



INTERIOR BOARD OF INDIAN APPEALS

Flowin Gold, Inc. v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs

63 IBIA 92 (05/25/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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FLOWIN GOLD, INC.,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 15-019
ACTING EASTERN OKLAHOMA)	
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	May 25, 2016

Flowin Gold, Inc. (Appellant) held an oil and gas lease, No. 503-6386 (68421) (Lease),¹ which in its extended term would continue for so long “as oil and/or gas is produced in paying quantities.” On September 11, 2014, the Acting Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), issued an Expiration Notice concerning the Lease for lack of reports of production or royalty payments since October 2013.² On appeal to the Board of Indian Appeals (Board), it is Appellant’s burden to show that the Regional Director erred in concluding that the Lease expired by its own terms. Appellant, through Robert E. Bellmyer, Sr., asserts that royalties were paid in November 2013 and March 2014. At best, the record shows that Appellant’s last royalty payment, in May 2014, was for production ending in October 2013, and does not support that the Lease was producing in paying quantities. Appellant concedes that there has been no production since March 2014, and seeks to rely on earthquake damage to excuse the most recent period of non-production. But that does not address the earlier period of non-production nor, as a bare assertion, does it excuse the subsequent period of non-production. We therefore conclude that Appellant has not met its burden and affirm the Regional Director’s decision.

¹ The Lease pertains to the allotment known as Bettie (Long) McKan, Creek M-180, covering the E¹/₂NE¹/₄ of Section 18, Township 15 North, Range 13 East, Okmulgee County, Oklahoma.

² The Expiration Notice also states that Appellant’s lease bond, No. OKC612350, issued by American Safety Casualty Insurance Company, will not be released until clearance is received from the Bureau of Land Management (BLM) and the Office of Natural Resources Revenue (ONRR).

Background

The Lease was originally approved on July 10, 1968, for a term of 5 years and “as much longer thereafter as oil and/or gas is produced in paying quantities from said land.” Lease at 1 (Administrative Record (AR) 1). The lessee was required to pay monthly royalties on the oil and gas produced from the land, and to submit monthly reports showing the “amount, quality, and value of all oil [and] gas . . . produced . . . during the preceding calendar month.” *Id.* at 2. On December 8, 2011, Appellant became the operator of the Lease, *see* Designation of Operator (AR 2), and on February 11, 2012, Appellant became the lessee by assignment approved by BIA, *see* Letter from Ketcher to Bellmyer (AR 3).

Appellant subsequently assured BIA that the Lease was producing, but BIA saw no indication of sales in 2012. *See, e.g.*, Email from Musick to Hollandworth, Sept. 5, 2012 (AR 6). On February 22, 2013, BIA issued Appellant a 30-day notice to show cause why the Lease should not be cancelled, explaining that, according to ONRR³ records, Appellant had not submitted any royalty reports since the assignment. First Notice to Show Cause at 1-2 (unnumbered) (AR 11). Appellant did not respond to the notice.

On November 8, 2013, Appellant filed its first set of production reports, for the period beginning January 2012 through June 2013. *See* Email from Hollandworth to Musick, Nov. 8, 2013 (AR 17). On November 26, 2013, Appellant reported that it made a royalty payment for the period from January 2012 through July 2013, in the amount of \$869, and would soon catch up on its obligations. *See* Email from Musick to Yandell, Nov. 26, 2013 (AR 17). Several months later, on March 5, 2014, BIA issued a second notice to show cause, advising that, according to ONRR, Appellant had not reported production or paid royalties since July 2013. Second Notice to Show Cause at 1 (unnumbered) (AR 21). Appellant did not respond directly to the notice, however, in April 2014, Appellant gave its last report on the Lease, which reflected production in October 2013. *See* Regional Director’s Response to Notice of Appeal, Jan. 29, 2015, at 3; Email from Hoepfner to Miller, Sept. 9, 2014 (AR 30).

BIA next requested that BLM conduct a field inspection to determine if the wells were producing. Memorandum from Realty Officer to BLM, May 6, 2014 (AR 26). While the request for inspection was pending, Appellant made a royalty payment on May 14, 2014, “for sales August – October of 2013.” Email from Musick to Martin, June 19, 2014 (AR 27); *see* Mineral Royalty Accounting Distribution (MRAD) Report, July 17, 2014 (AR 29). On July 16, 2014, BLM confirmed that the wells under the Lease

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.

were shut in, stated that the last production occurred in October 2013, and noted that the field inspection revealed several environmental concerns. Email from Martin to McDonald, July 16, 2014 (AR 28); Email from Martin to Musick, July 16, 2014 (AR 28); *see* ONRR Data Warehouse Production Report at 3 (unnumbered) (AR 31) (showing last production in October 2013).

On September 11, 2014, the Regional Director issued an Expiration Notice informing Appellant that the Lease had “officially expired for failure to produce oil and/or gas in paying quantities.” Expiration Notice at 1 (unnumbered) (AR 32). The notice explained that “the lease has reported no production or royalties since October 2013.” *Id.* The notice also advised that Appellant’s bond would not be released until clearance had been received from BLM and ONRR regarding the plugging of wells, surface restoration, and any outstanding royalty or rental obligations.⁴ *Id.*

Appellant filed a notice of appeal with the Board. Appellant did not file an opening brief, although advised of its right to do so. The Regional Director responded to the notice of appeal. Appellant did not reply.

Discussion

When an oil and gas lease of Indian land is for a primary term of years and so long thereafter as oil and/or gas “is produced in paying quantities,” the lease, if in its extended term, expires when production in paying quantities ceases. *Taylor Drilling Corp. v. Eastern Oklahoma Regional Director*, 53 IBIA 15, 18 (2011) (citations omitted); *Oxley Petroleum v. Acting Muskogee Area Director*, 29 IBIA 169, 170 (1996). Expiration occurs by operation of law and not by any action taken by BIA. *Taylor Drilling Corp.*, 53 IBIA at 18 (citations omitted). BIA’s determination that a lease has expired for non-production is a conclusion of law based on the evidence. *Id.* at 19. The Board reviews issues that go to the sufficiency of the evidence *de novo*. *Id.* Appellant bears the burden of proving error in the Regional Director’s decision by showing either that production in paying quantities did, in fact, occur, or that any period of non-production was excusable. *See id.* at 18 (citing *Oxley Petroleum*, 29 IBIA at 171) (citations omitted)); *see also Rixleben v. Acting Eastern Oklahoma Regional Director*, 63 IBIA 4, 8 (2016) (“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.”). The Board ordinarily does not consider evidence that could have been, but was not, presented in the first instance to the Regional Director. *See* 43 C.F.R. § 4.318; *Taylor Drilling Corp.*, 53 IBIA at 20 n.9.

Appellant has failed to meet its burden on appeal. Initially, we note that Appellant failed to respond to the two orders to show cause from BIA, when it was provided an

⁴ Appellant does not address this portion of the decision, and thus we discuss it no further.

opportunity to produce evidence. On appeal, Appellant asserts that it made royalty payments on November 27, 2013, and March 13, 2014. Notice of Appeal, Oct. 10, 2014. But even if we were to consider those assertions, Appellant does not pinpoint much less prove the amount of each payment or the period of production to which each payment relates, and thus Appellant has not shown that production in paying quantities occurred after October 2013. At best, the record shows that Appellant's last royalty payment was made on May 14, 2014, for the period of production ending in October 2013, which is when the Regional Director found that production in paying quantities had ceased.⁵ See Expiration Notice at 1 (unnumbered); AR 28, 30-31. Thus, Appellant has not shown error in the Regional Director's finding that the Lease was not producing in paying quantities. See *Rixleben*, 63 IBIA at 8; *Taylor Drilling Corp.*, 53 IBIA at 18.

Appellant also claims that damage from earthquakes prevented production "from March 2014." Notice of Appeal. According to Appellant, the main line and gas compressor were damaged, and a third party has yet to turn the gas meter back on. *Id.* But Appellant's burden was to show that production in paying quantities had occurred, or was excusable, after October 2013. Appellant's claim is patently insufficient as an excuse for non-production during the months-long period that preceded the alleged earthquake damage. Nor are Appellant's bare statements sufficient to show that the alleged earthquake damage excused Appellant's admitted non-production since March 2014. See *Oxley Petroleum*, 29 IBIA at 171.

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 11, 2014, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

⁵ The November 27, 2013, payment referred to in Appellant's notice of appeal could be the November 26, 2013, payment mentioned in the record, which covered the period from January 2012 to July 2013. It is also possible that the March 2014 payment referred to in the notice of appeal is actually the May 14, 2014, payment described in the record. Either way, Appellant fails to dispute, much less cite or provide evidence to rebut, the finding that the Lease was not producing in paying quantities after October 2013.