BADGER OIL CORPORATION AND
UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 89-98-A Decided March 1, 1990

Appeal from a decision of the Acting Phoenix Area Director, Bureau of Indian Affairs, invalidating an oil and gas lease of tribal lands and reinstating a prior lease of the same lands.

Vacated.

1. Appeals: Generally--Bureau of Indian Affairs: Administrative Appeals: Filing: Mandatory Time Limit

Regulations promulgated by the Bureau of Indian Affairs at 25 CFR 2.10 (1988) establish a 30-day period for filing a notice of appeal.

APPEARANCES: F. Alan Fletcher, Esq., Salt Lake City, Utah, for appellant Badger Oil Corporation; Robert S. Thompson III, Esq., Boulder, Colorado, and Martin E. Seneca, Esq., Reston, Virginia, for appellant Ute Indian Tribe; Richard B. Johns, Esq., Salt Lake City, Utah, for GW Petroleum, Inc.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellants Badger Oil Corporation (Badger) and Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe) challenge an August 17, 1987, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), invalidating Ute Tribal Oil and Gas Lease No. 14-20-H62-3930 (Lease No. 3930), issued to Badger; and reinstating a portion of Ute Tribal Oil and Gas Lease No. 14-20-H62-2118 (Lease No. 2118), issued to a predecessor of GW Petroleum, Inc. (GW). For the reasons discussed below, the Board vacates the Area Director's decision.

Background

Lease No. 2118, covering Ute tribal lands in the E½ SW¼ of sec. 9 and the NE¼ NW¼ of sec. 16 (sec. 16 tract), T. 1 S., R. 1 W., Uinta Meridian, Utah, was entered into on May 13, 1969, by the Tribe and the Ute Distribution Corporation, lessors, and the Flying Diamond Land and Mineral Corporation, lessee. The lease was approved by the Superintendent, Uintah and Ouray Agency, BIA, on June 25, 1969. The term of the lease was “10 years from and after approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying

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quantities from said land." Following a series of assignments, corporate acquisitions, and corporate name changes, GW now claims an interest in this lease. 1/

In 1970, a well was drilled in sec. 9 and another in sec. 16. Both wells produced through the early 1970's, and the sec. 9 well continues to produce. However, the well in sec. 16 was plugged and abandoned in 1977. BIA apparently considered Lease No. 2118 to have terminated with respect to the sec. 16 tract on June 25, 1979, the end of the primary term. No notice of termination was sent to GW.

On January 5, 1983, the Superintendent included the sec. 16 tract in an advertisement for oil and gas mining lease bids. Badger bid on the tract and was issued Lease No. 3930 for it. The lease was approved by the Superintendent on June 14, 1983.

Badger began drilling a new well in sec. 16 on August 20, 1983, and completed it on January 25, 1984. A communitization agreement covering all of sec. 16, Contract No. VR49I-84685C, was prepared, designating Badger as operator. Exhibit B to the communitization agreement showed the sec. 16 tract as leased to Badger under Lease No. 3930. Badger signed the agreement on August 20, 1983. GW signed the agreement on September 29, 1983, as working interest owner of certain other tracts in sec. 16. The agreement was approved by the Superintendent on March 27, 1984. Section 6 of the agreement provides:

> Segregation of Leases.
>
> Any portion of an Indian leasehold interest not included within the communitized area is hereby segregated from that portion included within the communitized area, and is considered as

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1/ These changes are described in Badger's Aug. 10, 1988, appeal at page 2:

"[O]n July 27, 1970, Flying Diamond assigned a portion of its leasehold interest * * * to Gas Producing Enterprises, Inc., * * * which by corporate name change is now known as Coastal Oil and Gas Corporation * * *. Flying Diamond was acquired by Bow Valley Petroleum, Inc. which, also by corporate name change, is now known as GW Petroleum, Inc. * * *; Flying Diamond assigned the balance of its interest in Lease No. 2118 to GW on December 19, 1978. * * * Coastal had assigned a portion of its interest in Lease No. 2118 to Prudential Funds, Inc. and that interest was subsequently assigned to GW."

For convenience, the term "GW" is used in this opinion to refer both to GW Petroleum, Inc., and to its predecessors.

2/ A title opinion prepared for Badger in 1983 and included in the administrative record states that the lease record book maintained at the agency indicated that the portion of Lease No. 2118 in sec. 9 was extended by production but that the portion in sec. 16 expired on June 25, 1979. The title opinion also states that there were no other documents in the lease file reflecting the termination.

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> a separate lease with the same parties subject to all of the terms of the original lease, excepting only the portion committed thereto.

On September 1, 1983, Coastal Oil and Gas Corporation assigned its remaining interest in the sec. 16 portion of Lease No. 2118 to GW through an intermediary. By letter of October 13, 1983, GW transmitted the assignment to the agency for approval. On May 16, 1985, the Superintendent returned the assignment to GW unapproved, stating in part: "As you know that portion of Lease 2118 in Section 16, T. 1 S., R. 1 W., was segregated and advertised in July, 1982. It is now leased by Badger Oil Corporation under Lease No. 3930, approved June 14, 1983, and Communitized under Agreement No. VR 49I 846 85C, approved March 27, 1984."

On September 27, 1985, Badger wrote to the Tribe's attorney, seeking assistance in securing from GW a release of Lease No. 2118, as it related to the sec. 16 tract, in order to remove a cloud on the title of Badger's lease. The Tribe's attorney in turn wrote to the Superintendent who, on December 3, 1985, wrote to GW requesting that it file a release. The Superintendent's letter stated in part: "This lease was segregated and this part of the lease is now leased to another oil company. In an effort to keep our title clear, we would appreciate a release on that portion of lease 2118 that is in section 16."

On March 20, 1986, the Superintendent wrote to GW, stating in part:

> Bureau and tribal staff have previously taken the position that [GW's] lease rights expired as to Section 16, despite production in Section 9, prior to sale of the [sec. 16 tract] to Badger in 1983. * * *
>
> Events subsequent to the sale of lease #3930 to Badger Oil have, however, operated to divest [GW] of its interests in the [sec. 16 tract]. On September 29, 1983, [GW] executed the approved communitization agreement form for Section 16. This form, as you know, works a segregation of leases which overlap section lines. Due to there being no production in Section 16 at signing of the communitization agreement, the well in the section produced on January 2, 1984, and the [sec. 16 tract] being in its habendum term, the lease for this acreage expired on the date of communitization. As of that time, Badger's top lease rights became effective and vested lease title thereto in Badger Oil. Thus, although the rationale originally underlying segregation of sections 9 and 16 is open to question, ultimately segregation validity occurred.
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> This letter will serve as an official notice to [GW] and Coastal that this lease was terminated.

GW filed a notice of appeal from this letter on April 23, 1986. The notice of appeal was accepted as timely by the Area Director. On August 17, 1987, the Area Director reversed the Superintendent's decision, citing as

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controlling authority a decision issued by the Deputy Assistant Secretary - Indian Affairs (Operations) on March 21, 1984, in an appeal filed by the Shell Oil Company. 3/ Based upon the holding in the Shell Oil case, the Area Director held that Lease No. 2118 had never been segregated and remained in full force and effect and that, therefore, Lease No. 3930 was invalid. The Area Director requested the Superintendent to attempt an equitable resolution of the matter between Badger, GW, and the Tribe.

Badger appealed the Area Director's decision to the Washington, D.C., office of BIA. Appeal proceedings were delayed while the parties attempted settlement. By letter of July 6, 1988, the Tribe notified the Assistant Secretary - Indian Affairs that the parties were at an impasse and that settlement was unlikely. Thereafter, briefs were filed by Badger, the Tribe, and GW.

The appeal was still pending in the Washington, D.C., office of BIA on March 13, 1989, the date new appeal regulations for BIA and the Board took effect. See 54 FR 6478 and 6483 (Feb. 10, 1989). On September 15, 1989, it was transferred to the Board by the Acting Deputy to the Assistant Secretary - Indian Affairs (Trust and Economic Development) for consideration under the new procedures. Although none of the parties filed further briefs, Badger and the Tribe filed a motion for oral argument, which was opposed by GW.

Discussion and Conclusions

Badger and the Tribe argue that (1) Lease No. 2118 should be deemed segregated as to the sec. 9 and sec. 16 tracts and terminated as to the sec. 16 tract; and (2) GW was barred by the doctrine of laches from challenging the Superintendent's determination that Lease No. 2118 had terminated as to the sec. 16 tract. 4/

GW denies appellants' contentions and argues, further, that the decision of the Deputy Assistant Secretary - Indian Affairs (Operations) in the Shell Oil Company case is controlling.

3/ In that decision, the Deputy Assistant Secretary held that a Shell Oil Company lease of Ute tribal lands had not been segregated by separate communitizations of portions of the lease.

4/ In support of their laches argument, appellants rely in part on Patterson v. Hawitt, 195 U.S. 309, 321 (1904), in which the Supreme Court stated:

"There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which today may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore may be discovered, from which an immense fortune is realized. Under such circumstances, persons having claim to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced."

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The Board first addresses appellants' laches argument and the related question of whether GW filed a timely appeal under 25 CFR Part 2. Appellants argue that GW first had constructive notice of BIA's determination concerning the partial termination of Lease No. 2118 in June 1979, when the notation of termination was entered in BIA lease records. Appellants then list other events which they contend constituted either constructive or actual notice to GW, prior to the Superintendent's March 20, 1986, letter: (1) BIA's notice of lease sale covering the sec. 16 tract; (2) Badger's recording of Lease No. 3930; (3) Badger's initiation of drilling in August 1983; (4) GW's September 29, 1983, execution of the communitization agreement, showing the tract as under lease to Badger; (5) the Superintendent's May 16, 1985, letter returning the unapproved assignments; and (6) the Superintendent's December 3, 1985, letter requesting GW to release its interest in the tract.

Both the May and December 1985 letters informed appellant that the sec. 16 portion of Lease No. 2118 had been segregated and leased to another lessee. Although neither letter was identified as a decision, both gave GW notice that a decision concerning its lease had been made. The Board finds that these letters were adequate to put GW on notice that BIA had made a decision adverse to its interests. 5/

25 CFR 2.4 (1988) 6/ provided in relevant part:

> Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, * * * Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth.

25 CFR 2.10 (1988) provided in relevant part:

> (a) * * * The notice of appeal must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the appellant. * * *
>
> (b) No extension of time will be granted for filing of the notice of appeal. Notices of appeal which are not timely filed will not be considered, and the case will be closed.

[1] The Board has frequently held that notices of appeal not timely filed with BIA must be dismissed. E.g., New Mexico Highway & Transportation

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5/ Further, GW was put on notice of a problem with its lease in 1983 when it signed the communitization agreement for sec. 16, showing the tract it claimed under Lease No. 2118 as leased to Badger under Lease No. 3930.

6/ At all times relevant to this appeal, the provisions of 25 CFR Part 2 were the same as those in the 1988 edition of the Code of Federal Regulations.

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Department v. Albuquerque Area Director, 18 IBIA 165 (1990); Arviso v. Assistant Navajo Area Director, 18 IBIA 118 (1990); Cahoon v. Portland Area Director, 17 IBIA 187 (1989). 7/ GW did not file a notice of appeal until April 23, 1986, even though it had received two letters from BIA in 1985 giving it notice of the termination decision. GW's appeal to the Area Director should have been dismissed as untimely.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the August 17, 1987, decision of the Acting Phoenix Area Director is vacated. In accordance with the determination made at the Uintah and Ouray Agency, Ute Tribal Lease No. 14-20-H62-2118 is deemed terminated as to the NE¼ NW¼ of sec. 16, T. 1 S., R. 1 W., Uinta Meridian, Utah. 8/

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

7/ GW was chargeable with knowledge of the appeal provisions at 25 CFR Part 2. New Mexico Highway & Transportation Department, 18 IBIA at 173. See also, e.g., Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); Venlease I, 99 IBLA 387 (1987).
8/ Appellants' motion for oral argument is denied.

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