

**STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION**

**IN THE MATTER OF THE APPLICATION OF J. C. WELL
SERVICE, INC. FOR AN ORDER RESCINDING APPROVAL
OF CHANGE OF OPERATOR, SAN JUAN COUNTY, NEW MEXICO**

Case No. 13237

APPLICANT'S HEARING MEMORANDUM

J. C. WELL SERVICE, INC., requests the Division enter its order rescinding the approvals of C-104A Change of Operator forms issued by the District III office for those wells described in the Application located in San Juan County, New Mexico.

BACKGROUND

Applicant acquired title to the wells pursuant to that Assignment, Bill of Sale and Conveyance executed by Action Oil Company, Inc. on February 11, 1998 (effective December 31, 1997) recorded with the San Juan County Clerk's office on March 17, 1998 at Book 1255/Page 774), and pursuant to those Bureau of Indian Affairs Form 5-1543e Assignments of Mining Leases executed by Action Oil Company, Inc. in favor of R&J Enterprises (Mr. John Cunningham). Mr. Cunningham operates the leases and wells through his operating company, J. C. Well Service, Inc.. Pursuant to the Assignment, Bill of Sale and Conveyance, Applicant became owner of the Navajo and Ute Mountain Ute tribal oil and gas leases described in the Application and upon which the wells are located.

Applicant took possession of the leases in February of 1998 and it is undisputed that Applicant has operated the wells located thereon at all pertinent times since.

On approximately June 3, 1998, Applicant filed C-104's with the Division to reflect the Change of Operator from Action Oil Company, Inc. to J. C. Well Service, Inc. The Operator Certificate of Compliance on the forms was executed by John Cunningham d/b/a J. C. Well Service, and was also acknowledged by Gene Burson, president of Action Oil Company, Inc. The Division approved the Change of Operator on June 3, 1998.

Applicant has subsequently assigned its interests in the Ute Mountain Ute lease and wells to Biya Operators, Inc. and it is anticipated that new C-104A's will soon be submitted to the District III office for approval.

Following the transfer of the leases to the Applicant, Mr. Burson obtained a divorce from Carmen Wood and pursuant to a Marital Settlement Agreement entered into in 2000, Mr. Burson conveyed Action Oil, Inc. to Ms. Wood. Under the Marital Settlement Agreement, it was agreed that Action Oil, Inc. had "*a net value of zero*". (Exhibit A, attached.) Subsequently, in 2002, Ms. Wood sued the Applicant. In the lawsuit¹, Wood sought to rescind a 1997 agreement and the corresponding assignments between Action Oil Company, Inc. and the Applicant for the sale and assignment of the tribal oil and gas leases. Ms. Wood asserted, incorrectly, that rescission was warranted because Applicant has not furnished a performance bond. She also asserted the assignments should be rescinded because the Bureau of Indian Affairs has not yet issued its approval of the transfer.

In 2003, during the pendency of the district court litigation, it was discovered that Ms. Wood had filed C-104A's requesting a change of operator from J. C. Well Service, Inc. to Action Oil Co., Inc. for all of the wells referenced in the Application, above. The C-104A's were filed

¹ *Carmen Wood and Action Oil Company, Inc. v. Johnny Cunningham, et al.* 11th Judicial District Court No. CV 2002-961-1

with the Division's District III office on July 14, 2003 and that the change of operator to Action Oil was approved that same day.

That section on each of the forms for completion and signature by the previous operator was not completed and the term "*Not Available*" was inserted by Ms. Wood instead. J. C. Well Service, Inc.'s approval for the change was neither sought nor authorized and the C-104A's were submitted to the Division without the Applicant's knowledge. Clearly, Ms. Wood was motivated to file the C-104A's in a misguided attempt to enhance her litigation position.

Recently, on March 9, 2004, the 11th Judicial District Court rejected the claims and arguments of Ms. Wood, dismissing her Complaint with prejudice. Despite the dismissal of all her claims, Ms. Wood continues to argue in this proceeding that the C-104A's in Action Oil's name should not be disapproved because the BIA has not yet finished processing the assignments for the Navajo and Ute Mountain Ute leases. Ms. Wood contends that because the BIA's lease assignment approvals remain pending, Applicant has no rights in the leases and should not be designated operator. This is the very same dead-horse argument that was rejected by the District Court last month.

UNDISPUTED FACTS

In the District Court litigation, the following matters of fact were undisputed or were otherwise uncontroverted:

- (a) Action Oil Company, Inc. had been ordered by the Bureau of Indian Affairs to plug and abandon a number of wells located on the tribal leases.
- (b) On December 31, 1997, Action Oil and Cunningham executed their Purchase and Sale Agreement ("Agreement").

(c) Action Oil Company executed that Assignment, Bill of Sale and Conveyance on February 11, 1998 (effective December 31, 1997), which was recorded with the San Juan County Clerk's office on March 17, 1998, at Book 1255/Page 774. Also on February 11, 1998, Action Oil executed the Bureau of Indian Affairs Assignment of Mining Lease forms for the three tribal leases.

(d) Section 5 of the Agreement is entitled "Consideration", but contains no requirement that Cunningham furnish bonds. The obligation to furnish bonds is stated in a separate section of the Agreement, Section 6.

(e) Section 6 of the Agreement provides, *inter alia*, as follows: "Buyer shall comply with all bonding requirements imposed by applicable state or federal laws and regulations. Until such time as Buyer secures the required bonding, Seller shall maintain in full force and effect its current bonds." No time for the performance of these obligations is stated in the Agreement.

(f) Cunningham took possession of the leases and wells in February, 1998, plugged and abandoned a number of the wells and has operated the remaining wells ever since. Subsequently, Cunningham assigned the lease on the Ute Mountain Ute lands to Richard and Debbie Baldwin, d/b/a Biya Operators, Inc., who now operate the wells located on that lease acreage.

(g) On approximately February 11, 1998, Cunningham delivered the assignments for the Navajo leases to the BIA for its approval. The assignment for the Ute Mountain Ute lease was subsequently submitted to the BIA's Ute Mountain Ute area office, but the exact date of the submittal is uncertain.

(h) In the case of any assignment of an oil and gas lease on Indian lands, the Bureau of Indian Affairs determines the amount of bond in its discretion that will be required of an assignee. *See* 43 CFR §§ 3106.6-1, 3104.5, and 25 CFR § 225.30.

(i) On December 19, 1999, Cunningham purchased a certificate of deposit for \$15,000.00 for the bond on the Navajo leases, assuming such would be the amount required for the bond.

(j) On April 11, 2003, assuming such an amount would be sufficient, Cunningham obtained a \$75,000.00 irrevocable letter of credit in order to satisfy the bond requirement.

(k) The BIA instructed Cunningham to purchase new bonds, but as of early June 2003, the BIA had not yet determined the bond amounts that would be required.

(l) By letter dated June 25, 2003, the Bureau of Indian Affairs, Navajo Area Office, informed Cunningham that a bond in the amount of \$65,000.00 would be required on the Navajo leases.

(m) On July 21, 2003, the \$65,000.00 bond was provided by Cunningham to the BIA Navajo Area Office.

(n) In July, 2003, Cunningham and the Baldwins provided a bond to the Bureau of Indian Affairs for the Ute Mountain Ute lease in the amount of \$45,000.

(o) To date, Action Oil has not initiated the procedures to obtain the release of its bonds by the Bureau of Indian Affairs, the Minerals Management Service and the Bureau of Land Management. *See Handbook Bureau of Indian Affairs, Albuquerque Area Office, Guideline For Release of Bonds – Indian Oil and Gas Leases.* (Exhibit B.)

(p) At no time has the BIA or the BLM made any claims against the bonds on the properties. At no time since Cunningham has operated the three leases has the Bureau of Land Management issued any demand for the plugging and abandonment of any well that has not been satisfied or otherwise resolved.

(q) The requests for approvals for the assignments of the three Indian oil and gas leases remain pending before the BIA. None of the requests for approval has been denied by the agency.

POINTS AND AUTHORITIES

The Indian Mineral Leasing Act (25 U.S.C.A. §§ 396a-396g) and its corresponding regulations are intended to ensure that Indian mineral owners will have their resources developed in a manner that maximizes their best economic interests and minimizes any adverse environmental or cultural impacts. 25 C.F.R. § 211.1(a). The requirement that lease assignments be approved by the Secretary of the Interior is for the protection of Indian tribes and to effectuate the fiduciary duty the United States government, as trustee, owes the beneficiary tribes. See *American Surety Co. of New York v. United States*, 112 F.2d 903, 905 (10th Cir. 1940). Accordingly, an assignment that has not been approved may be declared void for the protection or benefit of the beneficiaries of the regulation which, in this case, are the Ute and Navajo tribes. *Hertzel v. Weber*, 283 F. 921, 928 (8th Cir. 1922). Such a contract, which is merely voidable, can only be avoided by the party who has a right to complain—the tribes or the federal government on their behalf. *Briggs v. Chamberlain*, 107 P.1082, 1087 (Colo. 1910). Regulatory approval, or the lack thereof, is a matter between an assignee and the Secretary of the Interior. *Ganas v. Tselos*, 11 P.2d 751, 753 (Okla. 1932). Lack of approval is not grounds for rescission of an assignment contract by the assignor. *Cleary v. Sewell*, 299 P.2d 524, 528 (Okla. 1956).

Ms. Wood is not a not tribal members and Action Oil Company is not a tribal entity, so they are not members of the class the approval requirement was designed to protect. Ms. Wood simply has no business insinuating herself in the BIA's lease assignment approval process or in the Division's regulatory process.

Ms. Wood has repeatedly argued that because Cunningham did not file for BIA approval of the assignments within the five-day time period set out in the BIA's regulations, Cunningham has failed to fulfill a condition precedent. This assertion assumes that the window of opportunity to file is forever closed after five days from the date the Agreement is executed. This assumption finds no support.

The applicable regulation (29 C.F.R. § 211.53(c)) does not state or imply that late filings are not acceptable or that filing outside the five-day time period voids any assignment agreements. While there is little directly applicable authority from the Interior Board of Indian Appeals decisions, the numerous decisions from the Interior Board of Land Appeals construing the virtually identical approval provision of 43 C.F.R. ss 3106.1(b)² applicable to transfers and assignments of BLM oil and gas leases are most persuasive and are accorded significant weight.

There are no statutory requirements that assignments or transfers of BLM or BIA oil and gas leases be filed within a given time. Although the regulations governing BLM leases provide that an assignment shall or must be filed within 90 days of execution, numerous decisions of the IBLA and the Solicitor of the Department of Interior have concluded that the requirement is not mandatory. *Hughes & New Oil Company, Inc.*, 22 IBLA 305 (1975). Those cases conclude that the filing deadline is imposed for the convenience of the Department and, since it is a non-

² 43 C.F.R. ss 3106(b): "The rights of the transferee to a lease or an interest therein shall not be recognized by the Department until the transfer has been approved by the authorized officer. ...A request for approval of a transfer of a lease or interest in a lease shall be filed within 90 days from the dated of its execution."

statutory requirement, the Secretary may waive it. As a result, the cases and opinions firmly establish that the failure to file an executed assignment within the prescribed period is not grounds for disapproval. See *Alminex USA, Inc.* 55 IBLA 315 (1981); *Me-Tex Supply Company* SO-67 (1963).

More importantly, however, these authorities established the principle that an assignment or transfer is effective between the assignor and assignee or transferor and transferee *prior* to approval by the Secretary. See *Frederick J. Schlicher* 54 IBLA 61, 65 (1981). See also *Petrol Resources Corp.* 65 IBLA 104 (1982). The authorities also recognize that the assignee of an unapproved assignment can acquire the status of a bona fide purchaser and that the assignment is effective between the assignor and assignee. *Southwestern Petroleum Corp.* 361 F.2d 650 (10th Cir. 1966); *Frederick J. Schlicher, supra*. Further, there is nothing in either the Mineral Lands Leasing Act or the Indian Mineral Leasing Act that precludes an assignment or sublease from being effective between the assignor and assignee until the ministerial approval is processed. The transfer of rights and obligations between the assignor and assignee occurs on execution and are enforceable between the parties under state law.

In fact, as the Applicant has demonstrated, it is more often than not the case that assignees and operators experience significant delays, typically years, from the time tribal oil and gas lease assignments are executed until they are processed and approved by the BIA. Yet, as the authorities referenced above recognize, assignees need not wait for the BIA's approval to exercise their rights as bona fide purchasers and move onto locations and commence operations. Rather, it is the custom and practice of both industry and government to accommodate property transfers and avoid interruptions in operations rather than place important case development and operational activities on hold while awaiting the processing of lease assignments.

Even Action Oil Company knows this. In fact, Action Oil has practiced it.

Action Oil itself failed to seek regulatory approval within the five-day time period under 25 C.F.R. § 211.53(c) and it took possession of and began operating the Navajo leases well before approval of its assignments was received. Action Oil accepted and executed an assignment of Robert Crane's interest in Navajo Lease No 14-20-0603-639 on February 28, 1995, but did not file for BIA approval until April 25, 1995 – substantially more than five days later. The assignment was not approved by the Navajo Nation until September 28, 1995, and by the BIA until November 21, 1995.

On or before August 4, 1995, before approval of the Navajo Nation or the BIA, Action Oil took possession of the lease and began the process of applying for a permit to operate a salt water disposal well. Action Oil apparently believed the assignment was valid and binding prior to the time official notices of approval were issued.

Action Oil also took possession of Navajo Lease No. 14-20-0603-903 long before regulatory approval was granted. Action Oil accepted and executed an assignment from Robert Crane on February 28, 1995, but then waited nearly 60 days to file for BIA and Tribal approval (filed on April 25, 1995). The assignment was approved by the Navajo Nation on September 28, 1995, and the BIA on November 7, 1995. Yet, as early as November 8, 1993, Action Oil represented itself as the operator of wells on the lease.

Action Oil's past conduct demonstrates that it considered its assignments effective when executed, not when final regulatory approval was granted. Action Oil should not now be permitted to thwart the division's C-104 approval process on the same technicality it ignored when it benefited Action Oil to do so.

Respectfully submitted,

MILLER STRATVERT P.A.

By: 7. S. Hall

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Attorneys for J. C. Well Service, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading was served upon the following on this 15th day of April, 2004:

Gail MacQuesten, Esq.
New Mexico Oil Conservation Division
Energy, Minerals and Natural
Resources Department
1220 South St. Francis Drive
Santa Fe, New Mexico 87505

Thomas Montoya, Esq.
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7. S. Hall
J. Scott Hall

ELEVENTH JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SAN JUAN

FILED IN OPEN COURT ON
March 14, 2000
AT 2:57 P.M.
Harold L. Lantz
DISTRICT JUDGE

CARMEN J. BURSON,
n/k/a CARMEN J. WOOD.

Petitioner,

vs.

No. DM 1384-V

G. GENE BURSON,

Respondent.

DISTRICT COURT
SAN JUAN COUNTY
N.M.
MAR 15 2 34 PM

MARITAL SETTLEMENT AGREEMENT

This Marital Settlement Agreement is made and entered into on February 23, 2000, by and between Carmen J. Wood ("Wife"), represented by Tom Montoya and Gretchen Walther of Atkinson & Kelsey, P.A., and G. Gene Burson ("Husband"), represented by Mickey D. Barnett of Barnett Law Firm, P.A., and Karen L. Townsend of Karen L. Townsend, P.C.

RECITALS

WHEREAS, the parties have made this compromise agreement as to their rights and obligations and a division of their property, to be approved by the Court;

NOW, THEREFORE, in consideration of their mutual agreements herein contained, the parties agree as follows:

ARTICLE I
CUSTODY AND VISITATION

A. The parties have no minor children and none are expected.

EXHIBIT

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
ALBUQUERQUE AREA OFFICE
P.O. Box 26567
Albuquerque, New Mexico 87125-6567

GUIDELINE FOR RELEASE OF BONDS
Indian Oil and Gas Leases

Bonds for Indian oil and gas leases/agreements provide protection of tribal and allotted interests from monetary, environmental, safety and operational problems and therefore the release of any bond must be scrutinized by employing several safeguards.

When a company/operator requests release from a bond, the company/operator should submit a listing of all Indian leases/agreements affected, by reservation, to the Bureau of Indian Affairs (BIA). Each lease/agreement can then be checked by the BIA for the following:

- A. Current status as to rent and royalty payments is checked.
 - (1) Submit a request for a record review in accordance with the Tripartite Memorandum of Understanding (MOU), to MMS, if lease has produced or is in production.
 - (2) If lease has never produced, BIA-Agency should check rental and minimum royalty payments.
- B. For release of a bond, BLM will inspect the lease, permit or agreement to check compliance with applicable regulations, agreement terms and conditions; all plugging and abandonment requirements from the standpoint of environmental and safety problems must be complete.
- C. On leases containing surface disturbance due to oil and gas and geothermal operations, the bond will not be released until BIA and BLM have approved the reclamation. In addition, the bond will be held until MMS does a final records check and clears the accounts.
- D. In the event of a request for release of a bond from an active producing or shut in lease, the assignee assumes all responsibility and liability for plugging and abandonment of the lease(s). If all interest owned by a lessee in a lease is assigned or if a lease is surrendered, the liability under the bond or bonds given to secure performance of the lease is terminated as of the date of approval of the assignment or the effective date of the surrender of the lease. If the principal or surety requests notice of termination of liability under the bond, the following language shall be used:

"This bond is terminated only as to liabilities accruing after _____
(the effective date of the surrender of the lease or the date of the approval of the assignment)".

The listing of leases/agreements in the Albuquerque Area is as follows:

Jicarilla Apache

609-Prefix followed by six digit lease number	Jicarilla-XX (lease number)
same as above	701XXxxxxx **

Ute Mountain Ute and Southern Ute

614-Prefix followed by six digit lease number	BIA-I-22-IND-
619-Prefix followed by six digit lease number	BIA-14-20-151-
522-Prefix followed by six digit lease number	BIA-14-20-604-
524-Prefix followed by six digit lease number	BIA-MOO-C-14-20-
same as above	751XXxxxxx **
same as above	750XXxxxxx **

** -- XX-year approved, xxxxx-lease number designation

No bond is to be released if the lease/agreement has a delinquent royalty assessment until the situation can be rectified. As an additional monetary safeguard, a company audit is to be performed in accordance with the Indian Lease Audit Strategy and Audit Priority Criteria of September 30, 1985. The respective Albuquerque Agency is to prepare an Audit Information Form for each lease having a bond released. The MMS will then state in writing whether or not the company lease accounts are in good order. The respective tribal government will be notified. The tribal accounting staffs will then state in writing whether or not the company accounts (rents, royalties, taxes, etc.) are in good order.

The BLM will be asked to inspect each lease/agreement involved in a bond release from the standpoint of environmental problems (an oil spill not properly taken care of), safety problems or operational problems such as wells that need plugging and abandonment. If there are any problems, bond release will be withheld until all problems are remediated.

EXHIBIT

B

THENCE North 43°37'08" East 23.73 feet;
THENCE North 46°22'52" West 10.00 feet;
THENCE North 43°37'08" East 336.57 feet;
THENCE South 46°22'52" East 125.63 feet;
THENCE South 52°06'20" West 301.24 feet;
THENCE South 76°09'18" West 53.23 feet;
THENCE South 46°04'53" West 59.56 feet;
THENCE North 00°02'02" East 58.01 feet to the point of beginning;

TRACT II:

That part of Tract B of the Replat of MIDDLE FORK SUBDIVISION NO. 1, in the City of Farmington, San Juan County, New Mexico, as shown on said Replat filed for record July 23, 1986, described as follows:

BEGINNING North 43°37'08" East 336.57 feet from the Northwest corner of said Tract B;

THENCE North 43°37'08" East 100 feet to the Northeast corner of said Tract B;

THENCE South 46°22'52" East 150 feet;

THENCE South 57°18'38" West 102.92 feet;

THENCE North 46°22'52" West 125.63 feet to the point of beginning.

13. The real property located at Flora Vista, New Mexico, with an agreed net value of \$40,000.
14. The Riverlands Real Estate Contract with an agreed net value of \$151,692.
15. The Bella Vista mobile home, VIN #2HA11966 located at Ruins Road, Aztec, NM with an agreed net value of \$13,000.
16. 10,000 shares of the Z-Tech stock with an agreed net value of \$10,000.
17. All shares of the Federal Land Bank stock with an agreed net value of \$1,000.
18. Fifty-one (51) Gold Eagle coins with an agreed net value of \$22,400.
19. Action Oil with an agreed net value of zero.

