



INTERIOR BOARD OF INDIAN APPEALS

Taylor Drilling Corporation v. Eastern Oklahoma Regional Director, Bureau of Indian  
Affairs

53 IBIA 15 (01/31/2011)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

TAYLOR DRILLING CORPORATION,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 09-42-A
EASTERN OKLAHOMA REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	January 31, 2011

The Board of Indian Appeals (Board) affirms the December 16, 2008, decision of the Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which she affirmed, in turn, 2 decisions, both dated July 20, 2006, by the Superintendent of BIA’s Osage Agency declaring that Oil and Gas Mining Lease No. G06-17715 and Oil Mining Lease No. G06-992 had terminated for non-production.<sup>1</sup> We conclude that Appellant Taylor Drilling Corporation, the primary lessee on both leases, failed to dispute the Regional Director’s material findings or otherwise show error in the Regional Director’s decision.

## Background

Appellant is the assignee of a 99% share<sup>2</sup> in Oil and Gas Mining Lease No. G06-17715 and Oil Mining Lease No. G06-992.<sup>3</sup> Lease No. G06-17715 was

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<sup>1</sup> In their letters, the Regional Director and Superintendent both identify Oil Mining Lease No. G06-922 but the lease document itself is numbered G06-992. Because both letters recite the location of Lease No. G06-922 and because Appellant does not contend that it was misled, we conclude that the typographical error is immaterial.

<sup>2</sup> David Holloway is the lessee of the remaining 1% share.

<sup>3</sup> Lease No. G06-17715 is situated in the SW<sup>1</sup>/<sub>4</sub>, Section 26, Township 22 North, Range 10 East, Indian Meridian, Osage County, Oklahoma; Lease No. G06-992 is situated in the NW<sup>1</sup>/<sub>4</sub>, Section 26, Township 22 North, Range 10 East, Indian Meridian, Osage County, Oklahoma.

approved by BIA in 1999 for a period of “3 months from the date of approval hereof and as long thereafter as oil and-or natural gas is produced in paying quantities.” Lease No. G06-17715, ¶ 1 (Administrative Record (AR), Exh.1); Lease No. G06-992 was approved by BIA in 1967 for a period of “five years from the date of approval hereof, and as long thereafter as oil is produced in paying quantities.” Lease No. G06-992, ¶ 1 (AR, Exh.1). *See* 25 C.F.R. § 226.10 (Osage mineral leases shall contain a primary term and continue thereafter so long as production occurs in paying quantities). The subject mineral interests are owned by the Osage Nation. Appellant became an assignee of the 2 leases on March 18, 2003. It is undisputed that both leases were past their primary term, and thus were in their extended terms, i.e., the leases remained in effect so long as oil was produced in paying quantities.

On April 15, 2004, the Superintendent notified Appellant that no production in paying quantities had been reported to BIA for Lease No. G06-17715 since February 2003. Appellant immediately restarted production, and reported production for three consecutive months in April, May, and June of 2004, then ceased operations.

In February 2006 and in response to a letter from the Superintendent concerning Appellant’s “Moore lease,”<sup>4</sup> Appellant represented that its “primary problem for a number of years now has been money.” Letter from Appellant to Superintendent, Feb. 27, 2006, at 1 (AR, Exh. 10). Appellant recounted various problems, stating that “we were broke, no one was hiring us to do any outside work, we couldn’t afford to produce *any* of our own wells.” *Id.* at 1 (emphasis added); *see also id.* at 2 (Appellant candidly acknowledged that it was “in pretty serious financial trouble”). Appellant closed its letter by stating it would “have *all* of [its] leases producing within 90 days.” *Id.* at 2 (emphasis added).

On June 30, 2006, the Superintendent notified Appellant that BIA records reflected no production and no sales for either of the subject leases since June 2004.<sup>5</sup> The Superintendent afforded Appellant 15 days to show that the leases had, in fact, been producing in paying quantities, but advised Appellant that the opportunity was not

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<sup>4</sup> The letter to which Appellant responded is not part of the record nor is there information in the record that explains where the Moore lease is located. However, it appears that the leases that are the subject of this appeal are collectively known as the “Reed” lease. *See, e.g.*, AR, Exh. 9. Therefore, in considering Appellant’s February 27 response, we consider only those statements of general applicability to Appellant’s leases.

<sup>5</sup> In the time that Appellant has been an assignee on the subject leases, the only sale of oil reported to BIA was a sale that occurred in June 2004.

intended to be used to *establish* production but to demonstrate that the leases were *already* producing in paying quantities. In a response dated July 14, 2006, Appellant stated that pursuant to a meeting with the Superintendent, it had “attempted to establish production,” and that during the past 2 weeks, i.e., since July 1, it had produced over 3 feet of oil. Other than this information, Appellant provided no reports or information to show either production or sales since June of 2004. Appellant stated that “[t]he primary problem” impeding production was that the Environmental Protection Agency (EPA) would not approve Appellant’s salt water disposal well. Letter from Appellant to Agency, July 14, 2006, at 1 (AR, Exh. 12). Appellant stated, however, that it would “continue to truck the water” until the disposal well could be fixed. *Id.* Appellant also mentioned that there were financing difficulties and some vandalism of equipment. Appellant stated that it is committed to getting the wells producing again, and asked for an opportunity to meet with BIA personnel to show its sincerity. Appellant represented that it would get the leases “going within 90 days.” *Id.* at 2.

On July 20, 2006, the Superintendent declared both leases terminated “for not producing.” Superintendent’s Decision at 1 (AR, Exhs. 7, 15). By letter dated August 17, 2006, Appellant appealed to the Regional Director, and argued that the wells had, in fact, produced oil since June 2004. Appellant submitted a production report signed by its pumper that stated that, in addition to June 2004, oil was produced in September 2005 (15.3 barrels), May 2006 (10 barrels), and July 2006 (44.88 barrels). Appellant did not state whether the oil produced subsequent to June 2004 was sold or whether these quantities otherwise constituted “paying quantities.”<sup>6</sup>

On December 16, 2008, the Regional Director upheld the Superintendent’s termination of the subject leases for nonproduction of oil or gas in paying quantities. The Regional Director noted that the Superintendent had not received any production or sales reports from Appellant since June 2004, and that Appellant twice had sought additional time in 2006 to get the leases producing.

This appeal followed. Appellant submitted an opening brief; the Regional Director submitted an answer brief. No reply brief was filed.

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<sup>6</sup> The pumper’s statement specifically noted that the oil produced in June 2004 was “sold to [a] purchaser.” AR, Exh. 15 (statement of Larry Long). No similar representation was made concerning the subsequent production.

## Discussion

We affirm the Regional Director's decision. Although the Regional Director failed to acknowledge that BIA's own records reflected production in September 2005 for both leases, neither that production nor Appellant's subsequent reports for May and July 2006, is sufficient to demonstrate that the lease did not terminate by operation of law for failing to produce in *paying quantities*. On appeal to the Board, Appellant seeks to excuse its nonproduction by blaming EPA for demands concerning the salt water disposal well, and provides a litany of complaints against the Superintendent, arguing, among other things, that it was not afforded the opportunity to explain the problems it was having and to convince her that production soon would be restarted. None of Appellant's complaints about EPA and the Superintendent were presented in Appellant's appeal to the Regional Director, and we decline to consider them now. On the merits, Appellant does not demonstrate that the oil produced after June 2004 constituted production in *paying quantities*.

### 1. Standard of Review

As we explained in *McCann Resources, Inc. v. Acting Eastern Oklahoma Regional Director*, 48 IBIA 84, 89-90 (2008):

Appellant bears the burden of proving error in the decision. *Tallgrass Petroleum Corp. v. Acting Eastern Oklahoma Regional Director*, 39 IBIA 9 (2003). Unsupported assertions concerning BIA's decision are insufficient to carry this burden of proof. *See King v. Eastern Oklahoma Regional Director*, 46 IBIA 149, 153 (2007). When the issue is nonproduction from an oil and/or gas lease, Appellant bears the burden to show that production did, in fact, occur, *Clark Operating Services, Inc. v. Acting Muskogee Area Director*, 29 IBIA 109, 114 (1996), or that any period of non-production was excusable, *Oxley Petroleum v. Acting Muskogee Area Director*, 29 IBIA 169, 171 (1996).

When an oil and gas lease is issued for a primary term and so long thereafter as oil and gas is produced in paying quantities, the lease in its extended term expires when production ceases. *Dyck v. Acting Eastern Oklahoma Regional Director*, 35 IBIA 250, 251 (2000). This principal applies as well to an oil lease or a gas lease. *Tallgrass Petroleum Corp.*, 39 IBIA at 9 (oil lease). Expiration occurs by operation of law and not by any action taken by BIA. *Magnum Energy, Inc. v. Eastern Oklahoma Regional Director*, 38 IBIA

141, 142 (2002). Thus, BIA does not “cancel” or terminate a lease which expires of its own terms. *Dyck*, 35 IBIA at 251, citing *Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director*, 21 IBIA 88, 94-95 (1991), *aff’d*, *Benson-Montin-Greer Drilling Corp. v. Lujan*, No. CIV-92-210 SC-LFG (D.N.M. Jan. 13, 1993). It follows that production or nonproduction is determinative of whether the lease is in an extended term; nonproduction is not a lease violation and does not trigger lease cancellation or forfeiture procedures. *Tallgrass Petroleum Corp.*, 39 IBIA at 11.

The Board reviews *de novo* issues that go to the sufficiency of the evidence. *Emm v. Western Regional Director*, 50 IBIA 311, 316 (2009). As explained above, BIA’s determination that a lease has expired for non-production is a conclusion of law based on the evidence, and therefore, is reviewed *de novo* and not as a discretionary decision.

## 2. Lease Termination

Our analysis begins and ends with the term of the subject leases: Both leases are past their primary terms, and thus remain in effect only “as long thereafter as oil and-or natural gas is produced in paying quantities.” Lease No. G06-17715; *see also* Lease No. G06-992 (the lease shall continue “as long . . . as oil is produced in paying quantities”). These lease terms are consistent with acts of Congress (Act of June 24, 1938, Pub. L. No. 75-711, 52 Stat. 1035; Act of March 2, 1929, Pub. L. No. 70-919, 45 Stat. 1479) and their implementing regulations, *see* 25 C.F.R. § 226.10. Appellant relies on several examples to show some isolated “production” since June 2004, but Appellant does not dispute that the last production of *paying quantities* for these two leases occurred in June 2004. Consequently, we affirm the Regional Director’s conclusion that the leases expired by operation of law when production in paying quantities ceased. *See Magnum Energy*, 38 IBIA at 142.

Appellant contends that the leases have not expired because there was production in September 2005, May 2006, and July 2006. Evidence of this production, without more, is insufficient to satisfy Appellant’s burden. First, there is no showing that this production constitutes “paying quantities,” which is required by the terms of both leases as a condition of keeping the leases in effect. Although neither the leases nor the regulations or statutes define “paying quantities,” we have previously held that where there is no evidence that the lessee has received even a minimal profit from the lease, it is clear that there is no production in paying quantities. *Clark Operating Services*, 29 IBIA at 114. Here, Appellant fails to show any sales from the minimal oil production that occurred prior to the Superintendent’s June 30 letter, much less sales that resulted in a profit for Appellant. Second, evidence of production in July 2006, even assuming it was in paying quantities,

comes too late. As the Superintendent explained in her June 30 letter, she was providing Appellant with an opportunity to show that production in paying quantities had occurred between June 2004 and June 2006; she expressly stated that she was not giving Appellant an opportunity to reestablish production.<sup>7</sup> Finally, Appellant is required to “furnish certified monthly reports by the 25<sup>th</sup> of each following month covering all operations, whether there has been production or not, indicating therein the total amount of oil, natural gas, casinghead gas, and other products subject to royalty payment.” 25 C.F.R. § 226.13(b). Appellant apparently submitted the required reports,<sup>8</sup> and, between July 2004 and April 2006, reported no oil or gas production except for the month of September 2005 and no sales. *See* AR, Exh. 9. Therefore, with that sole exception, Appellant concedes that there has been no production whatsoever for nearly a full two years, much less any production in paying quantities.

Appellant also argues that it was not given the opportunity to meet with the Superintendent or the Regional Director concerning its leases. Appellant did not complain to the Regional Director that it was unable to meet with the Superintendent, for which reason we decline to consider this argument. *See* 43 C.F.R. § 4.318 (ordinarily, the scope of an appeal before the Board is limited to those issues that were before the BIA official whose decision has been appealed); *C.E. McClurkin v. Eastern Oklahoma Regional Director*, 44 IBIA 125, 129 (2007). Appellant also claims that it was denied the opportunity to meet with the Regional Director. Appellant cites no authority requiring that the Regional Director provide Appellant with a hearing or a meeting. Appellant was provided the opportunity to submit its legal arguments and evidence in writing to the Regional Director. *See* 25 C.F.R. §§ 2.9, 2.10. If Appellant believed it was denied the opportunity to present evidence to the Regional Director, its remedy was to submit that evidence to the Board and explain why it was unable to submit the same to the Regional Director.<sup>9</sup> Appellant does not inform the Board how its rights were adversely affected by the lack of a meeting, what

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<sup>7</sup> The record contains a number of references from Appellant to its inability to garner financial backing to establish production. The leases provide no defense from non-production based on an operator’s financial difficulties.

<sup>8</sup> The administrative record contains printouts for each lease, by year, that list *inter alia* monthly production, amount of royalty paid, and the date the monthly report was received. *See* AR, Exh. 9. The record does not contain the actual reports of production except to the extent that Appellant included the report for September 2005 with its statement of reasons in its appeal to the Regional Director.

<sup>9</sup> The Board ordinarily does not consider evidence that was not presented in the first instance to the Regional Director, *see McClurkin*, 44 IBIA at 129, but it has the inherent authority to do so where manifest injustice or error would otherwise result, 43 C.F.R. § 4.318.

arguments would have been made, or what evidence that would have been shared. Therefore, we conclude that this argument has no bearing on the termination of Appellant's leases by operation of law.<sup>10</sup>

Finally, Appellant argues that “[t]he main reason we could not maintain consistent operations on this lease is because we could not satisfy the permitting officer of the EPA [concerning the salt water disposal well].” Opening Brief at 2 (unnumbered).<sup>11</sup> Appellant also failed to raise this argument with the Regional Director. See *McClurkin, supra*. In any event, Appellant provides no details and no evidence other than saying that an agreement would be reached with the EPA inspector concerning work to be done on the well, Appellant would perform the agreed-upon work, and the EPA inspector would then “come up with something else [that needed to be done].” *Id.* at 2. Notwithstanding the issues with EPA, Appellant represented to BIA in July 2006 that it “ha[d] the lease producing” and would “continue to truck the water until. . .the salt water disposal well [is] fixed.” Letter from Appellant to Agency, July 14, 2006, at 1. Therefore, we are not convinced that Appellant's purported difficulties in obtaining approval for the salt water disposal well either precluded production or excused non-production, notwithstanding any inconvenience or additional cost that may have been involved.

### Conclusion

Appellant does not dispute the material finding by the Regional Director that it was not producing oil or gas *in paying quantities*, and while Appellant attempts, on appeal to the Board, to explain its inaction on the leases, Appellant has provided no basis upon which we could conclude that its non-production is excusable. Therefore, we agree with the Regional Director that Appellant's leases expired by operation of law when production in paying quantities ceased.

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<sup>10</sup> Appellant also claims that the Superintendent and a member of the Tribe's mineral council somehow blocked Appellant's efforts to meet with the mineral council. This argument, too, is raised for the first time on appeal to the Board, for which reason we need not consider it. And if we did, we note that Appellant offers only speculation concerning the Superintendent's alleged involvement, and does not explain the relevance of this allegation to its ability to provide evidence proving production in paying quantities during the relevant time period.

<sup>11</sup> It is unclear whether Appellant is referring to one or the other or both of the two leases when it refers to “this lease”.

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 December 16, 2008, decision of the Eastern Oklahoma Regional Director.

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge