

APACHE ORO COMPANY

IBLA 76-45

Decided November 11, 1975

Appeal from the rejection of an application for the renewal of three expiring mineral leases in the Lake Mead Recreation Area.

Affirmed.

1. Act of October 8, 1964 -- Public Lands: Leases and Permits

Where the holder of mineral leases in the Lake Mead National Recreation Area fails to mine and produce minerals within the time prescribed by the lease for reasons not beyond the control of the lessee, the leases are not in good standing and therefore are not subject to renewal.

2. Words and Phrases

"Will be subject to renewal." Where a regulation recites that a mineral lease "will be subject to renewal" under certain circumstances, the authorized officer is vested with the discretion to renew the lease or not, depending upon the circumstances.

3. Act of October 8, 1964 -- Public Lands: Leases and Permits

It is a proper exercise of discretion to refuse to renew mineral leases in the Lake Mead National Recreation Area where the lessee failed to commence mining and produce minerals as required by regulation and by the terms of the lease for reasons which were attributable to the lessee.

APPEARANCES: Warren M. Mallory, President, Apache Oro Co., for the appellant; John McMunn, Esq., Office of the Field Solicitor, San Francisco, Calif., for the National Park Service.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Three 5-year mineral leases in the Lake Mead National Recreation Area were issued effective May 1, 1970, to the Apache Oro Company. The leases were identified by serial nos. A-536, A-538, and A-885. They were issued pursuant to the authority contained in the Act of October 8, 1964, 16 U.S.C. § 460n (1970), and in conformity with the regulations in 43 CFR 3566.

Within the period provided by 43 CFR 3566.4-5 Apache Oro filed its request for the 5-year renewal of each lease with the Arizona State Office of the Bureau of Land Management, which had initially issued the leases.

However, renewal of the leases was opposed by the Lake Mead Superintendent of the National Park Service, who reported that a field review had revealed no evidence that mining had been conducted on the leased lands during the term of the leases as required by section 2(a) of the lease terms. He noted further that section 9 of the lease terms requires that prior to the initiation of mining operations the lessee must submit plans of all surface operations for the approval of the Superintendent, and this had not been done by Apache Oro.

Based upon these findings and the Superintendent's recommendation that the leases not be renewed, the Arizona's State Office, by its decision of June 2, 1975, denied Apache Oro's request for renewal of all three leases, from which decision the company has brought this appeal.

The salient portion of the applicable regulation, 43 CFR 3566.4-4, provides as follows:

Terms and conditions.

Each lease will contain provisions for the following: Diligent development of the leased property except when operations are interrupted by strikes, the elements, or casualties not attributable to the lessee unless operations are suspended upon a showing that the lease cannot be operated except at a loss because of unfavorable market conditions; * * *

In conformity with this regulation, each of the subject leases incorporates the following provision:

Sec. 2. The lessee in consideration of the lease of the rights and privileges aforesaid hereby agrees:

(a) To commence mining within six (6) months from the date hereof. To mine and dispose of the minerals with reasonable diligence, and, beginning with the second year of the lease, except when operations are interrupted by strikes, the elements, or casualties not attributed to the lessee or unless operations are suspended under the authority of the Secretary of the Interior, to mine and produce each year minerals from the leased area, to yield a royalty to the United States of not less than one dollar (\$1) per acre or to pay such a minimum royalty if the value of production be insufficient for that purpose.

On appeal Apache Oro does not assert that it has complied with the requirements to commence mining within 6 months, or, beginning with the second lease year, to mine and produce minerals. Instead, appellant offers a number of explanations by way of excusing its noncompliance.

It asserts first that it intended initially to establish a small gold placer operation, but this was contingent on a proposed sampling program to be conducted by the Bureau of Mines. Its reliance on this program was thwarted when, it alleges, budget reductions in the Bureau of Mines prevented the sampling program from ever getting started.

Appellant states that it conducted its own mineral investigations, which led it to believe that the gold deposits and coppermolybdenum porphyry deposits are considerably larger than it originally estimated. Therefore, it says, it abandoned its plan for a small recovery operation "which would be very inefficient and probably unprofitable because of its size." Thereafter, it states that it revised its plans so as "to deal with large, widely disseminated mineral deposits." Appellant does not state why these plans were not implemented, but the inference is that it used up the entire lease term, and much of its operating capital, conducting exploration activities and making plans. Appellant acknowledges that it could have "gone ahead with a small recovery operation on the leases as we had originally planned (instead of spending this money on further exploration as was done)" but that its decision "best served both Apache Oro Company's interest and the public interest under the circumstances."

Appellant is not the arbiter of the public interest, and knew, or should have known that it had an obligation to comply with the terms of its leases. Its decision not to mine and to produce minerals within the times specified was a decision to breach its

covenant to do so. The record before us does not show that appellant ever requested approval of any delay or suspension of its obligation.

[1] We can only conclude that appellant did not engage in "diligent development" as required by the regulation, supra, and did not "mine and dispose of minerals with reasonable diligence" as required by section 2(a) of the lease, and that its failure to do so is not attributable to any force beyond its control. This case is similar in all of its essential aspects to an earlier appeal decided by this Board, Apache Oro Company, 14 IBLA 75 (1973), wherein we held that appellant's exercise of its own business judgment in the making of a decision not to engage in mining could not excuse its noncompliance with the lease terms. There we held, as we now hold, that because of appellant's failure to mine, the leases were not in good standing at the end of their terms, and therefore were not "subject to renewal" as provided in 43 CFR 3566.4-5.

[2] Even were we to hold, contrary to the precedent set in the 1973 case, that the leases were in good standing and subject to renewal, we would still affirm the decision below. The employment of the words "subject to" [an action] has been held to invest the administrative officer with the discretion to determine whether noncompliance in a given instance should be excused or the prescribed penalty imposed or the prescribed benefit allowed. State of Alaska Department of Highways, 20 IBLA 261, 269; 82 I.D. 242, 245 (1975), and cases therein cited.

We take official notice that in yet another appeal decided by this Board, Apache Oro Company, 16 IBLA 281 (1974), the appellant's dilatory conduct of activities on still other leases held by it in the Lake Mead National Recreation Area was noted at page 283:

* * * Weiler also avers that the subject lease applications cover the identical lands formerly leased by appellant from 1967 to 1972, and for which no renewal application was filed. Weiler further states that appellant's representative informed him that during the terms of its previous lease, Apache Oro had never drilled, trenched, or conducted any systematic sampling program, nor done any detailed geologic mapping, nor performed any work on any of their leases within the recreation area except for assaying random grab samples. * * *

[3] We conclude that on the basis of appellant's nonperformance of its lease obligations in this case, and its history of nonperformance in other cases, the decision not to renew these leases would constitute a proper exercise of discretion.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Joseph W. Goss
Administrative Judge

