

INTERIOR BOARD OF LAND APPEALS

Bowers Oil and Gas, Inc.

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BOWERS OIL AND GAS, INC.

IBLA 97-514

Decided February 24, 2000

Appeal from a decision of the Utah State Office, Bureau of Land Management, disapproving assignment of record title interest and rescinding prior approval of assignment of record title interest in an onshore Federal oil and gas lease. U-40751.

Affirmed.

1. Rules of Practice: Appeals: Dismissal

A motion to dismiss an appeal for failure to timely serve the Solicitor is properly denied in the absence of any showing of prejudice.

2. Oil and Gas Leases: Assignments and Transfers

BLM properly disapproved assignment of record title interest in oil and gas lease because the applicable regulation, 43 C.F.R. § 3106.1(a), expressly requires that assignments of separate zones or deposits within an onshore oil and gas lease be disapproved.

3. Oil and Gas Leases: Assignments and Transfers

BLM may properly rescind its prior improper approval of an assignment of record title interest in an onshore oil and gas lease because any oil and gas lease, or interest therein, issued or approved contrary to law or regulation by subordinates of the Secretary does not bind the Secretary and is voidable.

4. Appeals: Generally--Rules of Practice: Appeals: Generally

The Board will properly decline to rule on a request for an advisory opinion.

APPEARANCES: James E. Bowers, Bowers Oil & Gas, Inc., for appellant; David K. Grayson, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Bowers Oil and Gas, Inc. (Bowers) appeals from a July 14, 1997, decision of the Bureau of Land Management (BLM), Utah State Office, denying approval of, and rescinding its prior approval of, record title assignments in onshore oil and gas lease No. U-40751. BLM denied and rescinded these approvals because assignments of separate zones or deposits within a single lease are not allowed by agency regulation, 43 C.F.R. § 3106.1(a). On July 28, 1997, Bowers sent a letter which the company stated was "written as an appeal," and which states the company's views about the decision. No other statement of reasons (SOR) was filed.

On September 26, 1997, BLM submitted an Answer seeking dismissal because of Bowers' failure to serve the Office of the Solicitor. Regulations governing appeals to this Board direct appellants to serve the Office of the Solicitor within 15 days of filing the notice of appeal. 43 C.F.R. § 4.413(a). BLM also requested dismissal for failure to file an SOR. The applicable regulation, 43 C.F.R. § 4.412, states that "[i]f the notice of appeal did not include a statement of reasons for the appeal, the appellant shall file such a statement with the Board * * * within 30 days after the notice of appeal was filed."

[1] BLM's motion to dismiss for failure to serve the Solicitor is denied because BLM presents no case that the Solicitor was prejudiced in any way by this failure. George Gilchrist, 117 IBLA 142, 144 (1990) (dismissal for failure to timely serve Solicitor is discretionary and properly denied without a showing of prejudice). BLM's motion to dismiss for failure to file an SOR is denied because we construe Bowers' timely notice of appeal in its July 28, 1997, letter as an effort to file a contemporaneous SOR.

The record discloses that, effective October 1, 1990, BLM approved an assignment to Bowers of a 6.667-percent record title interest in that part of oil and gas lease No. U-40751 located in sec. 33 of T. 37 S., R. 24 E., Salt Lake Meridian. On August 31, 1991, Bowers filed with BLM an assignment of this interest in equal shares to Energy Partners Nominee Company (EP), and DEI Enterprises, Inc. (DEI). On its face, however, the assignment was limited to the transferor's interest in a "Cave Canyon Waterflood Unit, dated May 25, 1989." The record shows that BLM approved the assignment effective September 1, 1991.

On June 30, 1997, Bowers assigned a 6.667-percent record title interest to a third assignee, DW Petroleum (DW), purportedly limited to all portions of Bowers' interest which were not included in the Cave Canyon Waterflood Unit. The lease file for lease No. U-40751 does not contain any indication that the lease was ever unitized into a "Cave Canyon Waterflood

Unit." Nor is there any indication that the lands or formations not committed to such unit were ever segregated into a different lease. See generally, Buttes Gas and Oil Co., 13 IBLA 125, 128-29 (1973).

BLM is obligated by the terms of the Mineral Leasing Act, as amended, 30 U.S.C. §§ 187 and 187a (1994), to approve assignments of record title interests in Federal leases. The 1997 assignment appeared to BLM to be an effort to "assign the same interest twice." (Decision at 2.) Thus, the 1997 assignment prompted BLM to take a second look at the one approved in 1991. Based on this review, BLM rescinded the prior 1991 approval and disapproved the 1997 assignment because Bowers had "attempt[ed] to split record title interest between separate zones which is not allowed by regulation [43 C.F.R. § 3106.1(a)]." (Decision at 2.) BLM also pointed out that the Cave Canyon Waterflood Unit had never been approved, and stated that a lease interest cannot be split from the unit interest in any event. Id.

Bowers appeals the decision both as it disapproves the 1997 assignment and also as it rescinds the 1991 assignment approval. Bowers claims that BLM's discussion is based on a misunderstanding of the

facts, discussions, and conclusion of the situation in 1991 * * * [which are that Bowers] obtained an interest in a well, the Cave Canyon #2-33. The well produced from the Desert Creek Formation and was (and is) operated by Yates * * * [T]he section in which this well is located * * * is located within the Cave Canyon Waterflood Unit, which produces from the Ismay Formation. Because of a title problem [Bowers] was unable to receive payment for production within the Unit, a problem DEI and EP were able to remedy by taking the interest from [Bowers]. In essence we were merely segregating the ownership in the two zones, a situation that is not uncommon.

(SOR at 1-2 (emphasis added).) Other comments reflect less clarity about the facts; Bowers states that "[o]ur records do not contain the notes made during the preparation of the Assignment, but I assume all information on hand at that time and/or discussion with the affected parties led us to write the Assignment as we did." (SOR at 1.) Bowers claims further that the 1991 approval "was relied on by all the parties." Id.

[2] We affirm BLM's decision on this record. It appears that Bowers tried to assign a "non-unit" record title interest to DW, having previously assigned whatever portion of the record title interest that was purportedly unitized to DEI and EP. Notwithstanding Bowers' explanation of the "facts," this attempt to separate the lease interest into zones via assignment must be disapproved, according to BLM regulations applicable to onshore oil and gas leasing on Federal lands at 43 C.F.R. Part 3100. With respect to transfers of lease interests, the relevant regulation states that an "assignment of a separate zone or deposit, or of part of a legal subdivision, shall be disapproved." 43 C.F.R. § 3106.1(a).

Bowers does not argue that BLM's construction of this regulation is wrong or inapplicable. Rather, Bowers explains that its attempt to split its lease interest into zones was deliberate. (SOR at 2.) Bowers does not appear to understand that the cited practice is prohibited by the regulation cited by BLM in its decision. The Mineral Leasing Act, 30 U.S.C. § 187a (1994), gives the Secretary the discretionary authority to disapprove transfers of "[a] separate zone or deposit under any lease." BLM exercised that discretion by prohibiting such transfers by rule; that rule has been in place since 1988. Thus, while Bowers may believe the practice to be "common," it is not allowed for Federal onshore oil and gas leases, and was not allowed at the time Bowers attempted to split its lease interest into zones in 1991.

To the extent Bowers' appeal is premised on a notion that BLM's understanding of the facts was incorrect, we note that the record supports BLM's view of the facts relevant here. Bowers claims that it had an "interest in a well, the Cave Canyon #2-33." (SOR at 1.) Yet, the record shows that the 6.667-percent interest Bowers received from TOC Acquisition Corporation (TOC) in 1990 was a record title interest in Federal oil and gas lease No. U-40751, covering all of sec. 33, T. 37 S., R. 24 E., Salt Lake Meridian. (Assignment of record title interest from TOC to Bowers Oil and Gas, Inc., approved Oct. 1, 1990.) Likewise, the record title interest conveyed to Bowers by TOC, was received by TOC by assignment approved April 1, 1989. It is this lease interest – not an interest in the Cave Canyon #2-33 well – which Bowers attempted to convey in assignment documents the company presented to BLM for approval.

Further, the nature of its lease interest should have been abundantly clear to Bowers in 1991. The record shows that, having obtained this record title interest from TOC, Bowers attempted in 1991 to convey it to DEI and EP as an "operating rights" transfer. BLM disapproved this effort. By letter to DEI dated July 10, 1991, BLM stated that Bowers' effort to assign its interest to DEI and EP

cannot be approved for the following reason: Bowers Oil and Gas, Inc. holds no operating rights in the above lease. Bowers was assigned record title interest in the pertinent lands effective October 1, 1990. But the approval of that assignment conveyed no operating rights, since operating rights were severed from record title interest in lease U-40751 as of April 1, 1987.

The record shows the assignment document was "returned unapproved 7/10/91. Transferor holds no operating rights interest in lease." (Unapproved assignment document, May 3, 1991.)

Subsequently, in August 1991, Bowers corrected the error and executed new assignment documents assigning record title interest to DEI and EP. It was this assignment, purportedly limited to a "unit" interest, that was

approved in 1991. Likewise, it was this same 6.667-percent record title interest, limited to a "non-unit" portion, which was the subject of the 1997 assignment.

Thus, whether or not the facts as articulated by Bowers in its SOR are true, they are issues that must be resolved among private parties. ^{1/} But Bowers' statement of facts relating to an interest in the Cave Canyon #2-33 well has no bearing on the lease interest Bowers obtained and attempted to assign, subject to BLM approval. That interest is the 6.667-percent record title interest in lease No. U-40751 within sec. 33, T. 37 S., R. 24 E., Salt Lake Meridian. With respect to that interest, BLM is bound by its regulations to disapprove an effort to segregate the lease interest in zones. BLM properly construed the regulation, as well as the nature of the interest being transferred.

[3] Bowers expresses a concern that the company and others had already relied on the 1991 approval. To the extent this comment reflects a separate challenge to BLM's rescission of the 1991 assignment approval to DEI and EP, Bowers' reliance does not justify this Board's reinstating an approval that was incorrectly given. Department regulations expressly provide that the United States is not bound by the acts of its employees when they "cause to be done what the law does not sanction or permit." 43 C.F.R. § 1810.3(b).

More specifically, the Secretary has the authority to cancel any oil and gas lease issued contrary to law or regulation because of the inadvertence of his subordinates. Boesche v. Udall, 373 U.S. 472 (1963); High Plains Petroleum Corp., 125 IBLA 24, 26 (1992); Clayton W. Williams, Jr., 103 IBLA 192, 202, 95 I.D. 102, 107 (1988). The Board has held that where a BLM officer acts beyond the scope of his authority in issuing an oil and gas lease, such action is "voidable." Beverly M. Harris, 78 IBLA 251 (1984); United States v. Alexander, 41 IBLA 1 (1979), aff'd, Alexander v. Andrus, No. 79-603-B (D.N.M. July 7, 1980); Nola Grace Ptasynski (On Court Remand), 28 IBLA 256 (1976), aff'd, Ptasynski v. Hathaway, Civ. No. 75-282-M (D.N.M. May 5, 1977). This logic extends to portions of lease interests as well. BLM may likewise rescind its approval of an assignment in cases where it had no authority for such approval. In this case, BLM had no authority to approve the assignment because the applicable regulation, 43 C.F.R. § 3106.1(a), expressly requires that an assignment of a separate zone or deposit be disapproved.

^{1/} Bowers states that sec. 33 is "located within the Cave Canyon Waterflood Unit," and describes separate formations from which the well and unit purportedly produce. (SOR at 2.) As noted above, the record contains no indication that lease No. U-40751 is the subject of an approved unit agreement.

We note that, once BLM properly disapproved the 1997 assignment, the only proper relief was to rescind the 1991 approval. Given that the regulation prohibits a record title holder from segregating its lease interests into zones for assignment, neither BLM nor this Board can choose an assignment that Bowers would have made had it followed the regulation.

Accordingly, we affirm BLM's decision to rescind the prior approval of the 1991 assignment of a "unit" interest to EP and DEI and its decision to disapprove the 1997 assignment of a "non-unit" interest to DW. As the decision itself notes, Bowers is free to assign its record title interest consistent with BLM regulations. (Decision at 2.)

[4] Bowers also challenges the following statement on page 3 of BLM's decision: "Since this has made a messier situation of an already messy situation in the operating rights interest abstraction worksheet, operating rights interest[s] will no longer be abstracted in this lease." Bowers construes this statement as a declaration of intent by BLM "to punish us by not allowing us to transfer operating rights." (SOR at 1.)

We do not construe BLM's statement as a disavowal of its own obligation to approve or disapprove operating rights transfers, under 43 C.F.R. §§ 3106.1(a) and 3106.7-2. BLM's statement regarding "abstracting" contains no prohibition against transfers of operating rights by Bowers or any other record title or operating rights holder. In fact, we note that instead of prohibiting operating rights transfers, BLM placed a "Notice" with respect to operating rights on a July 14, 1997, abstract, stating that the assignee and assignor bear all responsibility of ensuring the "accuracy of the land description, depths assigned, and percentages of interests assigned or retained."

Moreover, the statement derives from the fact that in its July 14, 1997, decision, BLM rescinded approvals of a series of three collateral assignments which stemmed from EP's assignment of its 3.3335-percent interest obtained from Bowers in 1991. (Decision at 2.) As BLM noted, the rescission of its prior approvals of these assignments was a "repercussion" of its decision with respect to Bowers. *Id.* While BLM does not mention this in the decision, these three approvals contained an error independent of BLM's error in approving the 1991 assignment. On July 11, 1995, BLM approved EP's transfer of its 3.3335-percent interest to Comdisco, Inc., in which EP purported to transfer "operating rights" – rights which it did not own, having received record title interest from Bowers. This approval, improperly granted, generated further improper transfers of nonexistent operating rights, from Comdisco, Inc., to Ciniza Production Company, and from Ciniza to Central Resources, Inc.

Thus, while at first glance BLM's commentary on the operating rights issue appears to come out of nowhere into a record title interest case and to be directed at Bowers, it actually stems from these improper subsequent approvals. The "messy situation" to which BLM refers derives from BLM's approval of BP's transfer of operating rights which it did not apparently own. Seen in this context, Bowers' concerns are unwarranted.

In any event, no operating rights transfer is at issue in Bowers' appeal. Bowers does not purport to represent the other parties to the three transactions stemming from BP's purported transfer of operating rights, nor do those parties appeal this decision. Bowers' stated concerns regarding BLM's treatment of the company's future efforts to transfer operating rights are entirely speculative both because no such transaction is at issue and also because the record does not indicate that Bowers owns any operating rights with respect to this lease. Where an appeal to the Board presents, in essence, a request for an advisory opinion, we properly decline to rule on that issue. See Oregon Cedar Products Co., 119 IBLA 89, 92 (1991); see also Jesse H. Johnson, 112 IBLA 369, 372 (1990) (appeal seeking advisory opinion properly dismissed).

Thus, we do not issue any decision with respect to this part of Bowers' appeal. However, nothing in this order should be construed to endorse or ratify BLM's statement regarding its abstract or its refusal to "abstract operating rights."

Finally, we note that Bowers did not challenge BLM's disapproval of Bowers' efforts to transfer "operating rights" in 1991. Therefore, that issue is not directly before us. However, the record contains some discrepancies on this point that BLM must resolve prior to proceeding to approve or disapprove any further transfers of interests in lease No. U-40751, to the extent they lie within sec. 33 of T. 37 S., R. 24 E., Salt Lake Meridian.

The record shows that in its decision of July 10, 1991, disapproving Bowers' attempted transfer of operating rights, BLM stated that Bowers owned no operating rights "since operating rights were severed from record title interest in lease U-40751 as of April 1, 1987." Indeed, the record shows that as of April 1, 1987, BLM had approved an assignment separating the operating rights from the record title interest in a transfer from Joan Chorney to Yates Petroleum Corporation.

However, this transfer between Chorney and Yates does not appear to relate to the lease interest at issue in this case. Moreover, as of that time, the record shows that TXP Operating Company (TXP) owned the 6.667-percent share of both the record title interest and the operating rights that ultimately made its way to Bowers via TOC. Therefore, as of April 1, 1987, the operating rights and record title interests for the lease percentage at issue here were not split.

The July 10, 1991, decision declaring Bowers to have no operating rights interest in lease No. U-40751 went on to state: "Severance of operating rights from record title interest in a lease occurs when a record title holder conveys operating rights to a transferee without assigning record title interest. TOC Acquisition Corp. still holds the pertinent operating rights interest in lease U-40751." However, if it is true that "severance of operating rights from record title interest" by one record title holder requires all other parties who hold record title in the lease

to convey operating rights separately from record title interest, this record does not disclose when this happened for the 6.667-percent interest at issue. The transfer documents from TXP, which held a 6.667-percent share of both record title and the operating rights, to TOC did not reflect such a separate transfer. Rather, the record contains only a single transfer from TXP to TOC of "record title" dated April 1, 1989. Likewise, the transfer from TOC to Bowers is a transfer of "record title" on October 1, 1990.

BLM's conclusion that TOC retained the operating rights, and necessarily that TXP did not, presumes the existence of some document separately transferring the operating rights to TOC. But we do not find such a transfer with respect to the subject 6.667-percent interest in the record that was sent to us. Because we do not have sufficient information in the record, and because the issue is not directly before us, we cannot and do not resolve this question. However, BLM should return to this record and ensure that all of the transfers are physically in the record, that its conclusions in this "messy situation" are correct, and advise the interest holders of any impacts of those conclusions, irrespective of its statement that it will not "abstract operating rights."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's Motion to Dismiss is denied and the July 14, 1997, decision of the BLM Utah State Office is affirmed, subject to a remand to BLM to clarify all record issues.

Lisa Hemmer
Administrative Judge

I concur:

James L. Burski
Administrative Judge