GAVILAN PETROLEUM, INC.
v.
ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 95-96-A, 96-81-A Decided June 5, 1998

Appeal from decisions concerning oil and gas leases on the Uintah and Ouray Reservation.

IBIA 95-96-A reversed; IBIA 96-81-A reversed and remanded.

1. Indians: Mineral Resources: Oil and Gas: Communitization Agreements

   The unit agreement under consideration in this case does not grant, transfer, or convey an interest in land or leases.

2. Administrative Procedure: Standing--Indians: Mineral Resources: Oil and Gas: Communitization Agreements

   The unit agreement under consideration in this case authorizes the unit operator to appear in any Departmental proceeding concerning the unit "for or on behalf of any and all interests affected" by the Departmental decision.

APPEARANCES: Thomas W. Bachtell, Esq., Phillip Wm. Lear, Esq., and Clay W. Stucki, Esq., Salt Lake City, Utah, for Gavilan Petroleum, Inc.; Bruce Hill, Esq., Field Solicitor, William Robert McConkie, Esq., and Rose Vallie-Robirds, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Phoenix Area Director; Robert S. Thompson III, Esq., Fort Duchesne, Utah, for the Ute Indian Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

In Docket No. IBIA 95-96-A, Gavilan Petroleum, Inc. (Gavilan), seeks review of a February 28, 1995, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning payment of royalties for nine allotted oil and gas leases (I-109-IND-5145, 5160, 5185, 5206, 5226, 5247, 5248, 5249, and 5251) and one Tribal oil and gas lease (I-109-IND-5242) on the Uintah and Ouray Reservation (collectively, the leases).



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In Docket No. IBIA 96-81-A, Gavilan seeks review of the Area Director's April 2, 1996, decision holding that, because Gavilan was not a lessee or assignee under the above leases, it lacked standing to appeal from their cancellation.

For the reasons discussed below, the Board of Indian Appeals (Board) reverses both of the Area Director's decisions and remands this matter for a decision on the merits of Gavilan's appeal from the Area Director's April 2, 1996, decision cancelling the leases.

## Background

The administrative record in Docket No. IBIA 95-96-A is obviously incomplete and therefore fails to provide a coherent history of this matter. Additional documents attached to the Area Director's Answer Brief and the administrative record submitted in Docket No. IBIA 96-81-A provide further information. Nevertheless, there are still large gaps in the background of these cases.

The leases at issue here were entered into during February through April of 1948. Several assignments of each lease were approved. According to the information in the administrative record, as supplemented, assignments of Allottee Leases 5248 and 5251 were approved on December 21, 1981, to the Roosevelt Unit, Inc.; and assignments of Allottee Leases 5145, 5160, 5185, 5206, 5226, 5247, and 5249 were approved on February 5, 1985, to Bravo Oil Co., d.b.a. Rio Bravo Oil Co. The parties agree that an assignment of Tribal Lease 5242 was approved to Utah-Westar Drilling Venture, Ltd. (Utah-Westar) on February 6, 1986, although the copy of the assignment provided to the Board does not show BIA approval. These are the last approved assignments of the leases shown in the record. There is no information in the record indicating that Gavilan has ever been a lessee under any of the leases at issue here, and Gavilan emphatically states that it is neither a lessee nor an assignee under any of the leases.

Each of the leases became part of the Roosevelt Unit when a Unit Agreement was entered into on November 7, 1950. A Unit Operating Agreement was executed on March 15, 1951.

Gavilan became the Co-Unit Operator for the Green River Participating Area of the Roosevelt Unit through a Designation of Successor Co-Unit Operator (Designation Agreement) dated December 9, 1987. The parties agree that the Bureau of Land Management (BLM) approved Gavilan as Co-Unit Operator on March 16, 1988, and that Gavilan became Co-Unit Operator as of that date. 1/

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1/ Departmental responsibility for overseeing Indian oil and gas leases is shared by BIA, BLM, and the Minerals Management Service (MMS) under a Tripartite Memorandum of Understanding (Tripartite MOU or MOU) signed by each of the bureaus.



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The record does not explain when the Roosevelt Unit was divided into participating areas, or how many participating areas are in the Unit. 2/

Gavilan states that in 1986, Utah-Westar drilled and operated several wells on Tribal Lease 5242 in which the Indian owners participated. 3/ The Board finds no evidence in the record that Utah-Westar was an assignee of any of the allottee leases at issue here.

The record shows that Utah-Westar attempted to assign Tribal Lease 5242 to Caloco Energy, Inc. (Caloco) on August 25, 1987. When the assignment was presented to BIA for approval, BIA forwarded it to the Ute Indian Tribe of the Uintah and Ouray Reservation (Tribe) for review. The Tribe raised sev eral concerns over the assignment and, on May 4, 1990, the assignment was returned to Caloco unapproved. There is no evidence in the record that Caloco was an assignee under any of the allottee leases at issue here.

According to a July 19, 1988, letter from BLM, BLM did not approve Caloco as an operator, although Caloco apparently operated the wells at least from August of 1987 until May of 1991. In response to BLM's letter, Gavilan, in its capacity as Co-Unit Operator, wrote Caloco asking for information about its production.

On October 19, 1988, Gavilan was removed as Co-Unit Operator by the working interest owners in the Unit and was replaced with Caloco. This change was approved by BLM on January 3, 1989. However, BLM rescinded its approval on January 9, 1989, after receiving a letter from Bravo Oil Co., which held a 49 percent interest in the Green River Participating Unit, withdrawing its consent to the removal of Gavilan. In a September 12, 1989, letter, Gavilan asked Caloco for information required by BLM and/or MMS, and stated:

> Gavilan has resigned as the unit operator of the Green River Participating Area pursuant to the Settlement Agreement between Gavilan and Caloco, but remains responsible as unit

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2/ The record in Docket No. IBIA 96-81-A suggests that there are two participating areas: The Green River, which covers the shallow Green River formation, and the Wasatch, which covers the deep Wasatch formation. The leases at issue here apparently extend through both the Green River and the Wasatch Participating Areas.

3/ The record in Docket No. IBIA 95-96-A does not show whether there are wells located on any of the allottee leases. According to one statement in the transcript of a Sept. 14, 1993, hearing on lease cancellation, which was submitted in Docket No. IBIA 96-81-A, at least three wells were located on Tribal Lease 5242, one on Allottee Lease 5226, and one on Allottee Lease 5248. Tr. at 37. However, another statement indicated that there was no production on any of the former Rio Bravo leases, although one non-producing well had been drilled. Id. at 40. Allottee Lease 5226 is a former Rio Bravo lease.



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> operator until a successor operator is elected pursuant to the Unit Operating Agreement. To this date no successor operator has been elected and, therefore, Gavilan remains responsible as operator. An election of successor unit operator should be commenced as soon as possible to fully relieve Gavilan of its duties and responsibilities as unit operator.

The Board finds no evidence in the record that a successor Co-Unit Operator was designated. Therefore, it appears that Gavilan remained the Co-Unit Operator during all time periods relevant to these appeals. 4/

Apparently, Utah-Westar either had financial problems or altered its business organization. On May 1, 1991, the Superintendent wrote to the trustee for Utah-Westar noting that Utah-Westar held "100% lease record title to the lands located within" Tribal Lease 5242, and stating:

> Since Utah-Westar has dissolved partnerships, an assignment needs to be completed from Utah-Westar to another company, so that Utah-Westar will not be held liable for Lease 5242. As of this date, all rents and royalties and all other sums due for Lease 5242 [are] the responsibility of Utah-Westar. If the assignment cannot be done, Lease [5242] is subject to cancellation for failure to provide this office with proper assignments and bonding as stated in our letter to Utah-Westar on December 11, 1990.

In a May 23, 1991, letter to Caloco, Gavilan stated:

> In May, 1990 Gavilan became aware that Caloco had failed to make certain royalty and tax payments on the wells it operated in the Roosevelt Unit. After a demand by Gavilan, Caloco provided evidence that led Gavilan to believe the payment deficiencies were remedied. The current evidence provided to Gavilan [by BLM] indicates continued non-payment of royalties and/or taxes and an apparent unwillingness on the part of Caloco to fulfill its responsibilities as operator of the wells to pay royalties and taxes or to remedy the deficiency in payment of prior royalties and taxes due.
>
> Pursuant to the authority granted Gavilan under the Unit Agreement and Unit Operating Agreement, this letter is to advise

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4/ The Board received a copy of a "To whom it may concern" memorandum, which stated that, on Apr. 10, 1997, the working interests in the Roosevelt Unit had voted to designate Road Runner Oil, Inc. (Road Runner), as the Unit Operator. On June 12, 1997, the Board received a status report on settlement negotiations in this matter from Gavilan. That report stated: "Gavilan has * * * signed a Letter of Intent to sell all of its assets to another party." On July 9, 1997, the Board received a motion to substitute counsel for Gavilan which stated that "Gavilan Petroleum is under new ownership and management." Road Runner appears to be the new owner.



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> that effective May 24, 1991 at 1:00 p.m. MDT, Gavilan will take over and assume operations of the following wells in the Roosevelt Unit. [Wells named Roosevelt Unit ## 1, 2, 4, 11, 13, 15-A1, 18-A1, and 20-2.]

It appears that, in its capacity as Co-Unit Operator, Gavilan began operating the wells on Tribal Lease 5242 as of May 24, 1991. The record does not reveal the present status of these wells. 5/

By memorandum dated June 21, 1991, MMS asked BIA to notify Caloco's surety of a demand for payment of overdue royalties. An August 15, 1991, internal BIA memorandum indicated that Caloco's surety stated that Caloco's Letter of Credit had expired on July 26, 1991, and had not been renewed. Nonetheless, by letter dated August 19, 1991, the Superintendent made a demand against Caloco's surety.

On December 20, 1991, MMS again requested BIA assistance in collecting additional royalties due from Caloco. The MMS stated that BIA should first attempt to collect from Caloco's surety, but that regulations in 30 C.F.R. Part 218 provided that the lessee was responsible for all monies due.

In response to a request from the Area Director for a status report, the Superintendent wrote on June 18, 1992:

> The current Lessees of Record for the Unit leases are Roosevelt Unit, Inc., Rio Bravo Oil Company, and Utah-Westar Drilling Venture. These companies have since filed bankruptcy or sold their interest without notifying this office, nor have they filed the correct Assignments to transfer their interests which cannot be completed without the assignor's company representative to sign the documents. We have also notified companies to provide this office with proper bonding and corporate documents to get assignments approved, but to no avail. This was the problem with Caloco Energy who, by the enclosed letter, bought Utah-Westar's lease interest.
>
> The three (3) Unit Lessees of Record have no current bonding. As you can see, we have tried to collect from the

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5/ An Apr. 11, 1994, letter from BLM to Gavilan stated:

"On April 11, 1994, Federal seals shall be placed on all vessels capable of holding oil produced from wells within the Green River Producing Area. * * *

"Within 14 calendar days of this Written Order, the royalty in arrears shall be paid or agreement reached concerning payment of the royalty. Additional actions will be undertaken after this period is over if the royalty issue has not been resolved. Such action could include the shutting-in of the Roosevelt Unit."

The Board found no further information on this topic in the administrative record.



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surety of Caloco Energy with no success. They had filed a Letter of Credit that expired July 28, 1989. [6/] We did not have any notification of this expiration and therefore had no claim. Caloco is not a Lessee of Record and is not a recognized operator by [BLM].

We are currently at a standstill of how to get the proper assignments filed by companies who are no longer in existence. Who is responsible for the Leases? Gavilan Petroleum, as the Green River Participating Area Designated Operator, recognizes responsibility to pay royalties of Caloco to the Ute Indian Tribe and Allottees, and [has] already entered into [an] agreement with the Ute Tribe Severance Tax Department concerning delinquent taxes. There are sub-operators for which Gavilan is responsible for, however, the question arises as to who is responsible for the individual Leases. Can [BIA] take action to dissolve the producing Roosevelt Unit for no current lessee?

By letter dated October 14, 1992, the Superintendent wrote Gavilan, stating:

This letter is to confirm the various conferences that you have had with our Petroleum Engineer * * * regarding the responsibility of the various oil and gas leases within the Roosevelt Unit.

Being the Designated Unit Operator, you had confirmed that you are responsible for the operations within the Roosevelt Unit. Along with this responsibility, you are responsible for the timely payments of rents, royalties and any debts that may occur when the sub-operators fail to comply. Therefore, the demand notices from [MMS] to Caloco and other sub-operators will have to be paid by Gavilan [due] to the sub-operators' fail[ure] to comply, or actions will be taken to collect from your Letter of Credit in the amount of $2,280.07, plus accrued interest for late payment. [7/]

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6/ This date for the expiration of Caloco's Letter of Credit differs from that given in the Aug. 15, 1991, internal BIA memorandum.

7/ Gavilan submitted a copy of Letter of Credit 06-362 with its Opening Brief. According to a July 22, 1993, letter from the Superintendent to Gavilan's surety, this is the Letter of Credit against which BIA demanded payment for Caloco's unpaid royalties. In a Jan. 24, 1994, filing in Gavilan Petroleum, Inc. v. Acting Phoenix Area Director, 25 IBIA 300 (1994) (Gavilan I), the Area Director acknowledged that this Letter of Credit covered Lease 14-20-H62-3423 (Lease 3423), and that Lease 3423 was not part of the Roosevelt Unit. In an Oct. 26, 1993, letter to the Superintendent, Gavilan stated that the Letter of Credit would expire on Feb. 4, 1994, and would not be renewed because Lease 3423 terminated on Nov. 9, 1992; the two wells located on that lease had been plugged and abandoned; and this lease



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> Please be advised that MMS may still have outstanding debts by Caloco other than the enclosed invoices.
>
> We further request that you file Assignments of Mining Lease for the allotted and tribal leases involved within the Roosevelt Unit so that our records are complete with Gavilan being the Lessee of Record as well as the Designated Unit Operator.

On January 5, 1993, MMS notified BIA that it had received some payments against the amounts owed by Caloco. The MMS indicated that some of the payments had been received from Caloco, and some from Gavilan. It stated, however, that there was still an outstanding balance.

On January 19, 1993, the Superintendent wrote Gavilan, stating that BIA could not confirm Gavilan's payment of royalties on the allottee leases, which were due on December 31, 1992, and that Gavilan had not submitted assignments of the leases. The Superintendent stated that if the royalty issues were not resolved, Gavilan's Letter of Credit would be seized. The Superintendent again instructed Gavilan to file assignments of the leases at issue here.

By letter also dated January 19, 1993, Gavilan wrote BIA stating:

> Subsequent to our meeting November 5, 1992, Gavilan began research of the purportedly delinquent royalty payments in the Roosevelt Unit. The MMS in Denver has advised Gavilan that the royalty payments for the period from May, 1990 through May, 1991, which the BIA believes are delinquent, have in fact been paid.
>
> Pursuant to our November 5 meeting, Gavilan made payment of the $2,280.07 which was described in the letter from the BIA dated October 14, 1992. No additional payments have been made to the MMS for delinquent royalties because Gavilan's records indicate that all royalties due to the MMS on behalf of the BIA/[Uintah and Ouray] Agency have been paid through the current month.
>
> Please advise Gavilan as soon as possible if the BIA records indicate different information than has been received from the MMS. If Gavilan does not receive further notice from the BIA we

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fn. 7 (continued)
had been the last Indian lease under which Gavilan was the lessee. Other documents in the record indicate that the Letter of Credit was subsequently extended several times for short durations.

It thus appears that the Letter of Credit against which BIA demanded payment for Caloco's unpaid royalties was posted to ensure Gavilan's performance as a lessee under a lease or leases that are not at issue in this appeal.



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will assume that the BIA concurs with the MMS information and that all royalty payments are current.

By memorandum dated March 12, 1993, MMS notified BIA that an additional $7,862.64 was due from Caloco. The text of the memorandum requested BIA assistance in collecting "from sureties that CALOCO and other parties may have posted." However, the subject of the memorandum was stated to be "Request Additional Demand Against Lease Sureties for CALOCO ENERGY, INC. (CALOCO)."

By letter dated March 30, 1993, the Superintendent wrote Gavilan, stating:

> On March 12, 1993, we were notified by [MMS] of outstanding amounts totaling $7,862.64 from Caloco Energy. Gavilan Petroleum assumed responsibility as the Designated Operator, therefore, we are demanding payment from Gavilan on behalf of Caloco Energy. Be advised that MMS will calculate interest on late payments.
>
> You are hereby notified that you are required to submit payment in the amount of $7,862.64 within thirty (30) days from receipt of this letter. Failure to do so will result in our sending notice to [Gavilan's surety] for seizure of the referenced Letter of Credit by the Superintendent as required by Regulations.

Gavilan appealed this decision to the Area Director who, on July 2, 1993, dismissed the appeal on the grounds that Gavilan had appealed as to Tribal Lease 5242, but the demand letter related to the nine allottee leases. Gavilan appealed to the Board. Concluding that Gavilan had not been given adequate notice of the leases under which payment had been demanded, the Board reversed the Area Director's decision and remanded the case for a decision on the merits. Gavilan I.

On remand of Gavilan I, the Area Director considered issues relating to both the tribal lease and the allottee leases. He issued the decision now under consideration on February 28, 1995. That decision states at page 3:

> The Superintendent notified Gavilan of the unpaid royalties of Caloco because numerous attempts to collect the unpaid royalties from Caloco had been unsuccessful. Caloco and the lessees of record had ceased doing business. By letter dated March 30, 1993, the Superintendent notified Gavilan that unpaid royalties in the amount of $7,862.64 were outstanding. By letter dated July 22, 1993, the Superintendent notified Gavilan that unpaid royalties in the amount of $26,719.43 were outstanding ($34,582.07 less $7,862.54 equals $26,719.43; the $7,862.54 having been paid into Escrow by Gavilan on July 27, 1993, pending the resolution of this appeal). The total amount due has now grown significantly with the addition of interest.
>
> * * * In fact, Gavilan paid a total of $2,280.07 in unpaid royalties of Caloco for the time period December, 1989 through



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> April, 1990. * * * Gavilan's payment suggests that it had assumed responsibility for Caloco's unpaid royalties. [8/]

Gavilan's appeal of this decision to the Board was assigned Docket No. IBIA 95-96-A. Gavilan and the Area Director filed briefs in that appeal.

In regard to Docket No. IBIA 96-81-A, on July 22, 1993, the Superintendent sent a Notice of Intent to Cancel Indian Oil and Gas Leases in the Roosevelt Unit to several companies, including Gavilan. As grounds for cancellation, the Notice stated that there were no existing lessees or assignees for the leases; there were no bonds; and royalties had not been paid or had been underpaid.

By letter dated August 13, 1993, Richardson Production Co. (Richardson) requested a hearing on lease cancellation, asserting that it was the Unit Operator of the Wasatch Participating Area and also owned an operating rights interest in several of the Indian leases at issue here. Richardson explained that because the Wasatch formation lies below the Green River formation, problems would arise if the Indian leases were "canceled as to all depths and formations." Aug. 13, 1993, Letter at 2. It continued:

> Whether acknowledged "on the record" or not, there has been a recognized difference in the shallow (Green River formation) production and operations and the deep (Wasatch formation) production and operations throughout the duration of the Roosevelt Unit. It is our understanding that there have unquestionably been problems with the shallow interval operators and owners throughout many years during the history of this unit. The same problems do not exist with regard to the deep zone owners, and the deep zone owners have properly developed and so far as we can determine from a review of your records, properly paid their royalties for many years.
>
> Many parties have relied upon this distinction as permitted to exist by [BIA], and to attempt at this late date to cancel the rights of the deep zone owners is not a fair or equitable solution to what is admittedly a difficult problem with regard to the shallow interest owners. Notwithstanding a technical reading of the regulations, to divest the deep zone owners of their rights in

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8/ Despite the Area Director's conclusion that Gavilan's payment of some of Caloco's debt suggested that Gavilan "had assumed responsibility for Caloco's unpaid royalties," Gavilan appears to have consistently argued that it was not obligated, as Co-Unit Operator, to pay Caloco's unpaid royalties. At page 1 of a Mar. 22, 1994, filing in Gavilan I, Gavilan disputed a similar statement by the Area Director, arguing that "[t]he real facts are that the money paid to the MMS was attributable to Caloco's working interest in Caloco's well, and was not paid with Gavilan's own funds. The action by Gavilan of paying Caloco's debt with Caloco's funds cannot be reliably used to express or imply that Gavilan assumed Caloco's debts."



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> production by virtue of these leases without just compensation is an improper taking of these property rights, and the position of Richardson * * *, both individually and as the proposed unit operator, will be that [BIA] is estopped to take these property rights without compensation.

Id.

Several other companies, including Gavilan, also requested a hearing.

On September 14, 1993, a public hearing was held on the Notice of Intent to Cancel. Representatives of Gavilan, among others, attended and participated in, that hearing. The BIA was represented at the hearing by counsel for the Area Director in Docket No. IBIA 95-96-A. Counsel stated that the position of the United States was that the leases could be cancelled for any one of the three reasons given in the Notice of Intent to Cancel, and made his position quite clear that the only way anyone could rebut the United States' position was to present proof that none of the three reasons was correct. See, e.g., Tr. of Sept. 14, 1993, Hearing at 5-6, 22-24.

Following the hearing, attempts were made by some of the hearing participants to resolve the problems. However, these efforts were apparently unsuccessful and, on October 19, 1995, the Superintendent cancelled the leases. But see note 16. Gavilan appealed to the Area Director who, on April 2, 1996, dismissed the appeal, holding that Gavilan lacked standing. Gavilan's appeal from this decision was assigned Docket No. IBIA 96-81-A. Briefs were filed in this appeal by Gavilan, the Area Director, and the Tribe.

The Board began consideration of these cases once, and determined that additional briefing was needed. Following receipt of that briefing, the Board requested that the parties attempt to settle these cases. When settlement discussions among the parties were unsuccessful, the Board asked that the parties participate in mediation. At the Board's request, the Director of the Office of Hearings and Appeals assigned these cases to an Administrative Law Judge for mediation. Mediation was also unsuccessful.

## Discussion and Conclusions
## Docket No. IBIA 95-96-A

The question raised in Docket No. IBIA 95-96-A is whether Gavilan is responsible for paying royalties that came due during a time period when it was the Co-Unit Operator for the Green River Participating Area of the Roosevelt Unit, but was not a lessee, and was not operating the particular wells from which royalties were due. The Area Director contends that Gavilan has a "non-record title interest" in the leases and/or wells that had been operated by Caloco, and that "[w]hen the Superintendent notified Gavilan, as Unit Operator, that royalties had not been paid to the Indian lessors, Gavilan was obligated by the terms of the Leases, the Unit Agreement, the Unit Operating Agreement, and [the] Designation Agreement to make the royalty payments." Answer Brief at 16.



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Gavilan contends that it is not responsible for any royalty payments which came due prior to the time it took over production of the wells Caloco had been operating. Gavilan argues that

> the Unit Agreement creates no obligation upon the Unit Operator to make royalty payments when, as in this case, the Unit Operator did not operate the wells, is not a lessee under any of the leases at issue, and owns no working interest in the lease or wells. Gavilan simply has no title (including a non-record title interest) to the wells, lands, or to the leases whatsoever.

Opening Brief at 10-11.

The Area Director presents several interrelated justifications for his position. The Board's analysis of the Area Director's arguments does not follow the presentation of the arguments set out in either the Decision or the Answer Brief.

The Area Director argues that Gavilan is responsible for Caloco's unpaid royalties because Gavilan holds a "non-record title interest" in the leases. He bases this argument on the Designation Agreement and the definition of the term "transfer" in 43 C.F.R. § 3100.0-5, which defines several terms for purposes of Federal oil and gas leasing. The Designation Agreement provides in pertinent part: "[Gavilan] hereby covenants and agrees to fulfill the duties and assume the obligations as Co-Unit Operator of the Green River Participating Area * * * under and pursuant to all the terms of said Unit Agreement."

Section 3100.0-5(e) defines "transfer" as

> any conveyance of an interest in a lease by assignment, sublease or otherwise. This definition includes the terms: Assignment which means a transfer of all or a portion of the lessee's record title interest in a lease; and sublease which means transfer of a non-record title interest in a lease, i.e., a transfer of operating rights is normally a sublease and a sublease also is a subsidiary agreement between the lessee (sublessor) and the sublessee, but a sublease does not include a transfer of a purely financial interest, such as overriding royalty interest or payment out of production, nor does it affect the relationship imposed by a lease between the lessee(s) and the United States.

The Area Director relies on part of this definition; namely, "transfer of a non-record title interest in a lease * * * is normally a sublease." He argues that, through BLM approval of the Designation Agreement making Gavilan Co-Unit Operator, a "non-record title interest" in the leases was "transferred" to Gavilan, and that this "non-record title interest" is a "sublease." See Answer Brief at 8-9, 12, 13, 14.

The only example of a "non-record title interest" given in 43 C.F.R. § 3100.0-5(e) which is at all relevant to this appeal is a transfer of



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operating rights. "Operating right" or "working interest" is defined in 43 C.F.R. § 3100.0-5(d) to mean "the interest created out of a lease authorizing the holder of that right to enter upon the leased lands to conduct drilling and related operations, including production of oil and gas from such lands in accordance with the terms of the lease." "Operating rights owner" is defined in 43 C.F.R. § 3100.0-5(j) as "a person or entity holding operating rights in a lease issued by the United States. A lessee also may be an operating rights owner if the operating rights in a lease or portion thereof have not been severed from record title."

The Area Director contends that an "operating agreement" is a sublease within the meaning of 43 C.F.R. § 3100.0-5(e). In support of this argument, he cites Paragraphs 3(c) and 3(h) of each lease, Paragraph 9 of the tribal lease and its corresponding Paragraph 11 in the allottee leases, and Paragraph 12 of the tribal lease and its corresponding Paragraph 14 in the allottee leases.

Paragraph 3(c) of each lease requires the lessee to pay rents and royalties. Paragraph 3(h) of each lease provides:

> Assignment of lease.--[The lessee shall] not * * * assign this lease or any interest therein by an operating agreement or otherwise nor * * * sublet any portion of the leased premises before restrictions are removed, except with the approval of the Secretary of the Interior. If this lease is divided by the assignment of an entire interest in any part of it, each part shall be considered a separate lease under all the terms and conditions of the original lease.

Paragraphs 9/11 deal with "Unit operation" and provide:

> The parties hereto agree to subscribe to and abide by any agreement for the cooperative or unit development of the field or area, affecting the leased lands, or any pool thereof, if and when collectively adopted by a majority of operating interest therein and approved by the Secretary of the Interior, during the period of supervision.

Paragraphs 12/14 are entitled "Heirs and successors in interest," and provide: "It is further covenanted and agreed that each obligation hereunder shall extend to and be binding upon, and every benefit hereof shall inure to, the heirs, executors, administrators, successors of, or assigns of the respective parties hereto."

The Area Director's argument here equates "operating agreement" in Lease Paragraph 3(h) with "agreement for * * * cooperative or unit development" in Lease Paragraphs 9/11. The Board sees no readily apparent reason why "operating agreement" in Lease Paragraph 3(h) should be read to mean anything other than "an agreement concerning operating" the leases. If "operating agreement" is read in this way, the assignment of a lease by "operating agreement" would mean the assignment of "operating rights."



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This interpretation of the leases is consistent with the definitions in 43 C.F.R. § 3100.0-5.

In the absence of more compelling evidence or arguments than that presented by the Area Director here, the Board finds no reason to conclude that a "unit agreement" under Lease Paragraphs 9/11 is an "operating agreement" within the meaning of Lease Paragraph 3(h). The Board therefore concludes that the Area Director has not shown that Gavilan owns a "non-record title interest" in the leases at issue here.

The Area Director also argues that "[a]n interest in the Leases or an interest to use the Leases was assigned, sublet or transferred to Gavilan by its designation as Unit Operator." Answer Brief at 6. He argues that this assignment, subletting, or transfer was approved by the Secretary of the Interior, through BLM, on March 16, 1988, and that "[u]nder [25 C.F.R. §§ 211.26(b) and 212.22(b) (1995) 9/], Gavilan, as Unit Operator, has had an 'interest' in the Leases from March, 1988 to the present." Id. In a related argument, the Area Director also contends that Gavilan was delegated the authority of the lessees to develop and operate the lands covered by the Unit Agreement.

In support of this argument the Area Director cites Paragraph 8 of the Unit Agreement and Paragraphs 1, 3, and 7 of the Unit Operating Agreement. The portion of Paragraph 8 of the Unit Agreement on which the Area Director relies provides:

> Nothing herein, however, shall be construed to transfer title to any land or to any lease or operating agreement, it being understood that under this agreement the Unit operator, in its capacity as Unit Operator, shall exercise the rights of possession and use vested in the parties hereto only for the purposes herein specified. [Emphasis added by the Area Director.]

Paragraph 1 of the Unit Operating Agreement provides: "The unit area * * * and all wells drilled thereon, shall be developed and operated by Unit Operator for the purposes set forth in the Unit Agreement, subject to the provisions contained therein and in this agreement." (Emphasis added to the portion relied upon by the Area Director.)

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9/ Part 211 concerns leasing of tribal lands for mineral development and Part 212 deals with leasing of allotted lands for mineral development. These parts were amended on July 8, 1996. 61 Fed. Reg. 35,653. The sections which now correspond to former sections 211.26 and 212.22 are sections 211.53 and 212.53. Present subsection 211.53(b) differs from former subsection 211.26(b), upon which the Area Director relied, only in non-essential wording. Present subsection 211.53(b) provides: "No lease or interest therein or the use of such lease shall be assigned, sublet, or transferred, directly or indirectly, by working or drilling contract, or otherwise, without the consent of the Secretary." Present section 212.53 provides: "The provisions of §211.53 of this subchapter are applicable to leases under this part."



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Paragraph 3 of the Unit Operating Agreement provides in pertinent part:

> The term "working interest" as used herein and in the unit agreement shall include any interest in land, or in a lease thereon, or interest under a lease, which is chargeable with and is obligated to pay or bear a portion of the cost of drilling, developing, producing and operating the land under the provisions of this agreement * * *. [Emphasis added by the Area Director.]

Paragraph 7 of the Unit Operating Agreement provides:

> Unit Operator shall have full control of the unit area and, subject to the provisions hereof and of the Unit Agreement shall conduct and manage the development and operation of the unit area for the production of unitized substances therefrom. Unit Operator shall pay and discharge all costs and expenses incurred pursuant to this agreement or the Unit Agreement, and shall charge each of the working interest parties hereto with its respective proportionate share thereof upon the cost and expense basis provided in the Accounting Procedure attached hereto, marked Exhibit C and made a part hereof.

The Board cannot agree with the Area Director's reading of these provisions. Although the provisions charge the Unit Operator with responsibility for overseeing the development of the entire unit (or participating area), they expressly restrict the authority of the Unit Operator to that given under the Unit Agreement. The Area Director cites nothing in the Unit Agreement which gives Gavilan, in its capacity as Co-Unit Operator, an unrestricted right to "use" the lands covered by the leases at issue here. Based on the argument presented by the Area Director, the Board cannot conclude that the "delegation" to Gavilan in its capacity as Co-Unit Operator, or the "interest to use" the leases at issue here, extends beyond the limitations set out in the Unit Agreement. 10/

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10/ Cf. Wyoming State Tax Comm'n v. BHP Petroleum Co., Inc., 856 P.2d 428 (Wyo. 1993). Although the court in BHP quotes only sparingly from the unit agreement at issue there, it quotes language identical to that in Paragraph 8 of the Unit Agreement here. The court held: "None of [the] provisions [of the unit agreement] accomplish an assignment. Instead the relationship is more properly termed an agency relationship. Although prospecting and producing rights are delegated to the unit operator, no property rights have been assigned to the unit operator." 856 P.2d at 432. The court continued: "The State claims that when unitization occurs, the unit operator becomes the designated lessee of the unit by assignment of rights from the other interest owners. While that arrangement may be possible, the specific agreements of this unit do not bear out that relationship." Id. at 433.



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The Area Director also argues that Gavilan is obligated by the Designation Agreement to comply with all of the terms of the leases. In support of this argument he cites, without quoting, 43 C.F.R. § 3162.1(a). This regulation provides:

> The operating rights owner or operator, as appropriate, shall comply with applicable laws and regulations; with the lease terms, Onshore Oil and Gas Orders, [Notices to Lessees]; and with other orders and instructions of the authorized officer. These include, but are not limited to, conducting all operations in a manner which ensures the proper handling, measurement, disposition, and site security of leasehold production; which protects other natural resources and environmental quality; and which results in maximum ultimate economic recovery of oil and gas with minimum waste and with minimum adverse effect on ultimate recovery of other mineral resources.

In further support of this argument the Area Director cites 43 C.F.R. § 3100.0-5(a), which defines "operator" as "any person or entity, including, but not limited to, the lessee or operating rights owner, who has stated in writing to the authorized officer that it is responsible under the terms and conditions of the lease for the operations conducted on the leased lands or a portion thereof." The Area Director contends that, under this definition,

> [a]n operator is "not limited to the lessee or operating rights owner;" rather, <u>an operator includes one who has stated in writing that it is responsible under the terms and conditions of the lease for operations conducted on the leased lands.</u> * * * When Gavilan became the Unit Operator in March, 1988, Gavilan agreed in writing that it would be responsible under the terms and conditions of the Leases and applicable Federal regulations.

Answer Brief at 7.

It would appear probable that a person who has "stated in writing that it is responsible under the terms and conditions of the lease for operations conducted on the leased lands" should be considered an "operator." However, the Board cannot agree that, under the Designation Agreement, Gavilan agreed to be responsible under the terms of the leases. Rather, it agreed "to fulfill the duties and assume the responsibilities as Co-Unit Operator * * * under and pursuant to all <u>the terms of said Unit Agreement</u>." (Emphasis added).

Furthermore, although the Area Director cites the definition of "operator" in 43 C.F.R. § 3100.0-5(a), he fails to cite the definition of "unit operator" in 43 C.F.R. § 3100.0-5(b). This subsection defines "unit operator" as "the person authorized under the agreement approved by the Department of the Interior to conduct operations within the unit." By separately defining "operator" and "unit operator," the regulations clearly contemplate that there is a difference between these terms, and that "operator" is not a synonym for, or interchangeable with, "unit operator."



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Additionally, Paragraph 4 of the Unit Agreement, which is entitled "Unit Operator," provides in pertinent part:

> Whenever reference is made herein to the Unit Operator, such reference means the Unit Operator acting in that capacity and not as an owner of interests in unitized substances, and the term "working interest owner" when used herein shall include or refer to Unit Operator as the owner of a working interest when such an interest in owned by it.

The Board finds that the Area Director has not presented a sufficient basis for equating "operator" and "unit operator," and has not proven that Gavilan is responsible for complying with all of the lease terms in the same way as if it were a lessee. 11/

The Area Director also argues: "In the Designation Agreement, Gavilan agreed to fulfill the duties and assume obligations as Unit Operator, under and pursuant to all the terms of the Unit Agreement. Such duties and obligations assumed by Gavilan include the payment of royalties to the Ute Tribe and Indian Allottees." Answer Brief at 9. This argument appears to be summarized at page 13 of the Area Director's Answer Brief:

> * * * [The] Unit Agreement, paragraph 18 provides that "any grant, transfer, or conveyance of interest in land or leases shall be conditioned "upon the assumption of all privileges and obligations hereunder by the grantee, transferee, or other successor in interest." Gavilan, in the Designation Agreement, covenanted and agreed to fulfill the duties and assume the obligations under and pursuant to all the terms of the Unit Agreement. Further, Unit Agreement, paragraph 26, recognizes the obligation of a unit operator to make rental and royalty payments due the Ute Indian Tribe and the Indian allottees. Gavilan must abide by the terms of the Unit Agreement and its obligation to make rental and royalty payments to the Indian lessors. [Quotation marks and emphasis as in original.]

Paragraph 18 of the Unit Agreement is entitled "Covenants Run With Land" and provides:

> The covenants herein shall be construed to be covenants running with the land with respect to the interests of the parties hereto and their successors in interest until this agreement terminates, and any grant, transfer, or conveyance of interest in land or leases subject hereto shall be and hereby is conditioned

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11/ Similarly, the Board cannot accept the Area Director's argument that Gavilan was required under 43 C.F.R. § 3162.3 to furnish a performance bond because this argument also equates "operator" in that regulation with "unit operator."



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upon the assumption of all privileges and obligations hereunder by the grantee, transferee, or other successor in interest, and as to Tribal Indian land and restricted Allotted Indian lands shall be subject to approval by the Secretary or his duly authorized representative * * *. [Emphasis added to the portion relied upon by the Area Director.]

Paragraph 26 of the Unit Agreement, which is entitled "Loss of Title," provides:

In the event title to any mineral interest in any unitized land shall fail and the true owner of such interest cannot be induced to join this unit agreement, so that such interest is not committed to this unit agreement, such interest shall automatically be regarded as not committed to the unit agreement and there shall be such readjustment of costs and benefits as may be required on account of the loss of such interest. In the event of a dispute as to title as to any royalty, working or other interests subject thereto, the Unit Operator may withhold payment or delivery on account thereof without liability for interest until the dispute is finally settled; provided, that, as to Indian land or leases, no payment of funds due the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, and to the owners of restricted Allotted Ute Indian lands shall be withheld, but such funds shall be deposited as directed by the Supervisor to be held in a special deposits account by the appropriate Federal agency pending final settlement of the title dispute, and then applied as earned or returned in accordance with such final settlement. [Emphasis added to the portion relied upon by the Area Director.]

Again, the Board cannot agree with the Area Director's reading of these provisions. The basic premise of Paragraph 18 of the Unit Agreement is that there has been some form of transfer "of interest in land or leases." However, Paragraph 8 of the Unit Agreement, which was quoted more fully above, clearly provides in pertinent part: "Nothing herein, however, shall be construed to transfer title to any land or to any lease or operating agreement."

A provision identical to Paragraph 8 here was at issue in Phillips Petroleum Co. v. Peterson, 218 F.2d 926 (10th Cir. 1954). 12/ In Phillips, the court was concerned with whether the unit agreement violated the rule against perpetuities. It found that the rule would be violated only if the

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12/ Gavilan states that the unit agreement under consideration in Phillips is the same Unit Agreement as in this appeal. Although this appears to be true, the information given in the court's opinion is not sufficient to allow the Board to determine conclusively that it is the same agreement. However, as stated, Paragraph 8 of the unit agreement which the court considered is identical to Paragraph 8 here.



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unit agreement "accomplishe[d] transfers of interests in real property, or otherwise stated, effect[ed] cross-transfers of property interests among the parties to the agreement." 218 F.2d at 930. Citing Paragraph 8 of the unit agreement, the court found that the unit agreement clearly stated that there was no transfer of interests in real property. See also BHP, 852 P.2d at 432.

[1] The Board finds that the Unit Agreement at issue here does not constitute a "grant, transfer, or conveyance of interest in land or leases." It therefore concludes that the Area Director's reliance on Paragraph 18 of the Unit Agreement is misplaced.

Paragraph 26 of the Unit Agreement deals with the limited situation--which is not present here--in which there are problems with title. The portion of the paragraph relied upon by the Area Director concerns "a dispute as to title as to any royalty, working or other interests subject thereto." The fact that the Co-Unit Operator may have certain responsibilities when there are questions about title to royalties does not translate into a general obligation to pay royalties when there is no dispute of the nature specified in Paragraph 26 of the Unit Agreement.

Furthermore, the Board finds that several paragraphs in the Unit Agreement and Unit Operating Agreement undermine the Area Director's argument that Gavilan is responsible for royalty payments in its capacity as Co-Unit Operator. Paragraph 13 of the Unit Agreement provides in pertinent part:

> Settlement for royalty interests not taken in kind shall be made by working interest owners responsible therefor under existing contracts, laws, and regulations, * * *; provided, however, that nothing herein contained shall operate to relieve the lessees of Indian land from their respective lease obligations for the payment of rentals and royalties due under said leases * * *.
>
> * * * * * *
>
> Annual rental and any minimum royalties due for Indian land * * * subject to this agreement shall be paid by the working interest owners responsible therefor under existing leases, contracts, laws and regulations, at the rates as specified in the respective leases. * * *
>
> * * * * * *
>
> Nothing in this section shall operate to relieve the lessees of any land from their respective lease obligations for the payment of any rental or minimum royalty in lieu thereof and royalties due under their leases.

Similarly, Paragraph 4 of the Unit Operating Agreement provides in pertinent part: "The working interest owners * * * shall * * * cause the



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purchaser or purchasers of such unitized substances to pay the proceeds thereof to the royalty owners entitled thereto."

Paragraph 24 of the Unit Operating Agreement provides:

> The liability of the parties hereunder shall be several and not joint or collective. Each party shall be responsible only for its obligations, as herein set out, and shall be liable only for its proportionate share of the cost of developing and operating the premises subject hereto, as determined by the provisions hereof.

These provisions make the lessee and working interest owners responsible for the payment of royalties. The Area Director concedes that Paragraph 13 of the Unit Agreement "recognizes that the lessees of Indian land have an obligation to pay rentals and royalties," but states that "there are no existing lessees for any of the Leases considered in this appeal." Answer Brief at 12. 13/ The Area Director also acknowledges Paragraph 4 of the Unit Operating Agreement, but argues: "Although the working interest owners are obligated to see that royalties are paid to royalty owners, Gavilan is obligated in its capacity as Unit Operator to make royalty payments when such payments have not been paid direct to royalty owners. The obligation of the Unit Operator to make royalty payments is set forth in Exhibit C to the Unit Operating Agreement." Answer Brief at 15.

Exhibit C to the Unit Operating Agreement is entitled "Accounting Procedure." The Area Director cites Article II, Development and Operating Charges, which provides in pertinent part:

> Subject to limitations hereinafter prescribed, Operator shall charge the joint account with the following items:
>
> 1. **Rentals and Royalties**. Delay or other rentals, when such rentals are paid by Operator for the joint account; royalties, when not paid direct to royalty owners by the purchaser of the oil, gas, casinghead gas, or other products.

For purposes of Exhibit C, Section I.1 defines "Operator" as "the party designated to conduct the development and operation of the leased premises for the joint account." The same section defines "joint property" as "the subject area covered by the agreement to which this 'Accounting Procedure'

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13/ In a Sept. 13, 1993, memorandum to the Superintendent, the BLM Chief, Branch of Fluid Minerals, Utah State Office, responded to questions which the Superintendent had raised based on several statements made by Gavilan. This memorandum is part of the administrative record in Docket No. IBIA 96-81-A. The BLM stated: "Pursuant to [Paragraph] 13 of the Unit Agreement royalty obligations are the responsibility of the individual Working Interest owners under each Tract. Ultimately, after default by these parties, the lessee's of record would be responsible."



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is attached." The Board finds no definition for "joint account" but, based upon the Accounting Procedure as a whole, concludes that the "joint account" is an account into which certain payments are made by the persons operating within the unit (or "joint property"), and from which certain expenditures are made by the Operator on behalf of the unit. The Board finds that it is not necessary for it to determine whether Gavilan is the "Operator" for purposes of Exhibit C because it further finds that it cannot agree with the Area Director's reading of the Operator's responsibilities under Exhibit C.

The Area Director contends that the Operator is responsible for making payment of royalties when the royalties are "not paid direct to royalty owners;" i.e., as argued by the Area Director, when the person initially responsible for paying royalties fails to do so. The Board does not read the provision in this way. Instead, it reads the provision to require the Operator to make royalty payments from the joint account when royalties are paid into the joint account rather than being paid directly to the royalty owners. Based on the Area Director's argument, the Board cannot conclude that Exhibit C to the Unit Operating Agreement requires the Operator to make royalty payments when it was not initially responsible for those payments and/or when royalty payments are not paid into the joint account. 14/

The Board finds nothing in the Area Director's arguments which convinces it that, under the circumstances of this case, Gavilan, in its capacity as Co-Unit Operator, was legally responsible for Caloco's unpaid royalties. Therefore, it reverses the Area Director's February 28, 1995, decision.

The Board comments on one additional matter which was raised in Docket No. IBIA 95-96-A by Gavilan's argument that the Area Director's demand that it pay Caloco's unpaid royalties was barred by the doctrine of administrative finality or res judicata. Gavilan states that MMS sought payment from it of other royalties which Caloco had not paid under precisely the same circumstances as are present in this appeal. 15/ It asserts that when it appealed MMS' demand, MMS withdrew the demand and instead sought payment

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14/ Similarly, the Board also cannot accept the Area Director's argument that royalties are included in "costs and expenses" for purposes of Paragraph 7 of the Unit Agreement, which provides that "costs and expenses incurred in conducting unit operations * * * shall be paid in the first instance by Unit Operator." The Area Director supports this argument with citations to Paragraph 26 of the Unit Agreement and Exhibit C to the Unit Operating Agreement.

15/ Gavilan's argument suggests the possibility that some of the unpaid royalties previously demanded by MMS may actually be the same as those sought by BIA in this appeal. Because of its disposition of this case, the Board finds it unnecessary to address this issue. It notes, however, that it could not have made a determination on this issue because the administrative record does not include any of the supporting documentation on which MMS based its findings that Caloco had failed properly to pay royalties.



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from Caloco. Gavilan contends that BIA should be barred from demanding payment from it under the same factual and legal circumstances as existed in the demand dropped by MMS.

The Area Director responds that BIA was not a party to the MMS proceeding and therefore is not bound by it.

When the Board first began consideration of these appeals, this argument caused it to question whether it was appropriate for BIA to demand payment of royalties under the division of responsibilities set out in the BIA/ BLM/MMS Tripartite MOU, or whether the responsibility for making this type of decision might rest with MMS. It therefore requested briefing from the Area Director on that issue.

The Area Director responded that the actions taken by the Superintendent were well within the spirit of the Tripartite MOU, noting that the Secretary has a trust responsibility to collect royalties due to Indian mineral owners. He argued that the Superintendent made a demand against Gavilan's Letter of Credit; that Attachment A, Section II.F.5, of the Tripartite MOU gives BIA final responsibility to demand performance by a surety; and that BIA may act on its own initiative in making such a demand. The Area Director stressed that the Superintendent's action gave Gavilan "the option of protecting its credit rating" by paying the demand rather than having BIA proceed against its Letter of Credit. Response to June 10, 1996, Order at 3. The Area Director continued:

> While we view the BIA activities as being harmonious with the MOU, we think it of merit to discuss the purpose of said MOU as regards the issues herein. The royalties are due the United States, through the Secretary of the Interior, in trust for the Ute Indian Tribe and individual Indians. The MOU is an inhouse (Interior being the house) procedural memorandum designed to accomplish payment. It is not a contract. We do not believe the MOU is legally enforceable in court by either the MMS, BLM or BIA as against one or both of the others. * * * The MOU not being a contract as between the parties, [it] is <u>not</u> a third party beneficiary contract. Gavilan does not stand in MMS' shoes and has no privity with MMS to enforce a supposed snub by the BIA of a provision in the MOU. If the BIA action in the March 30, 1993, letter of the Superintendent can be considered as technically contrary to a provision of the MOU although it is totally in harmony with its purpose, then the worst that can result is that the BIA might be subject to a reprimand from the Secretary, but such does not go to any issue in this matter. * * * We believe that the supposition that BIA did not have such authority to be unfounded and even assuming that it violated the spirit or letter of the MOU, such interpretation is straining at a gnat and does not accomplish the purpose of the MOU nor reach the basic authority of the Superintendent.

<u>Id.</u> at 4.



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The Board disagrees with the Area Director's assessment of "the worst that can result" if BIA were to violate the Tripartite MOU. Whatever might happen in Federal court, this Board exercises the review authority of the Secretary of the Interior, 43 C.F.R. §§ 4.1 and 4.1(b)(2), and can exercise the inherent authority of the Secretary to correct a manifest injustice or error. 43 C.F.R. § 4.318. The Board could reverse any BIA action or decision that it found to be in violation of the Tripartite MOU.

The Area Director stated that the current version of the Tripartite MOU is dated September 6, 1991. According to the introduction to that version of the MOU, "[t]he purpose of the MOU is to achieve common standards and methods for creating an efficient and effective working relationship between the Bureaus and for achieving the common goal of improved minerals accountability on Federal and Indian leases." As the Board stated in Delgado v. Acting Anadarko Area Director, 27 IBIA 65, 70 (1994), aff'd, Delgado v. United States, No. CIV-95-262-A (W.D. Okla. Feb. 5, 1997):

> In general, BLM monitors lease compliance, MMS monitors royalty calculations and payments, and BIA has overall responsibility for leases of Indian lands. BLM and MMS are involved in Indian oil and gas matters because of the specialized expertise they have developed in dealing with similar issues relating to public lands administered by the Department.

The Board emphasized that each of these three Departmental bureaus shares the Secretary's trust responsibility to Indian mineral owners. Id. at 71.

In addition to ensuring that Indian oil and gas leases have the benefit of the best programmatic expertise available within the Department, the Tri-partite MOU results in different appellate procedures based upon the Departmental bureau which took the action. Thus, decisions rendered exclusively by BLM or MMS are ultimately appealed to the Interior Board of Land Appeals, which has expertise in issues arising from BLM and MMS decisions; while decisions rendered by BIA are appealed to this Board, which has expertise in Indian law. If BIA here took an action that falls within the authority of MMS under the Tripartite MOU, then all parties to this proceeding were deprived of both the programmatic and the appellate expertise which the Department sought to ensure through the MOU. The Board does not believe that questioning BIA's authority to take this action under the Tripartite MOU is "straining at a gnat."

The section of the Tripartite MOU cited by the Area Director, Attachment A, Section II.F.5, provides that BIA has final responsibility for demanding performance by a surety under a bond. The MOU further states:

> The BLM or MMS will notify BIA when a call on a lease bond is necessary for operation, royalty, or bankruptcy related reasons. The BIA will notify the surety to demand performance on the bond within 30 days of notification from either Agency. The BIA will provide MMS and BLM with a copy of the letter request



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> to surety, and MMS will notify BIA when demand has been paid. The same 30-day grace period will be afforded MMS if BIA on its own initiative demands performance on a bond. In such cases, BIA will provide MMS and BLM with a copy of the demand letter.

Attachment A, Sections VII.B.1 and B.2.b, of the Tripartite MOU appear, respectively, to give MMS sole responsibility over rentals and royalties on producing leases and final responsibility over the collection of royalty liabilities or penalties. The record here shows that MMS consistently requested BIA assistance in demanding payment from Caloco's sureties as required under Attachment A, Section II.F.5, of the MOU. However, the Board found no communication from MMS in the administrative record which requested BIA assistance in demanding payment from Gavilan's sureties. In fact, in a November 2, 1993, memorandum to the Area Director, MMS stated:

> In the attached memorandums dated April 12 and August 30, 1993, we requested you collect payment for delinquent invoices issued to CALOCO. Under the BIA/BLM/MMS Tripartite MOU we request you demand performance on the bond within 30 days of notification. If payment is not received within 60 days, we will write off the delinquent invoices as uncollectible.

The Board found nothing in the administrative record submitted to it indicating that MMS had written off any of the unpaid royalties as uncollectible. As of February 24, 1995, 4 days before the Area Director issued his decision in this case, MMS was still requesting BIA assistance in collecting unpaid royalties from Caloco's sureties. These MMS memoranda suggest that MMS, not BIA, is the Departmental bureau which normally has access to royalty information, determines whether royalties have been properly paid, and has the documentation to support its demands for unpaid or underpaid royalties.

However, because it has found that the Area Director has failed to prove that Gavilan is responsible for Caloco's unpaid royalties, the Board finds that it is not necessary for it to decide whether BIA was in fact authorized to demand payment of these royalties under the Tripartite MOU, or whether BIA's decision is barred by the doctrine of administrative finality or res judicata.

## Docket No. IBIA 96-81-A

In Docket No. IBIA 96-81-A, Gavilan seeks review of the Area Director's April 2, 1996, decision holding that Gavilan lacked standing to appeal from the cancellation of the leases. Citing Uintah Oil & Gas, Inc. v. Phoenix Area Director, 27 IBIA 3 (1994), and HCB Industries, Inc. v. Muskogee Area Director, 18 IBIA 222 (1990), the Area Director held that Gavilan lacked standing because it was not an approved lessee or assignee under any of the leases at issue.

Gavilan claims standing under Paragraph 21 of the Unit Agreement which is entitled "Appearances." This paragraph provides:



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> Unit Operator shall, after notice to other parties affected, have the right to appear for or on behalf of any and all interests affected hereby before the Department of the Interior and to appeal from orders issued under the regulations of said Department or to apply for relief from any of said regulations or in any proceedings relative to operations before the Department of the Interior or any other legally constituted authority; provided, however, that any other interested party shall also have the right at his own expense to be heard in any such proceeding.

The Area Director contends that Gavilan lacks standing to appear under Paragraph 21 because there are no approved lessees for Gavilan to represent. Furthermore, because Gavilan is not itself an approved lessee or assignee, the Area Director reasons that Gavilan cannot represent itself. The Tribe concurs in this analysis.

[2] The Board finds that the Area Director and the Tribe read Paragraph 21 too narrowly. The paragraph does not grant the Unit Operator authority to appear only for, or on behalf of, lessees affected by Departmental action. Rather, the Unit Operator's authority extends to representation "of any and all interests affected." Both the Unit itself and other lessees and working interest owners within the Unit have interests which may be affected by the cancellation of the leases at issue here. The Board concludes that Gavilan has standing to appeal from BIA's cancellation of the leases under Paragraph 21 of the Unit Agreement.

This holding does not conflict with the prior Board cases cited by the Area Director. In each of those cases, the person attempting to appeal was an unapproved assignee. Here, the appellant is the Co-Unit Operator who is specifically given authority under the Unit Agreement to appear on behalf of the interests affected by a Departmental decision.

Therefore, the Board reverses the Area Director's determination that Gavilan lacked standing to appeal from the April 2, 1996, decision. This matter is remanded to the Area Director for a decision on the merits of Gavilan's appeal. 16/

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16/ At pages 3-4 of a filing dated Feb. 4, 1998, Gavilan stated:

" 13. In the course of settlement negotiations, Gavilan learned for the first time that the Agency, Ute Indian Tribe, Ute Distribution Corporation, and several allottees conspired with one or more third parties to cancel the leases that are the subject matter of these appeals in consideration for the third parties to lease the lands at royalty/overriding royalty rates more favorable than provided by the existing leases. * * *

"14. The probable collusion is evidenced in part by a Minerals Agreement, a Settlement Agreement, and a Joint Management lease (hereinafter collectively "**Agreements**") providing for a combined royalty/overriding royalty rate of 20% and payment by the third parties of unpaid royalties and severance taxes affecting two of the 15 wells in the Roosevelt Unit. A third party, Richardson Operating Company and Richardson Production Company * * *,



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Despite its holdings here, the Board continues to believe that it would be in the best interest of all parties involved with the Indian leases in the Roosevelt Unit to negotiate a resolution of the problems affecting those leases. Accordingly, it encourages the parties to consider negotiating a resolution of this dispute on remand.

In summary, the Board reverses the Area Director's February 28, 1995, decision demanding payment of Caloco's unpaid royalties from Gavilan, and also reverses the Area Director's April 2, 1996, decision that Gavilan lacked standing to appeal from the cancellation of the leases at issue here. This matter is remanded to the Area Director for a decision on the merits of Gavilan's appeal from the April 2, 1996, decision. 17/

_____
Kathryn A. Lynn
Chief Administrative Judge

I concur:

_____
Anita Vogt
Administrative Judge

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fn. 16 (continued)
signed these Agreements three months before the Agency issued its cancellation notice purporting to terminate the existing leases."

Gavilan sought an evidentiary hearing with full discovery in order to investigate these issues.

Because of its disposition of Docket No. IBIA 96-81-A, the Board denies Gavilan's request. However, it appears that these matters should definitely be addressed on remand.

17/ All arguments not specifically addressed were considered and either rejected or found unnecessary to the resolution of these appeals. All motions not previously addressed are denied.



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