

ROCKY MOUNTAIN HELIUM, LLC

IBLA 96-495, 99-108

Decided May 6, 1999

Appeals from separate decisions of the Bureau of Land Management denying a request for permission to drill wells and produce helium from Federal lands, and demanding payment of a bill of collection for annual rentals owed under a contract for the purchase of helium. FLL94-001.

Decision in IBLA 99-108 affirmed; decision in IBLA 96-495 affirmed in part, set aside in part and remanded.

1. Helium

A BLM decision denying a request under 43 C.F.R. § 16.3 for permission to develop wells on Federal land for the principal purpose of recovering helium from natural gas will be affirmed when such land is the subject of existing oil and gas leases, and Appellant is not an oil and gas lessee, nor acting under an agreement with a lessee for the production of natural gas, and has failed to show that BLM's decision was arbitrary or capricious.

2. Helium

A BLM demand for annual rental payments pursuant to a contract for helium extraction executed under the terms of 43 C.F.R. Part 16 will be affirmed when Appellant fails to support its allegation that events beyond its control prevented its compliance with the rental payment requirements of the contract.

APPEARANCES: Christopher M. Sullivan, Esq., Rocky Mountain Helium, LLC, Telluride, Colorado, for Appellant; Bradley Grenham, Esq., and Natalie Eades, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Rocky Mountain Helium, LLC (RMH/Appellant), has appealed from two decisions relating to the terms of Contract No. FLL94-001 (the Contract), executed by RMH and the U.S. Bureau of Mines (BOM), and effective August 1,

1994. Effective March 12, 1996, BOM's helium management duties were transferred to the Bureau of Land Management (BLM) pursuant to Secretarial Order No. 3198 (March 12, 1996). The first decision appealed (IBLA 96-495) is a June 7, 1996, decision of the Helium Administrator and the Assistant Director, Resource Use and Protection, both of BLM, denying Appellant's request for permission to drill wells and produce helium from Federal lands in the Harley Dome Field in eastern Utah. The second decision appealed (IBLA 99-108) is a September 28, 1998, decision of the Contracting Officer, Helium Operations, BLM, demanding RMH's 1998 annual rental payment of \$21,522.44, pursuant to the terms of the Contract. In the interest of administrative economy, we have consolidated the appeals.

The Contract, issued pursuant to the Helium Act Amendments of 1960, 50 U.S.C. §§ 167-167n (1994) and 43 C.F.R. Part 16, granted RMH the right to extract helium from natural gas produced from 21,522.44 acres of Federal land in Mesa County, Colorado and Grand County, Utah. Under the terms of the Contract and 43 C.F.R. § 16.3, RMH could not develop wells "with the principal purpose of recovering the helium component of natural gas," absent express permission from the Secretary of the Interior. (Contract at 1.) Accordingly, by letter of May 12, 1995, RMH sought such permission under 43 C.F.R. § 16.3 to drill wells and produce helium underlying 5,764.24 acres covered under the Contract, along with the rest of the natural gas. The subject acres included 4,844.24 acres leased by BLM under various oil and gas leases, each of which expressly accorded to the lessee the "exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas (except helium) in the [leased] lands." (Standard Lease Form No. 3100-11 (June 1988).) It is not disputed that RMH was not a party to any of these leases, and did not have any agreement regarding the production of oil and gas under those leases. The remaining 920 acres were not leased.

In its June 7, 1996, Decision denying RMH's request, BLM stated that granting RMH's request "could be construed as a breach of the Department's obligation to the existing Federal oil and gas lessees." (Decision at 2.) BLM noted that while the language of section 1 of the Mineral Leasing Act, as amended, 30 U.S.C. § 181 (1994), reserved to the United States ownership of the helium and the right to extract it or to have it extracted from the produced natural gas, such language did not allow BLM "to produce or require a lessee to produce, gas from lands that have already been leased, for the purpose of extracting the helium component of the gas stream." (Decision at 3.) To do so, BLM stated, "would interfere with the rights of the oil and gas lessees." Id.

In its Statement of Reasons for Appeal (SOR), Appellant argues that BLM's decision is an unlawful taking of its rights under the Contract. Appellant asserts that BLM's denial of its request to independently develop the helium reserves underlying the lands leased for oil and gas, in deference to the existing lessees, is contrary to the Secretary's authority under section 4 of the Helium Act Amendments of 1960, 50 U.S.C. § 167b (1994). Further, RMH argues that BLM's denial is contrary to the express

purpose of the statute to "foster and encourage individual enterprise in the development \* \* \* of supplies of helium." (SOR at 5 (quoting 50 U.S.C. § 167m (1994)).) Appellant also asserts that constraining the Secretary's authority in this way holds him "hostage to exorbitant demands of oil and gas lessees" and that BLM's decision grants them rights to preclude helium development "far in excess of any such rights granted in their oil and gas leases." (SOR at 3.)

In its Answer, BLM argues that it was a proper exercise of discretion for BLM to deny RMH's request to establish wells on pre-existing oil and gas leases for the purpose of extracting helium. Further, BLM asserts that its denial of RMH's request did not interfere with the Contract, since RMH was granted no right under the Contract to develop wells to recover helium.

[1] The Mineral Leasing Act does not provide for leasing helium deposits or for the production and sale of helium from Federal lands under oil and gas leases. Exxon Corp., 118 IBLA 221, 230 n.9, 98 I.D. 110, 114 n.9 (1991). It provides only that, in issuing such a lease, the United States retains ownership of helium and the "right to extract [it] from all gas produced from lands leased," provided that such extraction causes no substantial delay in delivery of the gas to its purchaser. 30 U.S.C. § 181 (1994).

The extraction of helium from produced gas is governed by the Helium Act Amendments of 1960 and 43 C.F.R. Part 16. Under 43 C.F.R. § 16.3, BLM has discretion to grant an applicant permission to drill wells primarily to recover helium. A decision made by BLM in the exercise of that discretion will not be overturned by the Board unless it can justifiably be said to be arbitrary and capricious, and thus without any rational basis. See California Association of Four-Wheel Drive Clubs, 38 IBLA 361, 371 (1978), aff'd, California Association of Four-Wheel Drive Clubs, Inc. v. Andrus, No. 79-1797-N (S.D. Cal. Aug. 5, 1980), aff'd, (10th Cir. Jan. 22, 1982). Thus, the Board has affirmed discretionary decisions when the record demonstrates that the relevant factors were considered and the decision is in accord with statutory directives. See Deschutes River Public Outfitters, 135 IBLA 233, 240 (1996) and cases cited. Moreover, the burden is upon RMH to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis, or that its decision is not supported by a record showing that BLM gave due consideration to all relevant factors, and acted on the basis of a rational connection between the facts found and the choice made. See Utah Trail Machine Association, 147 IBLA 142, 143 (1999). That burden is not carried simply by expressions of disagreement with BLM's analysis and conclusions. Larry Griffin, 126 IBLA 304, 308 (1993). In this case, Appellant has failed to meet its burden of proof.

In its Answer, BLM notes that all of the oil and gas leases on the subject lands provide that the United States reserves the option of extracting or having extracted helium "from gas production." (Section 8, Form 3100-11, June 1988.) Also, BLM notes the same language in the Mineral Leasing Act which provides that the United States reserves the ownership and right to extract helium from all "gas produced" from the leased lands.

30 U.S.C. § 181 (1994). Thus, BLM argues that because the United States has specifically reserved the right to extract helium from gas production, helium may only be extracted from the gas stream produced by lessees. BLM asserts that "[t]he language is simply not broad enough to reasonably interpret as allowing the United States or a third party to drill into a gas supply which is subject to a preexisting lease absent an agreement with the lessee." (Answer at 7.) We find that BLM's decision was based on a reasonable interpretation of relevant law and facts.

Moreover, in Penroc Oil Corp., 84 IBLA 36, 40 (1984), we concluded that one of an oil and gas lessee's rights is the right to the exclusive use of an oil and gas well drilled on leased lands, even where it has been plugged and abandoned, since granting a right-of-way to a third party to dispose of salt water in a plugged/abandoned well would necessarily infringe that right. Likewise, in the present case, we conclude that permitting Appellant to drill wells on leased lands for the removal of natural gas, along with helium, would necessarily infringe on the exclusive right of the lessees, and that BLM properly denied Appellant's request to do so. We therefore conclude that, in the case of those subject lands which were leased for oil and gas at the time of BLM's June 7, 1996, decision, BLM's decision was supported on a rational basis and must be affirmed.

However, we find no support for BLM's decision to deny Appellant's request to drill wells and produce helium from the 920 acres of land which are not already leased for oil and gas. BLM's decision does not assert any justification for denying Appellant's request as to that land. Accordingly, we conclude that it is appropriate to set aside that part of BLM's June 7, 1996, decision denying Appellant's request under 43 C.F.R. § 16.3 for permission to develop wells for the principal purpose of developing helium from the 920 acres of unleased land, and to remand the case for readjudication of Appellant's request as to that land.

We turn to RMH's appeal of BLM's September 28, 1998, decision. Article III, section 3.2 of the Contract provided that RMH would make rental payments of one dollar for each of the 21,522.44 contract acres at the time the Contract is executed, and then annually thereafter during the life of the Contract, unless helium payments (19 percent of the gross proceeds) were greater.

On July 9, 1996, RMH filed a petition requesting that annual rentals due, and the remaining term on the Contract be suspended until 30 days after this Board adjudicated its appeal in IBLA 96-495, or until "30 days after receiv[ing] approval to explore and produce the designated contract lands at Harley Dome in conjunction with the inclusion of these lands in an approved Operating Unit Agreement." By letter dated September 13, 1996, BLM denied RMH's petition, noting that IBLA 96-495 dealt with only 5,760 of the 21,522 contract acres available to RMH for helium production. Additionally, BLM demanded that RMH remit the rental payment within 30 days and stated that failure to do so "may subject the contract to cancellation under the terms of Article 3.3 of the contract."

On September 27, 1996, RMH filed another request for suspension of the Contract and deferral of the rental fees. By letter dated October 24, 1996, BLM denied RMH's request to suspend the contract terms, but agreed to defer payment of rental fees on the 5,764.24 acres associated with RMH's appeal. Moreover, BLM advised that unless Appellant exercised the option of making a partial payment of \$15,780 for each year for acreage not subject to Appellant's appeal, the full 1995 annual rental would be due no later than October 31, 1995. When BLM had not received RMH's 1995 and 1996 annual rental payments by March 5, 1997, it informed RMH by letter of that date that it was "discontinu[ing] administrative procedures to collect the outstanding amounts due per the terms and conditions of your contract until such time as our legal concerns are resolved or until you receive further notice." Additionally, BLM stated that its March 5, 1997, letter did not set aside or waive RMH's obligation to make the 1995 and 1996 annual rental payments, that penalty interest would continue to accrue at the rate of 5 percent per year on the unpaid balance, and that a delinquency penalty of 6 percent per year would also be assessed.

Finally, on September 28, 1998, BLM sent Appellant the demand letter which gave rise to this appeal. In that letter, BLM gave notice that it was reinstating collection actions under the Contract, and demanded payment of the 1998 annual rental of \$21,522.44 by October 31, 1998. Further, BLM stated that it planned to initiate a payment plan requiring RMH to pay rental due for the years 1995, 1996, and 1997, and that it was "willing to negotiate monthly, quarterly, or annual installments which will result in complete payment of the outstanding amounts accrued to your account no later than October 31, 2000." RMH filed a timely appeal of BLM's demand letter.

In its SOR, Appellant recounts the history of helium discovery in the Harley Dome field, and asserts that third-party oil and gas lessees in the Harley Dome field covered by its Contract have obstructed RMH's use and implementation of the Contract. RMH charges that such lessees exerted influence on Members of Congress and BLM officials, and, as a consequence, RMH was prevented from implementing its Contract in the Harley Dome field. Additionally, RMH alleges that such lessees and their agents have conducted a "sustained campaign of intimidation and fraudulent misrepresentation" amounting to "tortious interference" with RMH's contract to extract helium from the Harley Dome field. (SOR at 21, 22.)

BLM responds that under the terms of the Contract, RMH had two alternatives for producing helium from the contract lands. First, if it was an oil or gas lessee on the contract lands, it could capture the helium from wells it had developed subject to Federal leases. Second, if RMH held no Federal leases on the subject lands, it could try to negotiate agreements with third-party lessees to extract helium from their production on the contract lands. BLM asserts that RMH's status as a nonlessee on the contract lands and its inability to negotiate the right to extract helium from the production of lessees in the Harley Dome field should not excuse it from its obligation to remit rental payments. BLM also argues that while RMH asserts tortious interference by third parties with its Contract

and can pursue a remedy in Federal district court, it nevertheless owes rental payment under the terms of the Contract.

[2] BLM concludes that none of RMH's arguments excuse it from its obligation to pay 1998 rental charges on the contract lands as defined in the Contract. We agree.

RMH's Contract was premised on compliance with the Helium Act Amendments of 1960 and implementing regulations. It is well-settled that when the terms of a contract provide that it must be performed in compliance with specific laws and regulations, such provisions must be fulfilled, and failure to do so will defeat recovery. 17 Am. Jur. 2d Contracts § 630 (1991). Additionally, a party claiming impossibility of performance has the burden of showing that it had not assumed the risk of the events that caused the alleged nonperformance and that the events were not foreseeable. Id. at § 674.

Article XI of the Contract provides for the suspension of RMH's obligations pursuant to and for the duration of a force majeure. Section 11.3 of that Article defines force majeure as unforeseen and catastrophic events "not within the control of the party claiming suspension and which by the exercise of due diligence such party is unable to avoid."

The evidence put forth by RMH fails to show that its inability to negotiate agreements for permission to process helium from the gas production of third party lessees on the Harley Dome field was outside of its control and not foreseeable, or that the unwillingness of third parties to negotiate with RMH constituted a force majeure. Accordingly, we conclude that BLM's decision of September 28, 1998, must be affirmed.

To the extent Appellant has raised arguments in this consolidated appeal which have not been specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's decision of September 28, 1998, in IBLA 99-108 is affirmed; BLM's decision of June 7, 1996, in IBLA 96-495 is affirmed in part and set aside in part, and the case is remanded to BLM for action consistent with this opinion.

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John H. Kelly  
Administrative Judge

I concur.

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T. Britt Price  
Administrative Judge

