INTERIOR BOARD OF LAND APPEALS

Merrion Oil and Gas Corp.

147 IBLA 258 (January 27, 1999)

Title page added by:
ibiadecisions.com

<u>Editor's note:</u> <u>Eratta:</u> The citation for <u>Assiniboine and Sioux Tribes</u> on p. 263 has been corrected to read 792 F.2d 782, and the first line of the quotation on that page has been changed to read "The Indian Mineral Leasing Act * * *."

MERRION OIL AND GAS CORP.

IBLA 97-98 Decided January 27, 1999

Appeal from a decision of the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, denying, in part, an appeal from a Minerals Management Service order requiring the operator to remit $10,645.44 in compensation for avoidably lost gas. MMS-90-0018-IND.

Affirmed as amended.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Royalties: Payments

A finding that a lessee under an oil and gas lease of tribal lands must pay for the full value of vented gas avoidably lost during the period from 1979 to 1982 will be affirmed even though the Department has retroactively applied subsequently adopted similar regulations for the benefit of the oil and gas lessees who had leased nontribal Federal lands. A policy change may not be retroactively applied in the presence of "countervailing regulations, public policy considerations, or intervening rights," and the Department cannot abrogate its fiduciary duty to apply the terms of a regulation applicable to lease of Tribal lands when doing so would compromise the rights of the tribal lessor.

2. Administrative Authority: Generally--Appeals: Jurisdiction--Board of Land Appeals--Judicial Review--Oil and Gas Leases: Royalties: Generally

A statute establishing time limitations for commencement of judicial actions for damages on behalf of the United States does not limit administrative proceedings within the Department of the Interior.

APPEARANCES: Tommy Roberts, Esq., Farmington, New Mexico, for Appellant Merrion Oil and Gas Corp.; Howard W. Chalker, Esq., Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Washington, D.C., for Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Merrion Oil and Gas Corporation (Merrion) has appealed from that portion of a July 1, 1996, decision of the Deputy Commissioner of Indian Affairs (Deputy Commissioner), Bureau of Indian Affairs, denying Merrion's appeal from an Order of the Office of State and Tribal Program Support, Minerals Management Service (MMS), requiring Merrion to remit $10,645.44 as compensation for avoidably lost gas vented without prior approval from Well No. 1-9 (Navajo Tribal Lands Oil and Gas Mining Lease Contract No. 14-20-603-385) during the period from September 1979 through May 1982.

On April 12, 1982, the Bureau of Land Management (BLM) directed Merrion to file evidence of approval to vent gas from Well No. 1-9, situated in sec. 9, T. 43 S., R. 21 E., Salt Lake Meridian, San Juan County, Utah. This well was operated under the provisions of an October 2, 1953, contract between the Navajo Tribal Council and Ohio Oil Company. The well was completed on December 24, 1956, and produced until it was plugged on January 3, 1983.

An audit of gas vented from wells on the lease was conducted by the Auditor General of the Navajo Nation. As a consequence, on December 12, 1986, MMS asked BLM to determine whether gas vented from that well was avoidably lost. In a letter dated March 16, 1987, BLM cited Merrion with failure to comply with its April 13, 1982, order and apprised Merrion of its recommendation to MMS that Merrion be assessed the full value of the gas avoidably lost during the period from September 1979 through May 1982. Using information obtained from Merrion's Monthly Reports of Operations for the well, BLM deemed the volume of avoidably lost gas to be 18,252 mcf.

The record shows that Merrion did not contest BLM's determination. The Auditor General of the Navajo Nation continued the review and reported to MMS that it had determined the full value of the avoidably lost gas to be $10,645.44. On December 1, 1989, MMS directed Merrion to pay $10,645.44 as compensation for gas vented from the well without approval. Merrion appealed the MMS decision to the Commissioner of Indian Affairs, pursuant to 30 C.F.R. Part 290 (1988).

In its appeal, Merrion advanced the following three arguments for the Commissioner's consideration: (1) compensation should be based on the royalty value of the avoidably lost gas, rather than the full value; (2) the value of the gas should have been determined in accordance with Merrion's arm's-length gas sales contracts, rather than the National Gas Policy Act prices for gas not dedicated to arm's-length contracts; and (3) MMS was precluded by statute of limitations from collecting royalties for an event occurring more than 6 years prior to the date of the MMS demand.

In the July 1, 1996, decision the Deputy Commissioner denied Merrion's first and third arguments. In rejecting Merrion's first argument, the Deputy Commissioner concluded that when the Department amended its policy regarding compensation for avoidably lost gas from the full value of the

lost gas to the royalty value of the lost gas (and favorably applying those policies to existing lease arrangements), the Department's policy change did not apply to existing leases on Indian lands because of intervening Indian rights and the Government's trust responsibility. 1/ (Dec. at 3.) In denying the third challenge, the Deputy Commissioner opined that "[t]his is an administrative appeal rather than a court action, and the statutory bar is not applicable." (Dec. at 5.)

In response to Merrion's second argument, the Commissioner remanded the case to MMS, directing MMS to recalculate the amount owing, giving proper deference to Merrion's contract sales. As a result the royalty deemed owing was reduced to $9,494.96. (Dec. at 4.)

In its statement of reasons (SOR) in support of the appeal to this Board, Merrion, for the most part, recounts the supporting rationale submitted to the Deputy Commissioner, "adopt[ing] by reference as though fully set forth herein the arguments it submitted in conjunction with its appeal of the Original Decision." (SOR at 3 and 5.) This Board has repeatedly stated that, on appeal to this Board, an appellant is required to point out affirmatively why the decision under appeal is in error. Oregon Natural Resources Council, 139 IBLA 16, 20 (1997); Oregon Natural Resources Council, 122 IBLA 65, 67 (1992). This requirement is not satisfied when an appellant "has merely reiterated the arguments considered by the [decisionmaker below], as if there were no decision * * * addressing these points." Shell Offshore, Inc., 116 IBLA 246, 250 (1990). While Merrion adds nothing to its assertion that MMS is barred from collecting the compensation owed, it does contend that MMS may not conclude without explanation that intervening rights and trust responsibility dictate compensation in the amount of the full value of the gas lost, and claims that the Indian interests involved would better justify compensation based on the royalty value.

[1] At the center of this debate are two Board decisions, Mobil Exploration & Producing U.S., 119 IBLA 76, 98 I.D. 207 (1991), and Ladd Petroleum Corp., 107 IBLA 5 (1989). In those decisions, we held that newly adopted regulations changing the basis for the calculation of the amount due as compensation for avoidably lost gas to the royalty value rather than gross value should be applied retroactively in the absence of countervailing public policy reasons or intervening rights. The Deputy

---

1/ The regulation applicable to avoidably lost gas was amended after the gas had been vented from Well No. 1-9. MMS and this Board need not address whether the Department may prospectively apply its oil and gas regulations to tribal leases entered into before the regulations are adopted. The issue in this case is when can the Department retroactively apply the policy reflected in a regulation to the evaluation of gas produced before the regulation was adopted. The Deputy Commissioner decision on appeal and this decision should not be construed as prohibiting application of a regulation to an oil and gas lease of tribal lands entered into before the regulation was adopted, because that matter is not before us. To the extent that the decision below can be so construed, it is hereby amended.

Commissioner cited these cases to acknowledge that the Department had revised its policy regarding how to determine the amount due for avoidably lost gas and then distinguished those cases from this case, stating that the cited cases involved no intervening rights. (Dec. at 3.) Merrion asserts that those cases are controlling because there are no public policy reasons or intervening rights present in this case. We disagree.

To better understand the issue before us, we turn our attention to the explanation in Mobil Exploration, supra at 78-79, 98 I.D. at 208-209:

> The longstanding practice of assessing compensation that equals the full value of the avoidably lost gas is clearly stated in the Mineral Leasing Act of 1920, as amended in 1931, Section 1(h). Apparently, at that time, and in an attempt to discourage waste, the Department deemed it necessary to assess full value compensation for avoidably lost gas. The fact that the percentage value due the government exceeds the royalty rate may be construed as a "penalty." As oil and gas prices began to rise in the late 70's and early 80's, the Department concluded that assessing only the royalty value for avoidably lost gas would be a sufficient deterrent, in most cases, to insure that an operator would not waste gas that is economically feasible to market.
>
> (Dec. at 3.)
>
> Pertinently, 43 CFR 3162.7-1(d) provides that one in the position of Mobil "shall be liable for royalty payments on * * * gas lost or wasted from a lease." BLM argues that this regulation, however, may not be applied retroactively, because to do so would disparage other provisions of the Mineral Leasing Act not repealed by enactment of the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701-1757 (1988), the statute implemented by 43 CFR 3162.7-1(d).

See also Maxus Exploration Co., 140 IBLA 124 (1997). In the case now before us, the comparable regulation, applicable to oil and gas leases on tribal lands when the gas was improperly vented was 30 C.F.R. § 221.35 (1983). 2/ Merrion was required to prevent waste and, if it failed to do so, it would be required to pay the lessor, the Navajo Nation, the full value of the gas wasted. The policy espoused in § 221.35 was reconsidered in general by the Department in 1984, and the controlling regulation was

---

2/ 30 C.F.R. § 221.35 (1982): "The lessee is obligated to prevent the waste of oil or gas and to avoid physical waste of gas the lessee shall consume it beneficially or market it or return it to the productive formation. If waste of gas occurs the lessee shall pay the lessor the full value of all gas wasted * * *."

modified to provide that the royalty amount, and not full, value would be used as the bass for compensation for avoidably lost gas. 3/ Continuing with our look at Mobil, we observe that the Board considered when the regulation codifying the policy change may be applied retroactively to existing leases:

> [S]imilar arguments were rejected by this Board in Conoco, 115 IBLA 105 (1990), where it was urged that retroactive application of a rule more generous to a Federal lessee than the rule it replaced would be in derogation of past policy in effect before the rule change. Rejecting this argument and a parallel contention that retroactive application of the new rule would overrule past decisions of the Department that implemented the prior rule, we found that "the Department may, in the absence of intervening rights of others or prejudice to the interests of the United States, apply the amendment to pending cases." Id. at 106. Insofar as the argument that to do so would derogate the effect of prior law, we reasoned that "[i]t [the prior rule] has now been amended; thus, the law has changed. The only question is whether [the appellant] should have the benefit of the change. * * * there is ample authority for providing an affected party with the benefits of a regulatory change." Id. at 107 n.3.
>
> We also gave retroactive effect to policy changes in the administration of oil and gas royalty payments involving vented gas in Ladd Petroleum Corp., 107 IBLA 5 (1989). In that case, compensation for avoidably lost gas was at issue. Setting aside the BLM decision finding that payment was due the United States Government as described by NTL-4A Part I, we ordered BLM to reconsider whether the gas had been avoidably lost in light of the fact that Departmental policy had changed. We explained that, while the new policy had not been in effect when the decision under review had issued, the regulatory change made necessary a reconsideration of the question of payment because the newly promulgated rules
>
>> reflect the present policy of BLM concerning the proper application of NTL-4A and the regulations on which it is based to make determinations of avoidably lost gas. In the past, this Board has applied an amended version of a regulation to a pending matter if to do so would benefit the affected party, and if there were no

---

3/ The replacement regulation, 43 C.F.R. § 3162.7-1(d), reads: "The operator shall conduct operations in such a manner as to prevent avoidable loss of oil and gas. A [sic] operator shall be liable for royalty payments on oil or gas lost or wasted from a lease site * * *."

> countervailing public policy reasons or intervening rights. James E. Strong, 45 IBLA 386 (1980). The rationale for such an action is equally appropriate here where BLM has indicated a change in its policy regarding the application of NTL-4A concerning avoidably lost gas which would benefit appellants, and there are no countervailing regulations, public policy considerations, or intervening rights. See Somont Oil Co., Inc., 91 IBLA 137 (1986).

119 IBLA at 79-80, 98 I.D. at 209. Thus, in Mobil we made it abundantly clear that the 1984 policy change may not be retroactively applied if "countervailing regulations, public policy considerations, or intervening rights" were found to exist.

The crux of this appeal is that Merrion's assertion that those conditions do not exist, despite the differences between the Federal lessor relationship found in Mobil and Ladd, and the tribal lessor context controlling this case. However, the court in Assiniboine and Sioux Tribes v. Board of Oil and Gas Conservation, 792 F.2d 782, 794 (9th Cir. 1986), has clearly defined the Department's obligations in this matter:

> The Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396a-396g, is a detailed and comprehensive act that imposes extensive responsibilities on the government in tribal mineral leasing matters for the benefit of Indians. See Blackfeet Tribe of Indians v. Montana, 729 F.2d 1192, 1199 & n.18 (9th Cir. 1984) (en banc), aff'd, [471 U.S. 759], 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985); Jicarilla Apache Tribe v. Supron Energy Corp., 728 F.2d 1555, 1564-65 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), dissenting opinion adopted as the majority opinion as modified, 782 F.2d 855 (10th Cir. 1986) (en banc). Taking into account these specific, congressionally-imposed duties, and the long-standing, general trust relationship between the government and the Indians, we conclude that a fiduciary relationship exists in the management of tribal mineral resources. See Jicarilla, 728 F.2d at 1563-65 (statutes and regulations contain such explicit duties that it is clear Congress intended Secretary to act as trustee in managing leases for the Indians); cf. United States v. Mitchell, 463 U.S. 206, 224-26, 103 S.Ct. 2961, 2971-73, 77 L.Ed.2d 580 (1983)(statutes establish fiduciary duty of the management of Indian timber resources.)
>
> The United States, as the Tribes's fiduciary, is held to strict standards and is required to exercise the greatest care in administering its trust obligations. See Mitchell, 463 U.S. at 225-28, 103 S.Ct. at 2972-74, United States v. Mason, 412 U.S.

> 391, 398, 93 S.Ct. 2202, 2207, 37 L.Ed.2d 22 (1973); Nance, 645 F.2d at 710; F. Cohen, Handbook of Federal Indian Law 225-26 (1982 ed.).

(Headnotes and footnotes omitted.) Thus, it is clear that by statute and regulation the Department is obligated to recognize the Indian lessor's rights in determining whether to apply the policy change in a manner which would alter the amount due as compensation for avoidably lost gas. 4/ In this instance, the Navajo Nation actively participated in the determination that gas had been vented from the well, and specifically informed MMS of the compensation it deemed appropriate. That fact was noted by the Deputy Commissioner in rendering the appealed decision. (Dec. at 4.) As Merrion has not shown that the Department has therefore acted contrary to its trust obligations in this manner, we must conclude that MMS and the Deputy Commissioner properly determined the compensation to be awarded under the provisions of the lease is the full value of the avoidably lost gas.

[2] Addressing Merrion's contention that the 6-year statute of limitations at 28 U.S.C. § 2415 (1994) bars these administrative proceedings, we note that the Board has concluded on several occasions that 28 U.S.C. § 2415, which governs the time for commencing judicial actions brought by the United States, is strictly applicable to judicial actions and is not applicable to the administrative process. See, e.g., Texaco Exploration & Production, Inc., 140 IBLA 282 (1997) (royalty payments on gas produced under Jicarilla tribal lease); BHP Petroleum (Americas) Inc., 124 IBLA 185 (1992) (royalty payments on oil and gas produced under lease of Indian lands); Anadarko Petroleum Corp., 122 IBLA 141 (1992) (royalty payments on oil produced under Navajo tribal leases). By its own terms, § 2415 applies only to judicial actions initiated to recover money damages; it is not applicable to the administrative proceedings undertaken to determine the underlying liability for such payments. Texaco Exploration, 140 IBLA at 284-285, and cases cited. Thus, we have observed that although MMS may be prevented by the statute from obtaining judicial relief on a claim for royalties when the obligation to pay arose more than 6 years prior to the filing of the claim with a court, an administrative claim for royalties is not precluded by § 2415 even when more than 6 years have elapsed since the obligation to pay arose. Id. at 285. In addition, this Board has no authority to decide whether a statute of limitation would bar a judicial suit. That determination must be made by the court. Id.

4/ One of the purposes of FOGRMA is to fulfill the trust responsibility of the United States for the administration of Indian oil and gas resources. Mesa Operating Limited Partnership, 125 IBLA 28 (1992). Congress directed therein that the Secretary "aggressively carry out his trust responsibility in the administration of Indian oil and gas." 30 U.S.C. §§ 1701(a)(4), (b)(4) (1994).

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 as amended.

R.W. Mullen
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge