

INTERIOR BOARD OF LAND APPEALS

Paco Production Co., et al.

145 IBLA 327 (September 21, 1998)

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PACO PRODUCTION CO. ET AL.

IBLA 96-30 Decided September 21, 1998

Appeal from a decision of the Colorado State Office, Bureau of Land Management, upholding a denial of a request for suspension of two Federal leases until the Bureau of Land Management conducts a resurvey of the township containing the leases. COC 41386, COC 42006.

Affirmed.

1. Secretary of the Interior--Public Lands: Generally--Surveys of Public Lands:
Authority to Make--Surveys of Public Lands: Dependent Resurveys

The Secretary of the Interior has within his power and discretion the authority to cause to be made such resurveys or retracements of the rectangular system of surveys of public lands as he may deem essential to determine a question pending before the Bureau of Land Management for decision involving rights to the public lands.

2. Surveys of Public Lands: Challenges

Surveys of the United States, after acceptance, are presumed to be correct and will not be disturbed except upon proof that they are fraudulent or grossly erroneous. An appellant challenging a Government survey has the burden of establishing by a preponderance of the evidence that the survey is fraudulent or grossly erroneous.

3. Mineral Leasing Act: Generally--Oil and Gas Leases: Diligence--Oil and Gas Leases: Suspensions

Under the Mineral Leasing Act, as amended, continued operation or production on a Federal oil lease may be suspended under the implementing regulation at 43 C.F.R. § 3103.4-2, where operations under the lease are interrupted by force majeure conditions. Where the lessee has not commenced operations, and thus has not produced from the lease, no relief is available to the lessee under the force majeure provision.

4. Mineral Leasing Act: Environment–Oil and Gas Leases: Suspensions

Section 39 of the Mineral Leasing Act, as amended, provides for suspension of a Federal oil and gas lease either (1) as a matter of right where, through some act, omission, or delay by a Federal agency, beneficial enjoyment of a lease has been precluded, such as where delays imposed upon the lessee due to administrative actions addressing environmental concerns have the effect of denying the lessee timely access to the property, or (2) as a matter of discretion, in the interest of conservation, e.g., to prevent damage to the environment. Where there is no persuasive evidence either of undue delay imposed by administrative actions addressing environmental concerns or of environmental harm, an application for suspension under section 39 is properly denied.

APPEARANCES: Craig R. Carver, Esq., Gibson, Dunn & Crutcher, Denver, Colorado, for Appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Paco Production Company and Janet Jacobson Myrick (Appellants), as holders of operating rights and/or lessee, have appealed the September 20, 1995, Decision of the Acting Deputy State Director, Bureau of Land Management (BLM), affirming a ruling of the San Juan Resource Area Manager which denied a request for an indefinite suspension of the term of the two above-identified oil and gas leases, pending a BLM dependent resurvey of the township in which they reside. Appellants request for suspension was made under the regulation at 43 C.F.R. § 3103.4-2. The BLM Resource Area Manager's Decision, subsequently appealed to the State Director's Office, granted a suspension for a period of 60 days to allow time to conduct a private survey to locate the proposed wells on the leases.

The September 20, 1995, Deputy State Director's Decision (Decision) includes the following determination:

The decision of the SJRA Manager is upheld. Under current BLM policy, lack of a survey, or an inadequate survey, is not a matter that is beyond the reasonable control of the lessee. The 60-day suspension granted by the SJRA Manager was adequate time for Paco to do the necessary survey work to properly locate their proposed wells. It is not the responsibility of the BLM to provide an accurate public land survey prior to issuing an oil and gas lease. Paco has the option of having the work performed by a private surveyor.

(Decision at 6.)

In appealing the September 20, 1995, Decision of the Deputy State Director, Appellants contend that without a BLM resurvey, they are unable to determine the lease boundaries with sufficient accuracy to ensure that the wells for which a notice of staking has been filed are located within the lease perimeter. In their Statement of Reasons (SOR) for appeal, Appellants explain that in the first quarter of 1995, Paco developed a geologic prospect located in T. 37 N., R. 20 W., New Mexico Prime Meridian, near the western border of Colorado. In order to develop the prospect, Paco obtained an assignment of part of the last year of a portion of 10-year Federal lease 41386 from Mobil Oil Corporation. (SOR at 1-2.) Appellant Janet Jacobsen Myrick is lessee of nearby lease COC 42006. (SOR at 1.) Appellant PACO filed a Notice of Staking on May 25, 1995, for a well to be located in the SENE of sec. 14 of T. 37 N., R. 20 W. Subsequently, BLM expressed environmental concerns about the proposed drill site, and the drill site was then moved to the SWSW of sec. 13, T. 37 N., R. 20 W. (SOR at 2.) That section is surrounded on both sides by lease C43297, not controlled by Paco. Id. Paco claims that "[a] mistake of even a small distance in either direction, when combined with potential well-bore drift, could cause the well to bottom on one of the adjacent leases." Id.

In examining the survey conducted on the area encompassing the proposed drill site by Michael J. Mack in 1889, Paco found correlation lacking between the actual topography of township 37 as represented by a U.S. Geological Survey (USGS) topographic map and that topography depicted in the field notes of the Mack survey. See comparison between Mack survey (Ex. H to SOR) and USGS topographic map of the region (Ex. E to SOR). Appellant claims that subsequent resurveys of portions of township 36 to the east of township 37 in 1942 and 1958 suggest similar discrepancies in township 37. (SOR at 3-4.) (Note: No resurvey of township 37 has been conducted.)

In May 1995, Paco contracted with Huddleston Land Surveying to stake its proposed drill site in the SWSW of sec. 13. In attempting to locate the well site on the lease, Huddleston was unable to locate any original corners within the interior of township 37. Concluding that any private survey would not be considered definitive and that he could not warrant a private survey conducted on behalf of Paco, Huddleston recommended that "the ideal and definitive solution to this problem is for BLM to conduct an official re-survey of the township and set the corners. Once this is done, I will be able to stake the proposed location accurately and efficiently." Quoted in SOR at 6. Paco, together with Appellant Myrick and Mobil Oil Corporation, then requested a suspension of the two leases and that BLM conduct a dependent resurvey to definitively reset the corners. (SOR at 1.)

In an undated August 1995 Decision of the San Juan Resource Area Manager (Area Manager Decision), Appellants were advised that they were granted only a 60-day suspension of their leases to provide time to obtain a private survey of the leases, but not a suspension for a BLM dependent resurvey as that request was denied. The Area Manager's Decision stated that BLM did not find they had presented sufficient evidence of fraud, and that even if they had,

this office would still be reluctant to suspend the plat of record as it is the basis of all current disposals, leases, and other land actions. The Act of March 3, 1909 (35 Stat. 845) as amended June 25, 1910 (36 Stat. 884; 43 U.S.C. 773) states: That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of an[y] claimant, entryman, or owner of lands affected by such resurvey or retracement. Meaning that the basic principles of protecting bona fide rights are the same in either the dependent or the independent resurvey. Rights to land described under the public land survey system are done so that they may be specifically and exactly identified and located upon the ground.

(Area Manager Decision at 1.) The Decision further advised that Paco as operator/agent for the current lease holder had "not only the right but the responsibility to ensure that any development they undertake falls upon their legal description." Id. The Decision also advised that Appellant could hire a private surveyor registered in the State of Colorado to identify the lands located within the two leases and that BLM "would not anticipate a problem with the utilization of a private survey that followed these instructions [1973 Manual] and was properly documented by recorded monument records and a plat of survey filed in the county court house." Id. A request for review by the State Director's Office followed and the aforementioned Deputy State Director's Decision upholding the Decision of the Area Manager was issued.

[1, 2] This Board has addressed requests for and challenges to surveys and dependent resurveys on many occasions. In each, we have noted the Secretary of the Interior has within his power and discretion the authority to cause to be made such surveys, resurveys or retracements of the rectangular system of surveys of public lands as he may deem essential to determine a question pending before the BLM for decision involving rights to the public lands. See, e.g., Theodore J. Vickman, 132 IBLA 317, 321 (1995); John W. & Ovada Yeargman, 126 IBLA 361, 362 (1993); Elmer A. Swan, 77 IBLA 99 (1983); see also 43 U.S.C. §§ 2, 52, 751-53 (1994). Underlying this rule is the principle that surveys of the United States, after acceptance, are presumed to be correct and will not be disturbed except upon proof that they are fraudulent or grossly erroneous. An appellant challenging a Government survey has the burden of establishing by a preponderance of the evidence that the survey is fraudulent or grossly erroneous. Peter Paul Groth, 99 IBLA 104, 111 (1987).

In the present case, Appellants challenge the accuracy of the 1889 Mack survey and base their request for a dependent resurvey on the lack of internal monuments locatable by a private surveyor in a preliminary review 1/ within township 37 and based upon claimed discrepancies on a comparison of a current topographical map of township 37 prepared by the

1/ As noted earlier in this Decision, Huddleston did not conduct a private survey and recommended against Appellant doing so because he urged that a private survey could be attacked if a subsequent resurvey located the original monuments and the private survey failed to locate the same monuments.

USGS and the field notes of the Mack survey of township 37. We find that Appellants have failed to meet the required burden of proof to establish the 1889 survey as grossly erroneous or fraudulent. In fact, Appellants do not base their conclusions on any subsequent survey of township 37, but rather on a preliminary review by Huddleston of a proposed drill site during which he was unable to locate internal monuments within township 37. In fact, Huddleston has objected to conducting a private survey on behalf of Paco, and thus there is no real evidence that available external monuments on the perimeter of township 37 could not be used to establish internal corners.

We next address Appellants' claim that the topography represented by the USGS topographic map of township 37 differs significantly from the Mack field notes and map and thus shows the survey to be grossly in error or fraudulent. We have examined such claims previously and held that reliance on the features depicted on such topographical maps "would fall far short of showing error in a BLM [survey]." Theodore J. Vickman, *supra*, at 322. As indicated earlier, the authority to conduct surveys and resurveys is vested solely in the discretion of the Secretary of the Interior. That authority has been specifically delegated to BLM. Volney Bursell, 130 IBLA 55 (1994).

The primary purpose of the topographic map is to provide a graphic representation of topographic features. Although the maps do make an effort to portray section lines, the location of these lines are only as reliable as the information available to USGS at the time the maps are prepared. Moreover, these maps have not been held out as official surveys of the public lands because they were not performed by or on behalf of BLM. Theodore J. Vickman, *supra*, at 322. In fact, USGS has prepared a small undated pamphlet entitled Topographic Maps which states, at page 19, that "[t]he lines shown on the map are not intended to serve as definitive evidence of land ownership or boundary locations." (Topographic Maps at 19.)

We next address Appellants' claims that previous resurveys in 1942 and 1958 of sections within adjacent township 36 show that the 1889 survey of township 37 was inaccurate. While we are provided evidence which establishes the resurveys of township 36 reestablished corners on the boundary line of township 37 with township 36 to the east, there is no showing that the prior resurveys within township 36 determined the 1889 survey with respect to township 37 to be erroneous, let alone grossly erroneous or fraudulent.

Appellants further claim that if they had commissioned a private survey as suggested by the Deputy State Director in his Decision, they would not be able to defend the results of this survey against a later official BLM resurvey. This Board has addressed this concern in First American Title Insurance Company v. BLM, 110 IBLA 25, 32 (1989), and cases there cited. In this case, however, the BLM Deputy State Director for Colorado has stated in his Decision, "[c]learly, a resurvey executed by a qualified private land surveyor using proper methods is binding upon the Government in this case." (Deputy State Director's Decision at 3.) The proper methods referred to by the Deputy State Director reflect reference to the

Manual of Instructions for the Survey of the Public Lands of the United States (1973) (Manual). This statement by the Deputy State Director was in an official written decision of the BLM upon which Appellants were entitled to rely. In fact, if BLM had subsequently failed to support the results of a resurvey conducted by a licensed Colorado surveyor on behalf of Appellants after advising Appellants that their private survey could be relied upon if it followed the Manual, Appellants would be able to assert equitable estoppel. The doctrine of equitable estoppel would apply where Appellants received official BLM advice considering a matter of importance in a written BLM Decision, where the matter was within the authority of that BLM official, where there was a subsequent showing that the advice was erroneous, and where Appellants had acted to their detriment on that erroneous advice. See Steven E. Cate, 97 IBLA 27, 32 (1987), and cases there cited.

[3, 4] Even if a resurvey were ordered in this case, however, Appellants are not entitled to a suspension of their leases beyond the 60 days originally granted by BLM. We first address Appellants' request for suspension under the force majeure provision within 43 C.F.R. § 3103.4-2. Under that provision, a suspension of operations only or a suspension of production only may be directed or consented to by the authorized officer in cases where the oil and gas lessee is prevented from operating on the lease or producing from the lease, despite the exercise of due care and diligence, by reason of matters beyond the reasonable control of the lessee. 43 C.F.R. § 3103.4-2(a). This provision authorizes suspension by reason of force majeure of "all operations and production." Id. Where there has been no commencement of operations and no production, as here, however, a lease may not be suspended under this provision by the existence of force majeure conditions. See, e.g., Alfred G. Hoyl, 123 IBLA 169, 188 (1992).

We next examine Appellants' claim that suspension of the term of the lease is warranted because it is in the interest of conservation. (SOR at 16.) Under section 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (1994), the Secretary of the Interior or his delegated representative has the authority to either direct or assent to a suspension of an oil and gas lease "in the interest of conservation," thus extending the term of the lease by adding thereto any period of suspension. 43 C.F.R. § 3103.4-2(b). Such relief is available only in order to "provide extraordinary relief when lessees are denied beneficial use of their leases." Solicitor's Opinion, Oil and Gas Lease Suspension, 92 I.D. 293, 298-99 (1985).

A suspension application may be considered only if it is properly filed with BLM before a lease ends. TNT Oil Co., 134 IBLA 201 203 (1995). The burden of showing entitlement to such relief rests with the lessee. Cf. 43 C.F.R. § 3103.4-2(a) ("Complete information showing the necessity of such relief shall be furnished"). The record shows there were suspension applications pending at the end of the terms of Appellants' two leases and that BLM granted a 60-day suspension in order to allow Appellants to secure a private survey, but denied an open-ended suspension and Appellants' request that the suspension extend until BLM complete a dependent resurvey. The question before us, therefore, is whether Appellants have

demonstrated sufficient reasons to require a dependent resurvey and an open-ended extension of the leases until it is completed. We find that for the reasons set forth herein, they have not.

The Board has construed section 39 of the Mineral Leasing Act to provide for suspension where, through some act or omission by a Federal agency, beneficial enjoyment of a lease has been frustrated. TNT Oil Co., supra, at 203; see Nedvak Oil & Exploration, 104 IBLA 133, 137 (1988). Such circumstances are not shown to be present here. Appellants had the opportunity to locate their well sites on their leaseholds. Having failed to establish fraud or gross error in the existing survey that might justify a BLM dependent resurvey, they were provided the opportunity to conduct a private survey, if desired, with the written assurance that the private survey would be respected by BLM if conducted in compliance with Manual requirements. A 60-day suspension of the end-date of the leases was provided to Appellants for the purpose of conducting the private survey. Appellants did not avail themselves of this opportunity. Under the circumstances, therefore, Appellants have failed to meet the "extraordinary" requirement set forth in section 39, or to establish any factual predicate to a claim that they have been denied the beneficial use of their leases.

While an oil and gas lease is a contract between the Secretary and the lessee, that relationship cannot obscure the fact that the Secretary's authority to engage in leasing is statutory and that the Department's actions are controlled by those statutes and implementing regulations. The Mineral Leasing Act, unlike the mining law, provides no right of access to minerals subject to its provisions. TNT Oil Co., supra, at 203. Nonetheless, Appellants argue that there should be an implied right to drill associated with Federal oil and gas leases under familiar tenets of traditional contract law designed to discourage lease forfeiture. They argue that without the suspension, the leases cannot be successfully operated under the terms provided therein. (SOR at 17.) This rubric does not apply in the case of Federal oil and gas leases, however, because they are

not subject to the familiar rule that forfeitures are viewed with disfavor and will be enforced only when circumstances require it. The courts have held that in conjunction with [Federal] oil and gas leases, forfeitures are favored by the law so that such leases are to be construed liberally in favor of the lessor and provisions for forfeiture strictly enforced.

KernCo Drilling Co., 71 IBLA 53, 58 (1983), and authorities there cited.

We therefore find that BLM properly denied Appellants' request for a dependent resurvey of township 37 and for suspension of the term of the subject leases. We find that BLM properly determined that without evidence of fraud or gross error, a dependent resurvey was not warranted, and, having found no legal grounds to warrant lease suspension so as to achieve an extension of the lease terms, BLM properly denied Appellants' request.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur.

John H. Kelly
Administrative Judge