inspection had reported that the well was shut in without BLM approval and was not currently producing. *Id*.

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[6] It is unclear whether the Regional Director intended to refer to January, rather than February 2014. The records provided by Appellant show the last well production as occurring in January 2014. For purposes of our decision, the discrepancy is not material.

Appellant appealed to the Board. As evidence to support his appeal, Appellant enclosed copies of utility records showing "non-zero" electric usage for the site for 17 consecutive months, and copies of the OGOR reports showing a sale of 41 barrels of oil in May 2013, and the sale of 15 barrels in July 2014. Appellant also enclosed a copy of the royalty check for $10.31 that BIA had returned, as well as another check, dated October 2, 2014, payable to ONRR, for $0.02.

Appellant filed an opening brief. The Regional Director filed an answer brief. Appellant filed a reply brief.

Appellant contends that the enclosures to his notice of appeal demonstrate that paying quantities of oil were produced in May 2013 (sale of 41 barrels) and July 2014 (sale of 15 barrels, with manual royalties paid in August 2014). Opening Br. ¶¶ 3, 4, 20. Appellant contends that BLM's field inspection was conducted while the lease was "being worked on," *id*. ¶ 4, and seeks to clarify the statement in his November 2013 letter that the well was shut in, characterizing it as "shut-down temporarily for extended repairs." *Id*. ¶ 10. Appellant asserts that he was then "and is now still attempting to repair and/or find investment partners to . . . drill a replacement well and/or repair the [lease]." *Id*. Appellant argues that "[t]here is recoverable oil amounting to approximately 5 barrels of oil per day, after successful repairs and/or a replacement well is accomplished." *Id*. ¶ 6; *see id*. ¶ 11 (lease "still has recoverable oil production reservoir"). Appellant argues that the Regional Director's decision should be rescinded and the lease should be "continued" or "re-established." *Id*. ¶ 2. According to Appellant, he is uniquely situated to make the production of oil from the Jim Davis lease profitable, for the benefit of the lessees and the Indian landowners, but seeks to be allowed "up to 36 months to repair and/or drill an offset well and/or replacement well, to seek partners to drill a new well or attempt repairs, to locate repair experts, and/or to raise re-working capital, and/or any other relief allowed." *Id*. ¶¶ 2, 9; *see* Reply Br., Apr. 14, 2015, ¶¶ 3-7.

Standard of Review

When an oil and gas lease term extends beyond the primary term as long as oil and gas "is produced in paying quantities," the expiration of the lease, by those terms, is a question of law that is determined on the facts. "Expiration occurs by operation of law and not by any action taken by BIA." *McCann Resources, Inc. v. Acting Eastern Oklahoma Regional Director*, 48 IBIA 84, 90 (2008) (citing *Magnum Energy, Inc. v. Eastern Oklahoma Regional Director*, 38 IBIA 141, 142 (2002)). Because "BIA's determination that a lease has expired for nonproduction is a conclusion of law based on the evidence," the Board reviews BIA's determination *de novo*. *Taylor Drilling Corp. v. Eastern Oklahoma Regional Director*, 53 IBIA 15, 19 (2011).

When the issue is nonproduction from an oil or gas lease, the appellant bears the burden to show that production in paying quantities was occurring at the time relevant to BIA's determination. *McCann Resources*, 48 IBIA at 90; *Clark Operating Services, Inc. v. Acting Muskogee Area Director*, 29 IBIA 109, 114 (1996). "Evidence of . . . production, without more, is insufficient" to satisfy an appellant's burden to demonstrate production *in paying quantities*. *Taylor*, 53 IBIA at 19. An appellant has the burden to produce evidence allowing a calculation of profitability, and at a "bare minimum, . . . must submit information concerning its operating costs." *Clark*, 29 IBIA at 114. An appellant who fails to show that the lessee received at least a minimal profit cannot meet the burden to demonstrate production in paying quantities. *Id*.

Discussion

We conclude that the evidence in the record, described above, is sufficient to support the Regional Director's finding that the lease expired by its own terms for failure to produce oil and/or gas in paying quantities. We are not convinced that the evidence produced by Appellant, showing minimal, isolated well production after May 2013—a total of 3 barrels between July 2013 and July 2014—was sufficient to demonstrate continuing "production," and it clearly did not suffice to demonstrate profitability. If anything, given the sparse inventory and sparse well production during that time period, the electric utility bills produced by Appellant, totaling $408.43 for the period between May 2013 to August 2014, would seem to undermine any claim of profitability. Nor are we convinced that Appellant's "sale" of 15 barrels of oil in July or August of 2014 to the Estate of Patti Rixleben (leaving 3 barrels in the inventory), could suffice to demonstrate profitability of the lease. Appellant concedes that the quantity of oil he "sold" to his mother's estate, essentially to himself, was too small to be picked up by a third party purchaser. Opening Br. ¶ 18; *cf. Clark*, 29 IBIA at 114 ("no evidence at all—by any test or analysis—that appellant received even a minimal profit from the lease").

Appellant seeks to clarify his November 2013 characterization of the well as "shut in," but the distinction he seeks to make is without a difference when it comes to determining whether he has met his burden of proof to demonstrate production in paying quantities. The quantitative reports regarding well production and sales show little to no activity since May 2013, and Appellant effectively conceded that the well was down and in need of repair or replacement, and that he lacked the resources to do either.[7] Whether, as Appellant contends, there is still oil that can be recovered is not the issue; the issue is

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[7] Appellant concedes that he was unaware that he would have needed to submit a Sundry Notice in order to obtain the necessary permission to temporarily cease production. Reply Br. ¶ 2.

whether the lease was producing in paying quantities. On that issue, he has not shown error in the Regional Director's decision.

In summary, we agree with the Regional Director that the evidence demonstrates that the lease expired by its own terms for failure to produce in paying quantities, and Appellant has not met his burden to demonstrate otherwise.[8]

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 Regional Director's September 16, 2014, decision.

I concur:

// original signed	//original signed
Steven K. Linscheid	Robert E. Hall
Chief Administrative Judge	Administrative Judge

[8] To the extent that Appellant contends that the lease should be "re-established" or a new lease issued to him, *see supra* at 7, e.g., because he is uniquely situated to make it profitable, any issues regarding a new lease are outside the scope of this appeal, which is limited to the Regional Director's determination that the lease had expired by its own terms for failure to produce in paying quantities.