

KARL MLADINICH
VICTOR VOTAW

IBLA 89-669

Decided September 30, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease AA 48252-B.

Affirmed.

1. Oil and Gas Leases: Reinstatement--Oil and Gas Leases: Termination

Pursuant to 30 U.S.C. § 188(b) (1988), when the lessee fails to pay the required rental on or before the anniversary date of the lease, and there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law. The Secretary may reinstate the lease, pursuant to 30 U.S.C. § 188(c) (1988), if the full rental is paid within 20 days of the lease anniversary date, and the failure to timely pay was justifiable or not due to a lack of reasonable diligence. Mailing the rental payment on the lease anniversary date does not constitute reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day on which the office is open) as required by the regulation at 43 CFR 3108.2-2(a).

APPEARANCES: Karl Mladinich, Victor Votaw, pro sese.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Karl Mladinich and Victor Votaw have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated August 16, 1989, denying their petition for class I reinstatement of oil and gas lease AA 48252-B. BLM had previously advised appellants by notice dated May 15, 1989, that the lease had terminated on its March 1, 1989, anniversary date for failure to pay rental on or before that date.

The original lease AA 48252 was issued effective March 1, 1983. An assignment of record title to 640 acres within Lease AA 48252 from Linda S. Kane to appellants was approved by the Department effective September 1, 1983. This assignment had the effect of segregating the assigned acreage

to create lease AA 48252-B. By notice dated May 15, 1989, BLM notified appellants that AA 48252-B had automatically terminated on its anniversary date of March 1, 1989, because the rental payment was not received on or before that date. The notice informed appellants that they had the right to petition for class I reinstatement under 30 U.S.C. § 188(c) (1988) if they met all of the conditions listed in the notice.

To fulfill the conditions for class I reinstatement listed in the notice, it must be shown not only that the failure to pay rental timely was either justifiable or not due to a lack of reasonable diligence, but also that the rental due was received within 20 days of the anniversary date. A petition giving reasons for failure to pay the rental timely and the \$25 filing fee must also be filed within 60 days of receipt of the notice of termination. A final requirement is that no new lease has been issued for any of the lands affected by the terminated lease.

BLM received appellants' petition for class I reinstatement of lease AA 48252-B on May 25, 1989. However, that petition did not include the \$25 filing fee because appellants maintained that the termination was not valid since their rental had been received by BLM within the 20-day grace period and, therefore, the fee was not necessary. BLM responded by a letter dated June 6, 1989, explaining that submitting the rental within the 20-day period did not eliminate the necessity to comply with the requirements for reinstatement of the lease if the lease had terminated because the rental payment was not received until after the anniversary date. Appellants then sent BLM the filing fee and requested reinstatement of lease AA 48252-B. The filing fee was received by BLM on July 21, 1989, within the 60-day period required for class I reinstatement.

With BLM's receipt of the filing fee, three of the four requirements for class I reinstatement had been fulfilled as the rental was received within 20 days of the lease anniversary date and no new lease had been issued for any of the lands affected by lease AA 48252-B. However, by a decision dated August 16, 1989, BLM denied appellants' petition on the grounds that the petition did not show reasonable diligence in mailing the payment or offer a justifiable reason for the delay in payment. Therefore, appellants failed to meet the fourth requirement for class I reinstatement. Appellants have appealed the August 16, 1989, decision.

The envelope in which appellants' rental was sent bears a postmark of March 2, 1989, the day after the anniversary date of the lease. The record indicates that the rental payment was received by Minerals Management Service on March 6, 1989. In their statement of reasons, appellants state that they were aware of the necessity of mailing the rental by the anniversary date of March 1, 1989, and that they mailed the rental on March 1. They contend that their payment was handcarried to the post office on March 1, 1989, and, therefore, should have borne a March 1, 1989, postmark. Appellants have enclosed a July 17, 1989, letter from the Postmaster of the San Pedro, California, post office stating that, while the target time for all cancellations is midnight, there may have been too much mail and some of the mail may not have been cancelled until after midnight, thereby giving the rental a March 2 postmark. Appellants have also submitted a

September 5, 1989, letter from the San Pedro Postmaster stating that carry over of mail to the following day is not unusual.

Section 31(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(b) (1988), provides in part that "upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law." Payment requires that the rental be received by the proper office by the lease anniversary date (or, if the office is closed on that date, by the next day on which the office is open). See 43 CFR 3108.2-1(a). As the rental payment in this case was not received until March 6, BLM was clearly justified in issuing the lease termination notice to appellants.

A lease terminated for late payment of rental, however, may be reinstated under section 31(c), 30 U.S.C. § 188(c) (1988), if the rental was paid within 20 days after the anniversary date upon a showing by the lessee that the failure to pay on or before the anniversary date "was either justifiable or not due to a lack of reasonable diligence on the part of the lessee." See 43 CFR 3108.2-2(a) (class I reinstatement); Nyle Edwards, 109 IBLA 72 (1989); Ann L. Rose, 92 IBLA 308 (1986).

[1] The burden of showing that the failure to pay on or before the anniversary date was justified or not due to a lack of reasonable diligence is on the lessee. 43 CFR 3108.2-2(b). The Board has long held that reasonable diligence ordinarily requires a showing that the payment was mailed sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail. Leo Krenzler, 82 IBLA 205, 209 (1984); Anthony F. Hovey, 79 IBLA 148 (1984). Accordingly, the mailing of rental payments on the lease anniversary date has been held not to establish reasonable diligence. Kenneth W. Macek, 49 IBLA 153 (1980); see Rose M. Keegel, 49 IBLA 106 (1980) (mailing payment 2 days in advance not reasonable diligence).

In 1988 BLM amended the relevant regulation regarding reinstatement to liberalize the standard of diligence by providing that "reasonable diligence shall include any rental payment which is postmarked * * * on or before the lease anniversary date." 43 CFR 3108.2-2(a)(2) (emphasis added). In circumstances similar in all material respects to the present case the Board held that:

Mailing a rental payment on the date it is due will not establish reasonable diligence in the absence of a postmark on or before the lease anniversary date (or if the office is closed on the anniversary date, the next day on which the office is open) as required by the regulation at 43 CFR 3108.2-2(a), 53 FR 17357 (May 16, 1988).

Seth & Alice Swift, 109 IBLA 270, 272 (1989). Hence, the fact that the payment was placed in the mail on the lease anniversary date is not sufficient to establish reasonable diligence in the absence of the postmark required by the regulation.

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 affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge