

Editors' note: Reconsideration denied by Order dated Nov. 2, 1988

KOCH EXPLORATION CO.

IBLA 86-13

Decided January 12, 1988

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, affirming a decision of the Rawlins District Office, Wyoming, denying request for suspension of drilling obligations and adjustment of development term under the Monument Valley Unit Agreement. 14-08-0001-18081.

Affirmed.

1. Oil and Gas Leases: Drilling--Oil and Gas Leases: Suspensions--Oil and Gas Leases: Unit and Cooperative Agreements

Even when the doctrine of commercial impracticability is applicable, it may be invoked only where a party first establishes the factual basis for doing so. Therefore, where a unit operator fails to establish the necessary facts, the Board will decline to determine whether or not, in the proper circumstances, commercial impracticability could serve to waive diligent drilling requirements as set forth in a unit agreement.

APPEARANCES: Robert D. Buettner, Esq., Denver, Colorado, for appellant; Marla E. Mansfield, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Koch Exploration Company (Koch) has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated August 22, 1985, affirming a July 26, 1985, decision of the Rawlins District Office, Wyoming, denying appellant's request for suspension of drilling obligations and adjustment of the 10-year development term under the Monument Valley Unit Agreement (No. 14-08-0001-18081).

By letter dated December 21, 1984, appellant, operator of the Monument Valley Unit, requested a suspension of the drilling obligations imposed by Section 2(e) of the unit agreement, because of a "lack of an adequate market" for gas produced from the unit (Dec. 21, 1984, letter at 3). Appellant stated

the lack of an adequate market constituted "matters beyond the reasonable control of the unit operator," within the meaning of section 25 of the unit agreement, which prevented appellant from complying with its section 2(e) drilling obligations. Id. Appellant sought suspension "effective as of February 28, 1985, and that it be for an indefinite period of time until an adequate market can be established." 1/ Id. In addition, appellant sought an extension of the development term "for the period of [the] suspension," to afford the "full ten year term to explore and develop the committed leases under a unit-wide plan of development." Id. at 3, 4.

In support of its position that there was a lack of an adequate market, appellant noted certain developments affecting the gas purchase contract, dated April 21, 1981, between appellant and Northwest Central Pipeline Corporation (Northwest) 2/ for sale of gas from the two producing unit wells (Twin Forks No. 1 and Monument Valley No. 1). Appellant stated that it was then receiving "approximately \$3.00/MMBtu" (the "section 102 price") for gas produced and sold to Northwest and that only 22 percent of the gas produced "could be sold under the contract with Northwest." 3/ Id. at 2. Appellant argued that, given these circumstances, it could not justify drilling additional unit wells, as drilling and winter operating costs would be high and Northwest might decide not to connect its pipeline to the wells due to the uneconomic conditions. Appellant concluded that the "market" would simply not support drilling additional unit wells.

During the pendency of appellant's suspension request, appellant sought and was granted three successive extensions of the time to commence drilling a third test well under the unit agreement. Appellant was thereby finally required to commence actual drilling operations "before midnight, July 28, 1985." Letter to Koch, from Rawlins District Manager, dated May 28, 1985.

1/ Feb. 28, 1985, was the date the unit would contract to the initial participating area "unless diligent drilling operations [were] in progress on the nonparticipating lands," pursuant to section 2(e) of the unit agreement. (Letter, dated Dec. 21, 1984, at 3). Appellant believed that, in view of the inadequate market, "nothing can be gained by drilling still more gas wells * * * simply to avoid contraction of the [unit]." Id.

2/ At the time of execution of the contract, Northwest was known as the Cities Service Gas Company.

3/ Appellant explained that in a Dec. 27, 1982, letter, Northwest exercised its "'economic out' clause" (section 4(g) of the contract) which allowed Northwest to "escape from its obligations under the contract if the [delivered] cost of gas purchased is such that [continued purchases under the established terms are] deemed uneconomic by Buyer." Koch stated it had "no alternative," but to accede to Northwest's proposals to reduce the purchase price and the "take or pay" obligation (Letter dated Dec. 21, 1984 at 1, 2). Appellant stated that the purchase price was thereby reduced "from \$7.54/MMBtu" to approximately \$3.00/MMBtu and the "take or pay" obligation was reduced from 90 percent to 22 percent. Id. at 2.

In its July 1985 decision, the Rawlins District Office denied appellant's December 1984 request for suspension of appellant's section 2(e) drilling obligations. BLM stated "the inability to contract a 'favorable' sales price do[es] not constitute [a matter] beyond the reasonable control of the unit operator as specified in Section 25 of the Monument Valley Unit Agreement." BLM also stated that an indefinite suspension with a corresponding addition to the 10-year development term would not be "in the public interest."

In its decision the Rawlins District Office referred to Instruction Memorandum (IM) No. 85-537, dated July 9, 1985. In this IM, the Director, BLM, set forth "guidelines" for processing requests for suspension of unit agreement drilling obligations. ^{4/} IM No. 85-537 stemmed in part from appellant's December 1984 request for suspension, which was specifically addressed in the memorandum. The Director concluded that "unfavorable marketing conditions" cited by appellant "do not appear to warrant a suspension of the automatic elimination provisions" (IM No. 85-537 at 3, 5). ^{5/} However, the Director stated that "[f]avorable consideration may be given * * * if it is concluded that the sale price currently available to the unit operator is so significantly less than that received for other comparable gas in the area as to adversely affect the Federal royalty revenues." Id. at 5. The Rawlins District Office considered this IM when adjudicating appellant's suspension request, finding that favorable consideration could not be given because the "sales price of gas from the Monument Valley Unit is comparable to the sales price being paid for other gas in the area." The District Office stated that, after checking with Northwest and the Colorado Interstate Gas Company (CIG), it determined the "prevalent" price under "similar gas contracts" in the general area of the unit was \$2.50/MMBtu.

^{4/} The Director described appellant's request as a request for a "suspension of the automatic elimination provisions of a unit agreement" (IM No. 85-537 at 3). Under section 2(e) of the unit agreement, failure to comply with the unit agreement drilling obligations for nonparticipating unitized lands would automatically eliminate those lands from the unit. The Director also described circumstances giving rise to a suspension as a force majeure or unavoidable delay. Section 25 of the unit agreement is titled "Unavoidable Delay." 43 CFR 3186.1.

^{5/} The Director described the circumstances in appellant's case as follows:

"A marketing outlet exists and sales have occurred and presumably are continuing to occur. However, the unit operator is involved in a dispute with the purchaser as to the pricing and take-or-pay provisions of the related gas sales contract, i.e., the purchaser is offering a price less than previously paid and is seeking to reduce the minimum volume of gas for which payments would be due. Given these circumstances and the presently depressed gas market, the unit operator is desirous of retaining the unit area intact without further drilling until it is able to obtain a gas price sufficient to justify the expense of further drilling" (IM No. 85-537 at 3).

On August 12, 1985, appellant requested a technical and procedural review of the July 1985 Rawlins District Office decision pursuant to 43 CFR 3165.3. Appellant argued that the adverse effect on the revenues of working interest owners resulting from denial of appellant's suspension request constitutes "grounds for suspension" equal to the adverse effect on Federal royalty revenues.

In its August 1985 decision, the Wyoming State Office affirmed the July 1985 Rawlins District Office decision, finding "gas prices resulting from market conditions" do not justify a suspension under section 25 of the unit agreement because the unit price received by appellant is "not significantly less than those received for comparable gas in the area." This appeal followed.

In its statement of reasons for appeal (SOR), appellant contends it is entitled to suspension of its section 2(e) drilling obligations under section 25 of the unit agreement. Section 25 provides in relevant part that "[a]ll obligations under this agreement requiring the Unit Operator to commence or continue drilling * * * shall be suspended while the Unit Operator, despite the exercise of due care and diligence, is prevented from complying with such obligations, in whole or in part, by * * * matters beyond the reasonable control of the Unit Operator." 43 CFR 3186.1. Appellant argues that the decline in gas prices resulting from the generally recognized gas surplus constituted a matter beyond appellant's reasonable control which "effectively prevents" appellant from complying with its section 2(e) drilling obligations (SOR at 10). Appellant finds this absence of an economic market equivalent to the absence of any market, which, pursuant to IM No. 85-537, would justify a suspension of section 2(e) drilling obligations. ^{6/} Appellant states: "It is not a market if a producer is forced to sell the gas at a price so low it cannot even recover its expenses" (SOR at 14).

Appellant also challenges BLM's conclusion that appellant is not entitled to "[f]avorable consideration" in accordance with IM No. 85-537 because of the gas price "currently available" to appellant (IM No. 85-537 at 5). Appellant argues that BLM has not established that the gas price available to appellant is similar to the price of "other comparable gas," but based its holding on a finding that the price received by appellant is similar to the price under comparable contracts. *Id.* In particular, appellant argues BLM has not shown the prices cited by Northwest and CIG to be for "comparable gas." Rather, appellant states the gas prices referred to by BLM are not for

^{6/} In IM No. 85-537, the Director authorized a suspension of section 2(e) drilling obligations under the Hancock Gulch Unit Agreement in the absence of a market for gas produced from the unit. The Director described the situation as follows:

"At the present, there is no market available to take the gas from the completed wells. It appears that the present inability to obtain a marketing outlet is due primarily to the current oversupply of gas and may be influenced by the amount of reserves proven to date and the fact that the gas from these wells contains a significant amount of CO₂." *Id.* at 2.

"comparable gas." Appellant bases this contention on the fact that drilling in areas surrounding the Monument Valley Unit would be less costly because it is not produced from the deep, tight sand formations characteristic of the Monument Valley Unit. ^{7/}

Appellant contends that indefinite suspension of its section 2(e) drilling obligations is not contrary to the purposes of unitization and, in any case, a suspension could be structured to provide for periodic review. Appellant finds suspension to be in the public interest because it promotes a conservation of natural resources, rather than encouraging "premature depletion * * * at bargain basement prices" (SOR at 15). Appellant argues suspension would be consistent with the policy underlying 30 U.S.C. § 209 (1982), which authorizes the suspension of lease obligations "in the interest of conservation." Appellant next argues that suspension would benefit the United States by postponing the payment of royalties until the return of higher gas prices. Appellant concludes that failure to grant a suspension would be contrary to the purpose of unitization and conservation of natural resources: "[I]f Koch elects not to drill additional wells, the leases will drop out of the unit and will be developed, if at all, on an individual basis" (SOR at 18).

In response to appellant's SOR, BLM states appellant is not entitled to a suspension of its section 2(e) drilling obligations because of the "lack of a profitable market," citing various cases addressing the avoidance of contractual obligations on the basis of the doctrine of impossibility of performance (Answer at 4). BLM argues that appellant was not "prevented" from drilling within the meaning of section 25 of the unit agreement. BLM distinguishes the case from those where there was a total absence of a market. BLM also states the term "comparable gas" found in IM No. 85-537 refers to "gas similar in BTU content," not similar gas, based on drilling costs or the "depth of production" (Response attached to Answer at 2). BLM finds denial of appellant's suspension request to be consistent with the public interest because the denial causes the elimination of "potentially valuable" lands from the unit when the operator has not engaged in diligent drilling operations, thereby promoting development of the land. *Id.* BLM argues that granting requests such as that made by appellant constitutes unjustifiable "favorable treatment of a select few operators" and sets a bad precedent. *Id.*

The Monument Valley Unit Agreement, approved on August 28, 1979, provides in section 2(e) that lands not within a participating area "on or before the fifth anniversary of the effective date of the first initial participating area established under this unit agreement" shall be automatically eliminated from the unit in the absence of "diligent drilling operations." *See* 43 CFR

^{7/} Appellant submits the Nov. 26, 1985, affidavit of J. A. Ziser, appellant's Senior Vice-President, who states that another well drilled in the unit area would, at an estimated drilling cost of \$5 million, an estimated total gas production of 3 million MCF and the current gas price of \$2.50/MMBtu, "not pay out until the year 2005, or beyond the estimated life of the well."

3186.1. In such operations, affected lands remain subject to the unit agreement "for so long as such drilling operations are continued diligently, with not more than 90 days time elapsing between the completion of one such well and the commencement of the next such well." *Id.* As noted *supra*, the fifth anniversary of the effective date of the initial participating area was February 28, 1985. No drilling operations had occurred within the unit area since completion of the Monument Valley No. 1 well on March 25, 1981. Therefore, absent the relief provided by section 25 of the unit agreement, nonparticipating lands would be eliminated from the unit effective February 28, 1985. The sole concern in this case is the applicability of section 25 of the unit agreement.

[1] Section 25 of the Unit Agreement provides for suspension of drilling obligations including those obligations imposed by section 2(e), in certain circumstances. The enumerated circumstances are when the unit operator is "prevented" from complying with such obligations,

in whole or in part, by strikes, acts of God, Federal, State, or municipal law or agencies, unavoidable accidents, uncontrollable delays in transportation, inability to obtain necessary materials or equipment in the open market, or other matters beyond the reasonable control of the Unit Operator, whether similar to matters herein enumerated or not.

43 CFR 3186.1. The question, therefore, is whether the alleged absence of an economic market for natural gas which would prevent appellant from operating wells drilled pursuant to the terms of a unit agreement at an acceptable profit constitutes a matter beyond appellant's reasonable control, relieving an operator from the obligation to comply with its section 2(e) drilling requirements. In light of recent world-wide fluctuations, we find it reasonable to assume that general economic market conditions for natural gas are beyond appellant's reasonable control. ^{8/} The real question is whether such a circumstance "prevented" appellant from complying with its section 2(e) drilling obligations, within the meaning of section 25 of the unit agreement.

The term "prevented" in section 25 of appellant's unit agreement, (which is taken from the model unit agreement set forth at 43 CFR 3186.1) is not defined in the unit agreement or in any applicable statute or Departmental regulation. ^{9/} We note the applicable regulation, 43 CFR 3186.1, was promulgated to interpret and supplement section 17(j) of the Mineral Leasing Act, as amended, 30 U.S.C. § 226(j) (1982), which provides that the Secretary

^{8/} We do not apply the rule of *ejusdem generis* in interpreting the phrase "matters beyond the reasonable control of the Unit Operator" (see 18 S. Williston, A Treatise on the Law of Contracts § 1968 (3rd ed. 1978)) as section 25 of the unit agreement specifically states such matters need not be "similar to matters herein enumerated."

^{9/} The relevant language in the model unit agreement has remained substantially unchanged since it was first promulgated in 1951. See 30 CFR 226.12 (16 FR 77 (Jan. 4, 1951)) (section "26").

may prescribe a unit plan of development "which shall adequately protect the rights of all parties in interest, including the United States." See 30 CFR Part 226 (1959) ("Authority"). However, that guidance brings us no closer to understanding the meaning of the term "prevented" in the present context.

The term "prevent" is defined in Black's Law Dictionary 1352 (13th ed. 1981) to mean "[t]o stop * * * performance of a thing." It is also defined to mean "[t]o hinder, frustrate, prohibit, impede, or preclude." Id. Arguably, under the accepted definition, compliance with appellant's section 2(e) drilling obligations will be deemed to have been "prevented" only when compliance is either temporarily or permanently foreclosed, and not when compliance is merely made more difficult. Appellant does not allege that it is unable to engage in further drilling, arguing only that to do so would be economically impracticable. It would appear that appellant's compliance with its section 2(e) drilling obligations has not been "prevented" by prevailing economic circumstances, as that term is understood at common law.

The thrust of appellant's arguments on appeal is that the contract law doctrine of commercial impracticability should be applied to section 25 of the Unit Agreement. As developed at common law, impossibility of performance normally does not include instances where the promised performance is rendered more expensive than anticipated at the time of formation of the contract, described as cases of economic impracticability. See 18 S. Williston, A Treatise on the Law of Contracts § 1931 (3rd ed. 1978); 6 A. L. Corbin, Corbin on Contracts § 1333 (1962). In effect, unless the contract specifically provided otherwise, the promisor is charged with the risk that "commonly foreseeable" circumstances would render performance more expensive. 6 A. L. Corbin, supra. However, this rule admits an exception when the unanticipated increased expense approaches such an extreme that the promised performance has become "vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract." 18 S. Williston, A Treatise on the Law of Contracts § 1931 (3rd ed. 1978); see 6 A. L. Corbin, supra.

The concept of economic, or more commonly commercial, impracticability is well developed under common law. Thus, it is now recognized that performance of a contractual obligation may be excused in certain cases of commercial impracticability where, because of unforeseen circumstances, such performance could only be accomplished with "extreme and unreasonable difficulty, expense, injury or loss," as the doctrine is expressed in sections 454 and 456 of the Restatement of Contracts (1932). 10/ Gulf Oil Corp. v. Federal

10/ With adoption and promulgation of section 261 of the Restatement of Contracts (2d) (1981), which governs performance of a contract in the case of supervening impracticability, there is evidently a shift away from the requirement that the excusing contingency be unforeseen. Where section 456 of the Restatement of Contracts (1932) had required that such a contingency be that which a promisor "had no reason to anticipate," section 261 of the Restatement of Contracts (2d) (1981) provides only that the "non-occurrence" of the contingency be a "basic assumption on which the contract was made."

Power Commission, 563 F.2d 588, 599-600 (3rd Cir. 1977), cert. denied, 434 U.S. 1062 (1978); American Trading & Production Corp. v. Shell International Marine Ltd., 453 F.2d 939, 942 (2d Cir. 1972); Florida Power & Light Co. v. Westinghouse Electric Corp., 517 F. Supp. 440, 450-51 (E.D. Va. 1981), aff'd in part and rev'd in part, 579 F.2d 856 (4th Cir. 1978). The doctrine is also now codified in section 2-615 of the Uniform Commercial Code. See Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283, 293 (7th Cir. 1974); 93 A.L.R. 3d 584 (1979). However, it must be stressed that, under the doctrine, merely an increase in costs or a decrease in prices resulting in a loss to a party to the contract, which loss was not actually contemplated at the time the contract was entered into, will not serve to excuse performance. In such circumstances, performance will not be excused because to do so would "allow the obligation of contract to be treated lightly, and disregarded every time either of the parties thereto finds they have entered into a bad bargain." W. H. Edgar & Son v. Grocers' Wholesale Co., 298 F. 878, 881 (8th Cir. 1924). Moreover, it is said that the promisor has assumed the risk that market conditions will fluctuate because that circumstance is foreseeable and can be contractually protected against. Waldinger Corp. v. CRS Group Engineer's, Inc., 775 F.2d 781, 786 (7th Cir. 1985). Thus, in Megan v. Updike Grain Corp., 94 F.2d 551 (8th Cir. 1938), a lessee of a grain elevator was not excused from the obligation to pay rent where changed economic circumstances rendered operation of the elevator unprofitable. In so holding, the court said: "Loss of profit due to a sudden change in [weather and crop conditions, Government agricultural policy, foreign markets and general economic conditions] * * * is a risk assumed by the lessee of the elevator and not by the owner, in the absence of an express provision in the lease to the contrary." Id. at 555. Likewise, a party will not be excused from performance where it is deemed to have assumed the risk of currency fluctuations (Bernina Distributors, Inc. v. Bernina Sewing Machine Co., 646 F.2d 434, 439 (10th Cir. 1981)), and the volatility of oil prices (Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 441-42 (S.D. Fla. 1975)). In such cases, that which is foreseeable is simply the fact that a "given state of affairs is in flux." Florida Power and Light Co. v. Westinghouse Electric Corp., supra at 454. Also, in Publicker Industries, Inc. v. Union Carbide Corp., 17 UCC Rep. 989 (E.D. Pa. 1975) (discussed in Aluminum Company of America v. Essex Group, Inc.,

fn. 10 (continued)

Thus, the event "need not be unexpected, unforeseeable, or even unforeseen." Freidco of Wilmington, Delaware, Ltd. v. Farmers Bank of State of Delaware, 529 F. Supp. 822, 825 (D. Del. 1981). In any case, the district court in Freidco also adopted the requirement of the earlier Restatement, set forth in Gulf Oil, that the contingency must result in extreme difficulty, expense, injury or loss. Id.; see Restatement of Contracts (2d) § 261, comment d (1981). The court also quoted from the Restatement of Contracts (2d) § 261, comment b (1981), to the effect that "mere market shifts or financial inability do not usually effect discharge" because the non occurrence of these contingencies are "ordinarily" not a basic assumption of a contract. Freidco of Wilmington, Delaware, Ltd. v. Farmers Bank of State of Delaware, supra at 825.

499 F. Supp. 53, 74 (W.D. Pa. 1980)), the court refused to excuse from performance a party who had contracted, after a significant increase in the price of raw materials, to sell ethanol where the seller's costs had then risen to the point that each sale of a gallon of ethanol would result in a net loss of 10.7 cents, or a projected aggregate loss of \$5.8 million. See also Iowa Electric Light & Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978), rev'd on juris grounds, 603 F.2d 1301 (8th Cir. 1979).

On the other hand, a party to a contract will not be deemed to have assumed the risk of occurrence of a contingency which was unforeseeable. Id. In other words, there must be such an increase in costs or a decrease in prices that the resulting loss is "extreme and unreasonable," thereby rendering the performance clearly outside the reasonable contemplation of the parties to the contract. In such circumstances, performance will be excused because enforcing the contract would require a performance which was clearly not bargained for, to the detriment of one party and the windfall of the other. It is said that such circumstances frustrate the purpose of the contract. Thus, in Mineral Park Land Co. v. Howard, 156 P. 458, 459 (Cal. 1916), cited in Gulf Oil Corp. v. Federal Power Commission, supra at 599, a party who had contracted to remove gravel from land was excused from performance where the gravel could not be removed or used by the party except at "great expense." See also Kansas City, Missouri v. Kansas City, Kansas, 393 F. Supp. 1 (W.D. Mo. 1975); Dillon v. United States, 156 F. Supp. 719 (Ct. Cl. 1957). The court in Aluminum Company of America v. Essex Group, Inc., supra at 73, regarded a rise in costs which would cause the party to the contract to "lose well over \$60 million dollars out of pocket over the life of the contract" as sufficient to excuse performance.

As developed by the courts, the doctrine of commercial impracticability is an attempt to bring an element of fairness to bear on contractual arrangements by excusing performance (and thereby obviating any breach) of the contract. However, it is recognized by the courts that this doctrine is only applicable where the parties have not otherwise allocated the risk of added "difficulty, expense, injury or loss" or provided for what will happen in the event of occurrence of the particular contingency. Waldinger Corp. v. CRS Group Engineers, Inc., supra at 786-87; Florida Power & Light Co. v. Westinghouse Electric Corp., supra at 459. The doctrine operates in the absence of any expressed intention on the part of the parties to the contract. Conversely, where the parties have expressly provided in the contract for either allocating the risk or what will happen in the event of occurrence of the particular contingency, that will control.

Thus, the parties may provide that, in the event of such circumstances which render performance of the contract commercially impracticable, performance will not be excused but merely delayed. See Uniform Commercial Code § 2-615:9 (1983) (casualty clause excusing performance provides "permanent excuse for nonperformance, unless the contract provides that only delay shall be excused"). Such contracts are those, for example, which provide that they are "subject to delay." See United States v. Brooks-Callaway Co., 318 U.S. 120 (1943); Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 988 (5th Cir. 1976); Mitchell Canneries v. United States, 77 F. Supp. 498

(Ct. Cl. 1948). As stated in 3A A. L. Corbin, Corbin on Contracts § 642 (1960), at pages 67-68: "The provision may be so drawn as to affect merely the time for performance and not the duty of performance altogether, thus: 'contract is subject to delay from strikes, fires, and other causes beyond our control.'" In effect, the contract provides for suspension of the obligation to perform. See Gulf Oil Corp. v. Federal Energy Regulatory Commission, 706 F.2d 444 (3rd Cir. 1983), cert. denied, 464 U.S. 1038 (1984); and Gulf Oil Corp. v. Federal Power Commission, supra at 601 (gas purchase contract subject to suspension in the event of force majeure); Hawkland, "The Energy Crisis and Section 2-615 of the Uniform Commercial Code," 79 Com. L. J. 75 (1974).

In order to invoke the doctrine of commercial impracticability the party attempting to do so must first establish the factual basis for doing so. Unless this is done the question of its applicability to a contract need not be addressed. Appellant has not demonstrated that drilling an additional well within the unit would be unprofitable due to current and reasonably foreseeable circumstances such as would justify a suspension of its section 2(e) drilling obligations. As the court said in Eastern Air Lines, Inc. v. Gulf Oil Corp., supra at 440: "The party undertaking the burden of establishing 'commercial impracticability' * * * undertakes the obligation of showing the extent to which he has suffered, or will suffer, losses in performing his contract." Appellant has not satisfied that burden. At a minimum, appellant has not established that, over the life of any well subsequently drilled on non-participating acreage, appellant would not recover the cost of drilling and operating the well given anticipated producible gas reserves and current and reasonably foreseeable gas prices. With respect to the price of gas, appellant relies solely on the current price under its Northwest contract and has made no attempt to demonstrate that this price is representative of the industry as a whole n11 or that it would continue for the life of a well. It may be, given the volatility in gas prices, that, even if the contract price is the industry standard, the price of gas will rise over time. Moreover, appellant has made only a minimal effort to demonstrate anticipated producible reserves or the costs of drilling and operating a well. Finally, appellant has not demonstrated that drilling and operating a well would be unprofitable for any operator, where the doctrine of commercial impracticability imposes

11/ We note that, under the Northwest gas purchase contract, appellant was not bound to accede to the gas price reduction. As stated in the excerpt of the contract attached to appellant's December 1984 suspension request (Exhibit B), when Northwest considered the continued purchase of gas "uneconomic" Northwest was required to notify appellant, and meet "to review the facts supporting Buyer's contention and to determine what measures, if any, are necessary to rectify the situation including, but not limited to, a reduction in price." In the event the parties failed to reach a "mutual agreement," within 30 days of the original notice, appellant had the right to cancel the contract. It is clear that after the parties did not reach an agreement, appellant did not cancel the contract. However, appellant has not established that it could not obtain a better price for its gas.

an objective standard. 12/ See Pauley Petroleum, Inc. v. United States, 591 F.2d 1308, 1319-20 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979). In addition, because of the objective nature of the doctrine of commercial impracticability, one seeking to take advantage of the doctrine must prove that "all means of performance are commercially senseless." Jennie-O Foods, Inc. v. United States, 580 F.2d 400, 409 (Ct. Cl. 1978). Appellant, however, has submitted no evidence that no well could be drilled profitably anywhere within the non-participating acreage. Without such evidence, we cannot judge whether drilling a well would necessarily be an unprofitable undertaking, let alone so grossly unprofitable as to constitute a situation of commercial impracticability. 13/ Appellant desires a suspension of its section 2(e) drilling obligations largely on the supposition that drilling would necessarily be unprofitable. We will not overturn a determination denying a suspension in such circumstances, especially where it would deprive the United States "not only of the expected royalty from production * * * but of the privilege of making some other arrangement for availing [itself] of the mineral content of the land." 14/ Sauter v. Mid-Continent Corp., 292 U.S. 272, 281 (1933).

12/ BLM states on appeal that "just because [Koch] implies they cannot make a profit in the Monument Valley Unit Area does not mean that, at current conditions, it would be impossible for any company to make a profit" (Response attached to Answer at 2). Appellant responds that BLM's assertion that Koch is a "less efficient" operator is "unsupported in the record" (Response to BLM's Answer at 5). However, appellant has failed to establish that no other operator could make a profit.

13/ In arguing that it should be excepted from its section 2(e) drilling obligations, appellant seems to rely on the well-established principle in the case of private oil and gas leases that a lessee will be excepted from an implied covenant to further develop a lease after production has been initiated where there is no "reasonable expectation of profit" such that a reasonable and prudent operator would engage in development operations. Superior Oil Co. v. Devon Corp., 604 F.2d 1063, 1068 (8th Cir. 1979), and cases cited therein; Young v. Amoco Production Co., 610 F. Supp. 1479, 1485 (E.D. Tex. 1985), aff'd, 786 F.2d 1161 (1986).

Thus, it is said that a lessee is not obligated to develop a lease "beyond the point where it would be profitable to him, even if some benefit to the lessor would result therefrom." Trust Co. of Chicago v. Samedan Oil Corp., 192 F.2d 282, 284 (10th Cir. 1951). However, the exception to the implied covenant to further develop a lease, as well as the implied covenant itself, is plainly an outgrowth of the common law and has no bearing on the present case, which is governed by the express provisions of section 25 of the unit agreement taken from Departmental regulation, as they are interpreted herein.

14/ Subsequent to the decision on appeal, on June 6, 1986, the Director, BLM, issued IM No. 85-508, which set forth guidelines for suspension pursuant to section 17(f) of the Mineral Leasing Act and 43 CFR 3103.4-2, of production requirements imposed upon oil and gas lessees, upon certification and verification that a lessee would otherwise prematurely abandon so-called stripper wells. In such circumstances, the operator is permitted to shut-in such wells. In IM No. 86-687, dated Sept. 8, 1986, the Deputy Director

Appellant has failed to establish the factual predicates to the invocation of the doctrine of commercial impracticability, and we need not decide whether the doctrine is properly applicable to sections 25 and 2(c) of the unit agreement.

Appellant also argues that section 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1982), provided an alternative basis for granting a suspension of appellant's section 2(e) drilling obligations because unitized leases are effectively treated as one lease for operation and production purposes. See: Automatic Termination of Unitized Leases for Failure to Pay Rentals, Solicitor's Opinion, 69 I.D. 110 (1962), and cases cited therein. However, on this latter point, we note that "leases do not completely lose their identity when they are unitized." General Petroleum Corp., 59 I.D. 383, 390 (1947). Lease obligations must be distinguished from unit obligations. See Oil and Gas Lease Suspension, Solicitor's Opinion, 92 I.D. 293, 298 (1985).

Moreover, section 39 of the Mineral Leasing Act, enacted in 1933, essentially confirmed the existing authority of the Secretary to suspend "operations and production under any lease." 30 U.S.C. § 209 (1982); see Solicitor's Opinion, 92 I.D. at 296. Under the statute, such a suspension is to be granted only "in the interest of conservation." 30 U.S.C. § 209 (1982). But more importantly, the statute tolls the running of the lease term and rental and royalty obligations during the period of the suspension. It was primarily intended to "provide extraordinary relief when lessees are denied beneficial use of their leases." Solicitor's Opinion, 92 I.D. at 298-99. Therefore, in contemplation and as it has been consistently interpreted by the Department and the courts, section 39 of the Mineral Leasing Act applies to the suspension of lease obligations. See, e.g., Cooper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981); Getty Oil Co. v. Clark, 614 F. Supp. 904 (D. Wyo. 1985) (affirming Sierra Club (on Judicial Remand), 80 IBLA 251 (1984)); Interpretation of the Mineral Leasing Act of Feb. 25, 1920, (41 Stat. 347), as amended, Solicitor's Opinion, 56 I.D. 174, 195-96 (1937). It provides no authority for suspension of obligations imposed by a

fn. 14 (continued)

further stated that such a suspension would be approved when the lessee, despite the exercise of due care and diligence, is "prevented from producing * * * by reason of * * * matters beyond [its] reasonable control." Thus, it could be argued that the Director now regards the decline in oil prices which renders production from a stripper well economically impracticable to be a circumstance beyond the reasonable control of the lessee which prevents compliance with lease production requirements. That determination appears to apply only to stripper oil producers, and seems related to the protection of the Federal royalty interest. There is no evidence that the Director has made a similar determination with respect to the impact of the admitted decline in gas prices generally on section 2(e) drilling obligations, i.e., that the decline has rendered drilling of unit gas wells economically impracticable such that compliance with section 2(e) drilling obligations is prevented by matters beyond the unit operator's reasonable control.

unit agreement. Therefore, BLM had no authority to suspend appellant's section 2(e) drilling obligations pursuant to section 39 of the Mineral Leasing Act.

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.

R. W. Mullen
Administrative Judge

We concur:

Wm. Philip Horton
Chief Administrative Judge

James L. Burski
Administrative Judge

