

PRIMA EXPLORATION, INC.

IBLA 86-1493

Decided March 2, 1987

Objection to issuance of notice of cessation of production and notification of potential termination of oil and gas lease W-75672A during pendency of appeal from a decision denying request for suspension of operations and production on that lease.

Objection denied.

1. Administrative Procedure: Generally -- Appeals: Generally -- Oil and Gas Leases: Expiration -- Oil and Gas Leases: Extensions -- Oil and Gas Leases: Production -- Oil and Gas Leases: Suspensions -- Rules of Practice: Appeals: Effect of

If there is an appeal from a decision denying an application for a suspension of operations and production, only the effect of BLM's decision is suspended under 43 CFR 4.21(a); the lease is not suspended. Although Departmental regulation 43 CFR 4.21(a) provides that the timely filing of a notice of appeal will suspend the effect of the decision under appeal, this provision does not require the agency to take positive action for the benefit of an appellant. Thus, the pendency of such an appeal does not preclude BLM from issuing a notice that the lease will expire if the lessee fails to place a well on producing status within 60 days, because the notice will be mooted if the appeal is successful.

APPEARANCES: Ted J. Gengler, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of Regional Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Prima Exploration, Inc. (Prima), is the operator for a competitive oil and gas lease, W-75672A which was issued on August 1, 1981, for a primary term of 5 years ending on July 31, 1986. A well identified as the Susan Federal #27-6 was drilled and completed on this lease with initial production

in January 1983. This well was reported as continuously shut-in from May 1983.

To avoid termination of the lease at the expiration of its primary term of 5 years, on May 5, 1986, Prima requested approval to shut-in the well "for 12 months without having [the] lease expire." By letter dated June 10, 1986, the Casper District Office, Bureau of Land Management (BLM), denied appellant's request. The letter referred to Instruction Memorandum No. 86-409 (Apr. 22, 1986), which outlines circumstances considered appropriate to permit stripper wells to be shut-in due to the presently depressed oil price without placing the associated leases in jeopardy of expiration. The decision stated that the well must have been producing on a more or less regular basis before or during the current price decline. Because appellant's well had been shut-in since 1983, BLM determined that the well was not eligible for shut-in pursuant to this instruction memorandum. Prima appealed this decision.

On October 28, 1986, BLM's Buffalo Resource Area Office issued appellant a letter citing a provision of 30 U.S.C. § 226(f) (1982) to the effect that no lease on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee fails to place the well on producing status within 60 days after receipt of notice to do so. The letter informed appellant that if the lease were capable of producing hydrocarbons in paying quantities, appellant was to furnish adequate documentation showing that the well was put back on production on a regular monthly basis. If the lease were incapable of production, the letter advised appellant that it would be terminated effective July 31, 1986. Prima filed an objection to this notice.

This decision does not address the merits of the appeal from the denial of appellant's suspension request, but only appellant's objection to the October 28 notice. No request for expedited consideration has been made in that case, and the appeal does not involve matters of greater urgency than other appeals awaiting adjudication. We will not consider the merits of the appeal until the case is reached in the normal docket sequence.

Prima contends that issuance of the October 28 notice was improper, citing 43 CFR 4.21(a), which provides that the timely filing of a notice of appeal will suspend the effect of the decision appealed pending the decision on appeal. We note 43 CFR 3165.4 provides:

Instructions, orders or decisions issued under the regulations in this part may be appealed in accordance with the provisions of Part 4 of this title if Federal lands are involved or 25 CFR Part 2 if Indian lands are involved. An appeal shall not result in a suspension of the requirement for compliance with the order or decision from which the appeal is taken unless the official to whom the appeal is made determines that suspension of the requirements of the order or decision will not be detrimental to the interests of the lessor or upon submission and acceptance of a bond deemed adequate to indemnify the lessor from loss or damage.

The decision in this case rejected appellant's request for a suspension of operations and production filed pursuant to 43 CFR 3103.4-2. Although 43 CFR 3165.4 has been recognized as creating an exception to the automatic stay provisions of 43 CFR 4.21(a) in on-shore oil and gas operations cases, see Park County (Wyoming) Resource Council v. BLM, 638 F. Supp 842, 845 (D. Wyo. 1986), since the decision in this case did not arise "under the regulations in this part [Part 3160]", the regulation does not apply; rather the controlling regulation is the general rule codified at 43 CFR 4.21(a).

Prima contends that BLM's "subsequent decision requiring the well to be put back on production on a regular monthly basis during the pendency of this appeal, is clearly contrary in the intent, the spirit, and the effect, of the regulation."

If appellant were correct in contending that BLM was precluded by 43 CFR 4.21(a) from issuing the October 28 notice, no notice could be issued until after the final disposition of the appeal. Thus, appellant would obtain not only a suspension of BLM's decision, but also would obtain a suspension of the lease itself for the duration of the appeal, regardless of the merits of the appeal. Obviously, such a result could make a decision on the merits of this case irrelevant.

[1] In Jack P. Burke, A-30473 (Nov. 30, 1965), the Department ruled that an appeal from a decision denying an extension does not operate to extend the term or suspend the running of the lease term during the pendency of the appeal. Thus, only the effect of BLM's decision is suspended; the underlying lease which is the subject of the decision is not. This conclusion is completely consistent with the intent, spirit, and effect of 43 CFR 4.21(a). The provisions of that regulation implement 5 U.S.C. § 704 (1982), which provides that a decision constitutes final action for the purposes of judicial review unless the agency requires by rule that an appeal be taken to superior agency authority, and "provides that the action meanwhile is inoperative." See United States v. Consolidated Mines & Smelting Co., 455 F.2d 432 (9th Cir. 1971). As one authority has noted, however: "The requirement that agency action be inoperative pending required appeals to the agency or to superior agency authority does not require the agency to take positive action for the benefit of an applicant." Attorney General's Manual on the Administrative Procedure Act 105 (1947). Thus, BLM is not required to treat appellant as if its application for a suspension had been granted; it is only required to act as if the lease had not yet expired.

Issuance of the October 28 notice is consistent with this requirement and caused Prima no cognizable harm. Issuance of the notice confronted Prima with the following choice: (1) bring the well into production and abandon the request for a suspension, or (2) await the outcome of the appeal, which, if successful, would moot the October 28 notice. If the appeal were not successful, however, the lease would be deemed to have expired effective July 31, 1986.

If the decision below were not suspended by 43 CFR 4.21(a), then appellant's failure to comply with the October 28 notice would cause the lease to expire, regardless of the outcome of this appeal. Appellant would not have had the choice described in the preceding paragraph under such circumstance.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, appellant's objection to BLM's issuance of the October 28 notice is denied. In the absence of contrary evidence submitted in this appeal, the Board will decide this appeal on the assumption that the well is capable of producing oil or gas in paying quantities.

Franklin D. Arness
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Bruce R. Harris
Administrative Judge