

INTERIOR BOARD OF LAND APPEALS

Mustang Fuel Corp.

134 IBLA 1 (September 26, 1995)

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MUSTANG FUEL CORP.

IBLA 93-645

Decided September 26, 1995

Appeal from a joint decision by the Acting Deputy Director, Minerals Management Service, and the Acting Commissioner for Indian Affairs, Bureau of Indian Affairs, denying recoupment or refund of overpaid royalties on an Indian allottee oil and gas lease. MMS-93-0062-IND.

Reversed and remanded.

1. Appeals—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals:
Statement of Reasons

An appeal supported by a statement of reasons which does not meet the Department's rules of practice may be dismissed. However, dismissal is not mandatory and each case will be considered individually.

2. Oil and Gas Leases: Royalties: Payments

Although MMS policy, as expressed in the Payor Handbook, prohibits cross-lease recoupments on Indian allottee oil and gas leases, such a recoupment may be authorized by this Board where the record contains evidence that (1) MMS has deviated from that policy in the past; (2) the payor has made an overpayment on an Indian allottee lease and circumstances make it impossible to recoup from that lease; and (3) the proposed cross-lease recoupment can be easily accomplished.

APPEARANCES: Elisabeth M. Ellis, Esq., Oklahoma City, Oklahoma, for appellant; Peter J. Schaumberg, Esq., Howard W. Chalker, Esq., Geoffrey Heath, Esq., Washington, D.C., for the Minerals Management Service.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Mustang Fuel Corporation (Mustang) has appealed an April 28, 1993, decision issued jointly by the Acting Deputy Director, Minerals Management Service (MMS), and the Acting Deputy Commissioner for Indian Affairs, Bureau of Indian Affairs (BIA), denying recoupment or refund of royalty overpayments to the account of Indian allottee oil and gas lease

No. 14-20-205-5580 (Heirs of Young Bear Well). ^{1/} The overpayments, in the amount of \$42,008.96, occurred during the production months June 1988 and November 1988 through August 1990.

On November 1, 1990, MMS notified Mustang that Mustang had erroneously reported revenue under one lease Account Identification Number (AID), when it should have reported under several different numbers. The error resulted in an overpayment of approximately \$42,000 in royalty on production from Mustang's Heirs of Young Bear Well on Indian allottee oil and gas lease No. 14-20-205-5580. By letter of December 28, 1990, Mustang advised the Concho Agency, BIA, El Reno, Oklahoma, that because of diminishing reserves, recoupment from the Heirs of Young Bear Well was not possible. Mustang requested permission to recoup the overpayment from the Dadisman 1-32 Well on Indian allottee oil and gas lease No. 14-205-6470. Mustang pointed out that with the exception of three royalty owners on the Dadisman 1-32 Well, the two wells had identical royalty owners. Mustang explained that the three royalty owners on the Dadisman 1-32 Well who held no interests on the Heirs of Young Bear Well would continue to be paid their proper monthly revenue.

By letter decision of March 11, 1991, the Acting Superintendent of BIA's Concho Agency denied Mustang's request, stating that "the Anadarko Area Director's Office established a policy that prohibits the collection of overpaid royalties from Indian mineral interest owners." He instructed Mustang to "recoup the overpaid royalties using the prescribed method as explained in the MMS Payor Handbook." He also informed Mustang that it had a right to appeal his decision to the BIA Area Director.

Immediately following receipt of that denial, Mustang filed a request with BIA for a refund of the overpayment. In a letter decision dated March 26, 1991, the Acting Superintendent, Concho Agency, denied that request repeating that "the Anadarko Area Director's Office established a policy that prohibits the refund of overpaid royalties from Indian mineral interest owners." He informed Mustang that it could also appeal this decision to the Area Director.

Mustang filed timely notices of appeal of both Concho Agency letter decisions with the Concho Agency and with the Director, MMS. On May 14, 1991, the Chief of MMS' Fiscal Accounting Division, denied Mustang's request for recoupment, observing, *inter alia*, that MMS did not have the authority to "overrule BIA on their recoupment requirements." That decision did not notify Mustang of any right to appeal.

On April 15, 1992, the Anadarko Area Director affirmed the two BIA decisions stating that the authority for granting recoupment of overpaid

^{1/} The decision also denied a request by Mustang to post a bond in lieu of royalty payments. Mustang has not appealed that part of the decision.

royalties rested with MMS, not BIA. The Area Director further ruled that no refund could be authorized because BIA was without statutory or regulatory authority to initiate a collection action seeking the return of overpaid royalties from Indian mineral owners. The decision referenced appeal rights to the Interior Board of Indian Appeals (IBIA).

By letter of May 14, 1992, Mustang filed an appeal of the Area Director's decision with IBIA. On October 23, 1992, counsel for BIA filed a motion for remand requesting that IBIA vacate the Area Director's decision for lack of jurisdiction and refer the matter to the Director, MMS. On November 2, 1992, IBIA issued an order vacating the Area Director's decision and remanding the case to him so that he could refer the case to the Director, MMS. On December 24, 1992, he did so.

The April 28, 1993, joint decision denied both recoupment and refund. It denied recoupment on the basis that allowing Mustang to recoup its overpayment on another lease would be contrary to MMS policy, as expressed at section 4.4.3 of the MMS Payor Handbook. ^{2/} The decision explained the reasons behind the policy in this way:

First, the Department has a long-standing duty to protect the financial interests of Indian Tribes and individuals. See 55 Fed. Reg. 3232 (1990). Limiting recoupments of overpaid royalties to 50 percent of current monthly revenues on the same lease where the overpayment occurred aids in accomplishing this goal. Royalty revenue is often the major source of revenue to an Indian tribe and may be the only source of revenue to an individual Indian allottee. Consequently, the Indian lessors generally would not have the means to refund an overpayment. Therefore, to prevent undue financial burden on the Indian lessors, it has been the longstanding policy of MMS and the BIA that overpayments on Indian leases are not refunded, but rather must be recouped as credits against future rents and royalties. Additionally, because an individual's financial resources are often more limited than a tribe's, the policy limits recoupments for allotted leases to 50 percent of current monthly revenues due on only the overpaid lease.

The MMS does not permit cross-lease offsetting on Indian allotted leases because these leases are issued individually under the leasing statute for allotted Indian minerals, 25 U.S.C. section 396. Often, as is the case in this appeal, the lessors are not identical from lease to lease. To permit cross-lease

^{2/} That section (dated Sept. 30, 1986) provides in part: "Overpayments on Indian allotted leases may be recouped as a credit against a current month's rent or royalty due only on the lease on which the overpayment was made, prorated so that the current monthly rental or royalty due is not reduced by more than 50 percent." (Emphasis in original.)

offsetting even for only common owners could lead to very complex accounting problems because the percent of common ownership in each lease may vary and the number of lessors on each lease may be quite large. Thus, there is a possibility that permitting cross-lease offsetting could lead to accounting mistakes causing some lessors to be underpaid or not paid at all. In these circumstances, to treat each lease as a single account for purposes of offsetting over- and underpayments is consistent with the nature of the royalty obligation under the lease.

(Decision at 6-7).

In also denying a refund, the decision stated:

[T]he Department of the Interior does not have authority to initiate an action against the allottee lessors to collect overpaid royalties. An examination of the leasing statute, 25 U.S.C. § 396, clearly reflects that it was enacted for the benefit and protection of Indians. There is no reference to royalty refunds or any indication that Congress intended for the Department to have authority to initiate collection actions against the allottee lessors. Nor do any of the Department's regulations provide such authority.

(Decision at 8).

Mustang has filed a statement of reasons (SOR) the title page of which states that the appeal is from the joint MMS and BIA decision of April 28, 1993. The actual text of the SOR, however, appears to be identical to that filed with BIA and MMS, in which the BIA decisions of March 11 and 26, 1991, were appealed (SOR at 9, Tab O).

[1] The Board's rules of practice require the filing of a statement of reasons for appeal. 43 CFR 4.412. Such a statement is one which affirmatively points out error in the decision from which the appeal is taken. In Re Eastside Salvage Timber Sale, 128 IBLA 114, 116 (1993); J. W. Weaver, 124 IBLA 29, 31 (1992). Where a statement of reasons fails to present new issues and fails to point out how the decision from which the appeal purports to be taken erroneously decided the issues before it, an appeal is subject to dismissal because the failure to file an adequate statement may be treated the same as the failure to file any statement. See Burton A. & Mary H. McGregor, 119 IBLA 95, 98 (1991); 43 CFR 4.402 and 4.412(c). However, dismissal of an appeal for deficiencies in the statement of reasons is within the discretion of the Board and each case will be examined individually to determine the appropriateness of a dismissal. See Mullins Coal Co. v. OSM, 96 IBLA 333, 335 (1987).

In this case, we decline to dismiss. Mustang raised various issues in its SOR not addressed in the joint decision.

We initially note certain inconsistencies in the April 28, 1993, decision under appeal. That decision states that a refund is not available because there is no statutory or regulatory authority for initiating collection actions against allottee lessors, and that it is the "longstanding policy of MMS and BIA that overpayments on Indian leases are not refunded" (Decision at 6). Presumably, recoupment is the only remedy for Mustang. However, because production from the well on the lease upon which the overpayments were made is insufficient to allow recoupment, Mustang sought permission for a cross-lease recoupment. The decision explained that in accordance with the MMS Payor Handbook, the policy is not to allow cross-lease recoupment and not to allow recoupment for more than 50 percent of the current monthly royalty.

We turn to the MMS Payor Handbook, which sets forth MMS policy. ^{3/} It is true that section 4.4.3 Recoupments of Overpayments on Indian Leases states that overpayments may be recouped only on the lease on which the overpayment was made. However, the next section of the Handbook, section 4.4.4 Refunds of Overpayments on Indian Leases, provides the following guidance:

Royalties due Indians are promptly distributed to the Bureau of Indian Affairs (BIA) and Tribes on the basis of Form MMS-2014 information. If a payor is unable to recoup an overpayment, the request for refund must be submitted directly to the appropriate BIA Agency or Area Office or Tribe. Please contact MMS's Lessee Contact Branch immediately upon learning of an Indian overpayment that cannot be recouped and requires a refund. [Emphasis added]. [4/]

^{3/} In its answer on appeal, counsel for MMS stated that Indian recoupment requirements had been set forth in Section IX B. of Notice to Lessees and Operators of Indian Oil and Gas Leases No. 1A (NTL-1A), Procedures for Reporting and Accounting Royalties, 42 FR 18139, 18139 (Apr. 5, 1977), until March 1, 1988, when NTL-1A was superseded by revised oil and gas product valuation regulations. They explained that the primary reason NTL-1A was superseded was to update the product valuation regulations, but that "MMS also inadvertently removed the procedures regarding recoupment. The recoupment policy and procedures remain in MMS's Payor Handbook" (Answer at 6).

^{4/} A "Dear Payor" letter from MMS dated July 10, 1985, set forth "a summary of Minerals Management Service's (MMS) policy regarding recoupments and refunds on Federal and Indian leases" (SOR at Tab G). The letter included a paragraph entitled "Obtaining a Refund on Indian Leases." It stated that "[i]f a payor is unable to recoup an overpayment" and the money has been distributed to BIA, a request for refund should be submitted to BIA and if distribution has not been made, that the request should go to MMS.

The question which leaps to mind is why, if MMS and BIA have a "longstanding policy" of not refunding "overpayments on Indian leases," are payors invited by the MMS Handbook, which reflects MMS policy, to request a refund from BIA, when they are "unable to recoup an overpayment?" Surely, if the policy were "longstanding," the drafters of the MMS Handbook would have been aware of it. The only case cited in the decision, and in MMS' answer filed in this case, in support of the "longstanding policy" is a nonprecedential decision issued by the Deputy Commissioner of Indian Affairs, BIA, Koch Industries, Inc., MMS-91-0023-IND (Nov. 7, 1991), containing language identical to that included in the decision under appeal. Koch provides no citation to support its claim of a "longstanding policy."

The genesis for that statement appears to be the preamble to proposed rules published in the Federal Register in January 1990 governing recoupment of overpayments on Indian leases. 55 FR 3232 (Jan. 31, 1990). MMS stated in the preamble that because royalty payments are a major source, and sometimes the only source, of income to many Indian allottees, "it has been a longstanding Department of the Interior policy that overpayments made by lessees and other royalty payors to Indians cannot be recovered by refund." Id. 5/ The stated purpose of the rulemaking was to codify longstanding policy on recoupment. However, MMS proposed an exception to the 50 percent recoupment policy, stating that recoupment at a higher percentage could be approved by MMS with the concurrence of BIA. The rationale for the exception was that "without the exception, there would be no flexibility in the rule to accommodate unexpected situations." Id. The proposed rule was silent as to cross-lease recoupments. Thus, MMS did not propose to prohibit them. In any event, a final rule has apparently not been issued, and the current version of the Code of Federal Regulations contains no such regulations.

Mustang's confusion regarding what to seek and from what agency to seek it is completely understandable. Mustang sought recoupment from BIA and was denied. It then sought a refund from BIA and was denied. Both

5/ No explanation is given in that preamble or in the decision presently under appeal for the fact, as pointed out by Mustang in its SOR, that NTL-1A allowed the lessee or operator to request a refund directly from the allottee. Sec. IX B. of NTL-1A provided that "[i]n the event that current rental or royalty accruals are insufficient to recover an overpayment within a reasonable period of time, the lessee or operator may request a refund from the individual allottee(s) involved." 42 FR 18135 (Apr. 5, 1977). Thus, in the situation presented in this case, NTL-1A would have allowed Mustang to seek a refund from the allottees. At some time, MMS changed that policy to require that refund requests be made directly to BIA. See note 4, supra. Despite that history, the proposed rulemaking, in 1990, and the decision under review, in 1993, announced the "longstanding policy" of not allowing refunds for overpayments made to Indians.

denials include the statement that there was a BIA "policy that prohibits collection of overpaid royalties from Indian mineral interest owners." ^{6/} The Area Director, BIA, affirmed those decisions, and when an appeal of that action was sought before IBLA, that decision was vacated and the case remanded to the Area Director, upon motion of counsel for BIA that the Area Director had no jurisdiction to take that action.

[2] In the decision under appeal, Mustang is told that cross-lease recoupments are against MMS policy and MMS does not permit them. The decision does not address the evidence provided by Mustang that Exxon Company, U.S.A., had received authorization from MMS to make retroactive adjustments between two Indian allottee leases in 1987. ^{7/} No attempt is made in the decision to explain the Exxon situation. While that case could be distinguished from this case by the fact that in Exxon the two leases involved identical allottees and interests, it still involved an adjustment between two Indian allottee leases. Thus, the statement in the decision that "[t]he MMS does not permit cross-lease offsetting on Indian allottee leases" is apparently incorrect to the extent that the Exxon letter shows that MMS has allowed a company to make adjustments between two Indian allottee leases. The conclusion to be drawn is that the MMS' recoupment policy is flexible. ^{8/}

^{6/} We have no reason to doubt Mustang's representations on appeal that attempts to elicit that "policy" from BIA proved futile. See SOR at 4-5. No evidence of such a "policy" appears in the record on this case.

^{7/} That evidence is in the form of a Mar. 20, 1987, letter to Exxon Company, U.S.A., from the MMS Chief, Lakewood Section, Lessee Contact Branch (SOR at Tab I), stating in pertinent part:

"We have compared the division of interest of each allottee on the Authorization for Payments from the Muskogee Area Office dated January 22, 1987 for both leases and found that the allottees and their interests are the same. Since they are the same, your request for not establishing the recoupable balance for making the retroactive adjustments as requested by [illegible] on Annie Wilson A and B [Indian allottee leases] is granted. As you know, this permission is granted only for making these retroactive adjustments. Any and all future adjustments for overpayments must be done in accordance with the procedures set forth in the Payor Handbook for overpayment of royalties on Indian leases."

^{8/} In addition, as recognized in the decision, the MMS Payor Handbook does not have the force and effect of law enjoyed by statutes and regulations. Exxon Company, U.S.A., 113 IBLA 199, 206 (1990); Mesa Petroleum Co., 107 IBLA 184, 192 (1989). As such, it is not binding on this Board. Thus, even if Mustang had not established the flexibility of MMS' recoupment policy, the circumstances of this case merit the authorization of a recoupment, as explained below.

Despite the fact that the proposed cross-lease recoupment in this case does not involve identical allottees, we believe the record supports application of the flexible policy to allow recoupment in this case. There are two reasons for this, the first being equitable, the second, practical. First, the record is clear and there is no dispute by MMS that Mustang cannot recoup the overpayments from the lease for which the overpayments were made. Production has been exhausted. In addition, assuming for the moment that the decision is correct that no refund is available, Mustang has no realistic way to recover its overpayments unless MMS authorizes a cross-lease recoupment.

Second, as a practical matter, the cross-lease recoupment process would be rather simple to administer for both Mustang and MMS. Mustang asserts that it would forward to MMS 50 percent of Dadisman 1-32 Well revenues for the 11 overpaid allottees and 100 percent for the other three allottees utilizing the appropriate payment method codes so that MMS could properly track and distribute the royalty. It also states that it would provide BIA with a monthly statement showing the recoupment status of the 11 overpaid allottees and distribution to the other 3 allottees. See SOR at Tab B, at 4-5.

The decision under review claims that "cross-lease offsetting even for only common owners could lead to very complex accounting problems" (Decision at 6). While we do not doubt that statement as a general proposition, there is no evidence that the cross-lease recoupment proposed by Mustang in this case would cause any confusion whatsoever.

Since we conclude that a cross-lease recoupment is an appropriate method by which Mustang may recoup its overpayment in this case, we need not resolve the question raised by the conflict between the decision under review and the MMS Payor Handbook regarding the availability of a refund.

We note that in December 1992 MMS published a final rule allowing payors to correct payment reporting errors under limited circumstances by permitting the offsetting of overpayments incorrectly reported to a Federal or Indian tribal lease against underpayments on a different Federal or Indian tribal lease to which they should have been reported. 57 FR 62200-206 (Dec. 30, 1992). That rule, promulgated at 30 CFR 218.42(a), specifically stated that "any underpayment on any Indian allotted lease shall not be reduced by offsetting against any overpayment on any other Indian allotted lease under any circumstances." 57 FR 62202 (Dec. 30 1992). That regulation is not applicable in this case because there has been no underpayment by Mustang. Mustang merely seeks a method to recoup its overpayments in subsequent payments to the overpaid allottees.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed

from is reversed and the case remanded to MMS for action consistent with this opinion.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge