McCULLISS RESOURCES CO., INC.
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-47-A Decided October 30, 1995

Appeal from a determination that a tribal oil and gas lease had expired by its own terms.

Affirmed as modified.

1. Administrative Procedure: Standing--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Communitization Agreements--Oil and Gas Leases: Communitization Agreements--Oil and Gas Leases: Expiration

   Where an Indian oil and gas lease is included in a communitization agreement, and the only producing well in the communitized area is located on the Indian lease, a person with an interest in the communitization agreement has standing to challenge a Bureau of Indian Affairs determination that the Indian lease has expired.

2. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

   Where the term of an Indian oil and gas lease is for a specified term and "as much longer thereafter as oil and/or gas is produced in paying quantities," the lease does not expire as long as either oil or gas is produced in paying quantities.

APPEARANCES: Paul L. McCulliss, its president, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant McCulliss Resources Co., Inc., seeks review of an October 17, 1994, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), holding that Tribal Oil and Gas Lease 14-20-H62-1939 (the lease) on the Uintah and Ouray Reservation had expired by its own terms. For the reasons discussed below, the Board affirms the Area Director's decision as modified herein.

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Background

The Ute Indian Tribe and the Ute Distribution Corporation are the lessors and Mountain Fuel Supply Company was the original lessee under the lease, which was approved by the Superintendent, Uintah and Ouray Agency, BIA, on December 5, 1968. The lease term was "10 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land." Four assignments of the lease have been approved, the most recent being an assignment to YM Oil Corporation, approved by the Superintendent on February 22, 1994.

The lease became productive in 1978, when Tribal Well 3-1 was drilled. Also in 1978, the lease was included in a communitization agreement (CA) covering all of sec. 3 in T. 4 S., R. 6 W., USM, Duchesne County, Utah. At all times relevant to this appeal, Tribal Well 3-1 was the only producing well in the communitized area.

By memorandum dated May 12, 1993, the Bureau of Land Management (BLM), through the Assistant District Manager for Mineral Resources, Vernal District, notified the Superintendent that oil production on the lease had last occurred in November 1992.

On August 31, 1993, the Superintendent wrote to the operators under the CA, Darrel Hadden and Thomas D. Harrison, stating that the lease had expired for failure to produce. 1/ The letter also indicated that the CA had terminated.

Appellant appealed to the Area Director, who affirmed the Superintendent's decision on October 17, 1994. The Area Director stated:

> According to federal and state records, the well ceased production in December 1992. During 1993, the records show that the well produced oil for only two months, March and April. Although gas was produced from the well during the period in question, [BLM] classifies this well as an oil well. If you have determined that this well is no longer capable of producing oil in paying quantities and is now predominantly a gas well, you need to notify [BLM] as to this change in well status.
>
> Regardless, production of oil must be continuous. Since oil has not been consistently produced from this well, the lease has expired under its own terms.

1/ The May 12, 1993, BLM memorandum noted that Hadden and Harrison were the officially recognized operators but that appellant "has apparently been operating the well since January 1, 1992."

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Appellant appealed the Area Director's decision to the Board. In its notice of appeal, appellant stated:

> Attached for your review are copies of the production reports for the period on [sic] November 1992 through June 1993, clearly showing oil and/or gas was produced in paying quantities from said land. * * *
>
> This appeal is based in large part on the fact that oil and/or gas has been produced in paying quantities from said land. [Appellant] has always maintained the lease in accordance with the lease terms. The termination of the lease is clearly in violation of the lease term. [Appellant] will continue to vigorously defend its rights under said lease.
>
> As a practical matter, [appellant] has spent significant time and money on the subject lease to maintain it and provide royalties to the BIA. Many other people would have given up a long time ago. I am doing my best and I strongly believe that my lease is legally valid. My efforts deserve cooperation, and it is our desire to work together for everyone's benefit.

(Notice of Appeal at 2). Neither appellant nor any other party filed a brief.

Standing

In the notice of docketing for this appeal, the Board observed that appellant was an apparent stranger to the lease. The Board therefore ordered appellant to show that it had standing to challenge the Area Director's determination that the lease had expired. This showing was to be made in appellant's opening brief. As noted however, appellant did not file a brief.

[1] Ordinarily, a person without a valid interest in a lease lacks standing to challenge a BIA decision finding that the lease has expired. E.g., Uinta Oil & Gas, Inc. v. Acting Phoenix Area Director, 27 IBIA 3 (1994). Under other circumstances, this appeal might be dismissed for lack of standing. In this case, however, the Board has found appellant listed on a July 5, 1994, division order for the CA. Appellant is shown there as holding a .00227090 interest in oil and/or gas produced from the CA. Under the circumstances of this case, where the only producing well on the CA is located on the lease, the Board finds that appellant's interest in the CA is sufficient to give it standing to challenge the Area Director's decision that the lease has expired. 2/

2/ The Board reaches no conclusion as to whether appellant's status as the de facto, but apparently unapproved, operator under the CA, would give it standing in this case.

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Discussion and Conclusions

[2] The Area Director held that, in order to avoid expiration, the lease must produce oil in paying quantities. Apparently because BLM classified Tribal Well 3-1 as an oil well, the Area Director concluded that only oil could be considered in making a determination as to whether or not the lease had expired. The lease, however, provides that it is to continue as long as "oil and/or gas is produced in paying quantities" (emphasis added). Determinations as to whether a lease has expired are controlled by the term of the lease itself, rather than by BLM's classification of a well. Thus it was error for the Area Director to base his decision upon oil alone. No expiration occurred if either oil or gas (or both) continued to be produced in paying quantities.

The administrative record includes BLM and Utah State production records. The BLM records cover the period November 1992 through March 1994. The State records cover the period January 1993 through July 1994. For the period covered by both BLM and State records, i.e., January 1993 through March 1994, there are discrepancies between the two records for the months of September 1993, October 1993, and March 1994. 3/ For all other months, the records are consistent.

The BLM records show that neither oil nor gas was produced in December 1992. Further, they show a seven-month period of non-production beginning in September 1993 and extending through March 1994. The State records show a four-month period of non-production beginning in November 1993 and extending through February 1994.

There is no explanation in the record for the discrepancies between the BLM and State records, and appellant provides none. The BLM records, and presumably the State records as well, are based on production reports submitted by appellant. For purposes of this decision, the Board accepts the BLM figures as accurate. 4/

The term of the lease at issue here--i.e., for a fixed primary term and "as much longer thereafter as oil and/or gas is produced in paying quantities from said land"--is similar to that in many other oil and gas leases of tribal land issued under the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-396f (1994). Such a lease, if in its extended term, expires by its own terms when production ceases. E.g., Benson-Montin-Greer Drilling Corp. v. Acting Albuquerque Area Director, 21 IBIA 88, 98 I.D. 419 (1991), aff'd, Benson-Montin-Greer Drilling Corp. v. Lujan, No. CIV-92-210 SC-LFG (D.N.M. Jan. 13, 1993).

3/ The State records show gas production in September and October 1993, where the BLM records show none. The State records also show both oil and gas production in March 1994, where the BLM records show none.

4/ Even if it were to use the State records, the Board would reach the same conclusion it reaches below.

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In this case, however, the standard lease language has been modified by the CA, which provides in paragraph 10:

> This agreement * * * shall remain in force and effect for a period of two (2) years and for so long as communitized substances [i.e., oil and gas] are, or can be, produced from the communitized area in paying quantities * * *. This agreement shall not terminate upon cessation of production if, within sixty (60) days thereafter, reworking or drilling operations on the communitized area are commenced and are thereafter conducted with reasonable diligence during the period of nonproduction. [5/]

BLM's May 12, 1993, memorandum to BIA stated that, according to BLM records, no reworking or drilling operations had taken place on the CA following cessation of production in December 1992. The Superintendent's August 31, 1993, decision incorporated this statement. Appellant neither disputes the statement nor contends that it has, at any later time, engaged in reworking or drilling operations on the CA. Accordingly, the Board finds that no reworking or drilling operations were conducted on the CA.

The second sentence of paragraph 10 of the CA, read together with the term provision of the lease, indicates that the CA and lease expire when production ceases and no reworking or drilling operations are initiated within 60 days of cessation. The first sentence of paragraph 10, however, states that the agreement shall remain in force as long as oil and/or gas can be produced. If read alone, the first sentence might be interpreted to mean that, as long as oil and gas remain in the ground and are capable of being produced, the CA and lease do not expire, regardless of the efforts, or lack thereof, of the operator and/or the lessee. Interpreted in this manner, however, the first sentence would conflict with the second sentence, which clearly puts an obligation on the operator to resume production. It would also be inconsistent with the statutes governing Indian mineral leasing and the principles developed in the cases interpreting those statutes.

5/ Paragraph 10 provides in its entirety:

"This agreement is effective October 1, 1978, upon execution by the necessary parties, notwithstanding the date of execution, and upon approval by the Secretary of the Interior, or by his duly authorized representative, and shall remain in force and effect for a period of two (2) years and for so long as communitized substances are, or can be, produced from the communitized area in paying quantities: provided, that prior to production in paying quantities from the communitized area and upon fulfillment of all requirements of the Secretary of the Interior, or his duly authorized representative, with respect to any dry hole or abandoned well, this agreement may be terminated at any time by mutual agreement of the parties hereto. This agreement shall not terminate upon cessation of production if, within sixty (60) days thereafter, reworking or drilling operations on the communitized area are commenced and are thereafter conducted with reasonable diligence during the period of nonproduction.

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See, generally, Benson-Montin-Greer, supra. Clearly, the two sentences of Paragraph 10 must be read together. Upon such a reading, it becomes apparent that the CA and lease remain in effect following cessation of production only if (1) oil and gas capable of production remain in the ground and (2) "within sixty (60) days [following cessation of production], reworking or drilling operations on the communitized area are commenced.

Because production ceased and no reworking or drilling operations were initiated within a 60-day period, the Board finds that the lease has expired.

As to the date of expiration, the Superintendent and the Area Director made different findings. The Superintendent stated that the lease was terminated effective the date of his decision, i.e., August 31, 1993. The Area Director held that the lease expired by its own terms on May 30, 1993. The Board finds neither of these dates correct.

The Superintendent's choice of date demonstrates a lack of understanding that the lease expired by its own terms, rather than as a result of the Superintendent's decision. Cf. Benson-Montin-Greer, 21 IBIA at 94-95, 98 I.D. at 423 (A determination that a lease has expired by its own term is not a cancellation of the lease). The Area Director recognized the Superintendent's error in this regard but failed to explain his own choice of May 30, 1993, as the date of expiration.

As noted above, the record shows two periods when neither oil nor gas was produced--the month of December 1992 and the seven-month period from September 1993 through March 1994. After the December 1992 cessation, appellant resumed production of gas, initially at a minimal level, in January 1993 and continued producing gas until September 1993. It resumed production of oil in March 1993 and continued through April 1993.

One question presented by the facts in this appeal is whether resumption of production within the 60-day period following cessation of production, when no reworking or drilling has been initiated, is sufficient to prevent expiration of the CA and lease. If not, the lease may well have expired in December 1992 despite the subsequent resumption of production of both oil and gas. 6/

In the circumstances of this case, where the parties have not addressed this question; where it is conceivable, although not specifically contended, that appellant's non-production during December 1992 was excusable; and where, if expiration did not occur in December 1992, it certainly occurred during the extended period of non-production in 1993, the Board declines to address the question.

6/ The Board has never had occasion to consider the effect of a resumption of production after cessation, in a case where a lease or CA term allows a 60-day period following cessation for the initiation of reworking or

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For purposes of this decision, the Board assumes that appellant's nonproduction in December 1992 can be excused under the Board's decisions in Citation Oilfield Supply & Leasing, Ltd. v. Acting Billings Area Director, 27 IBIA 210 (1995); Citation Oilfield Supply & Leasing, Ltd. v. Acting Billings Area Director, 23 IBIA 163 (1993); and Duncan Oil, Inc. v. Acting Navajo Area Director, 20 IBIA 131 (1991).

Production of both oil and gas ceased in September 1993. There was no reworking or drilling in the 60-day period following cessation of production. Nor was production resumed within that period. The Board holds that the lease expired when production ceased in September 1993.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the secretary of the Interior, 43 CFR 4.1, the Area Director's October 17, 1995, decision is affirmed as modified to show that (1) the lease did not expire as long as either oil or gas was produced in paying quantities and (2) the lease expired in September 1993.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

fn. 6 (continued)
drilling operations. However, with respect to a lease with the standard term language for Indian oil and gas leases--"10 years [or other specified term] from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land"--the Board has held that an unexcused shut-in of a well resulted in expiration of the lease, despite the resumption of production following the shut-in. Benson-Montin-Greer, supra.

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