

PETRO-HUNT CORP.

IBLA 92-117

Decided November 4, 1992

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, denying petition for class I reinstatement of oil and gas lease WYW-120904.

Affirmed.

1. Oil and Gas Leases: Reinstatement

A petition for class I reinstatement of an oil and gas lease is properly denied where the rental payment was received by BLM after the anniversary date, and the lessee, having paid the rental within 20 days following the lease anniversary date, fails to establish that the failure to pay the rental on the anniversary date was justified or not due to a lack of reasonable diligence.

APPEARANCES: Char McLaughlin, Bismarck, North Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Petro-Hunt Corporation (Petro-Hunt) has appealed from an October 24, 1991, decision of the Wyoming State Office, Bureau of Land Management (BLM), denying its petition for class I reinstatement of Federal oil and gas lease No. WYW-120904.

BLM issued lease No. WYW-120904 effective July 1, 1990, and approved the assignment of the lease to Petro-Hunt effective March 1, 1991. The lease embraces approximately 1,586.80 acres in secs. 20, 22, 28, 29, 30, and 33, T. 26 N., R. 62 W., sixth principal meridian, Goshen County, Wyoming. Annual rental for the lease, \$2,380.50, was due on July 1, 1991, the lease anniversary date, but the Minerals Management Service (MMS) did not receive the rental until July 9, 1991.

By notice dated August 9, 1991, BLM informed Petro-Hunt that oil and gas lease No. WYW-120904 had automatically terminated by operation of law on July 1, 1991, because the rental payment had not been received on or before the lease anniversary date. BLM advised Petro-Hunt that it could petition for reinstatement of the lease under 30 U.S.C. § 188(c) (1988), and 43 CFR 3108.2-2 (class I reinstatement) and/or under 30 U.S.C. § 188(d) and (e) (1988) and 43 CFR 3108.2-3 (class II reinstatement).

On October 7, 1991, Petro-Hunt filed a petition for class I reinstatement of lease No. WYW-120904. It asserted that the failure to timely pay

the rental was not due to a lack of reasonable diligence, explaining that the routine practice of the company is to mail rental checks by certified mail return receipt requested 4 to 6 weeks prior to the due date. It indicated that the rental check for lease No. WYW-120904 was mailed on June 4, 1991, but that as a result of a clerical error in the mail room, insufficient postage was put on the envelope. According to Petro-Hunt, the envelope was not returned until July 3, 1991, and on the next business day, July 8, 1991, it sent the rental to MMS by Federal Express where it was received on July 9, 1991. Petro-Hunt contended that despite its due and reasonable diligence, the 31 days it took the Postal Service to return the envelope was beyond its control and considerably in excess of reasonable expectations. Petro-Hunt argued that the late payment of the rental should be considered justified because the untimeliness was caused by extenuating circumstances outside its control during the 31-day period.

BLM denied Petro-Hunt's petition for class I reinstatement on October 24, 1991, finding that the inadvertence or negligence of Petro-Hunt's employees in failing to put adequate postage on the envelope was insufficient justification to reinstate a lease terminated for failure to make a timely rental payment. BLM further noted that because Petro-Hunt chose to rely on the Postal Service as the means of delivery of the rental, the company must bear the consequences of Postal Service delay or nondelivery.

On appeal, Petro-Hunt asserts that it does not base its reinstatement petition upon excusing an inadvertent error, but rather upon the fact that its failure to rectify the error in a timely manner was caused by the Postal Service's excessive delay, an extenuating circumstance beyond Petro-Hunt's control. Petro-Hunt argues that mailing payments 30 to 45 days prior to the due date should allow for normal delays in collection, transmittal, and delivery of the payment, and that 30 days would have been more than enough time to correct the insufficient postage error if the Postal Service had followed its procedures and returned the envelope within 10 days. In short, Petro-Hunt contends not that its inadvertent error should excuse the late payment, but that its practices allowed adequate time to cure the error, and that the excessive delay of the Postal Service, an outside party beyond Petro-Hunt's control, caused the late payment.

[1] 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." Such lease, however, may be reinstated under section 31(c), 30 U.S.C. § 188(c) (1988), if the rental is 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 (class I reinstatement); Denise M. White, 120 IBLA 163, 163-64 (1991); George Foster, 109 IBLA 82, 83 (1989). The lessee has the burden of showing that the failure to timely pay the rental was justified or not

due to a lack of reasonable diligence. 43 CFR 3108.2-2(b); see, George Foster, supra.

Petro-Hunt acknowledges that the rental payment received by MMS on July 9, 1991, was sent by Federal Express on July 8, 1991, after the July 1, 1991, lease anniversary date. In general, a lessee has failed to exercise reasonable diligence if the rental payment was mailed after the lease anniversary date. Denise M. White, supra at 164; George Foster, supra; Ann L. Rose, 92 IBLA 308, 310 (1986), and cases cited therein.

However, failure to exercise reasonable diligence may be considered justifiable if it is demonstrated that, at or near the lease anniversary date, there existed sufficiently extenuating circumstances outside the lessee's control which affected its actions in failing to make timely payment. Denise M. White, supra; George Foster, supra; Freedom Oil Co., 87 IBLA 71, 75 (1985). Those circumstances, which must be proximate in time to the lease anniversary date, must also be the causative factor for the failure to exercise reasonable diligence in mailing the late payment. Denise M. White, supra; Joan F. Bechtel, 76 IBLA 1 (1983). Additionally, a lessee must establish that the factors which caused the late payment were beyond its control. Denise M. White, supra, and cases cited therein. When the failure to pay the rental on time is due to negligence, forgetfulness or inadvertence, the failure is not justifiable. Denise M. White, supra; George Foster, supra at 84; PRM Exploration Co., 91 IBLA 165, 169 (1986).

Petro-Hunt asserts that the late rental payment was caused by factors beyond its control. We disagree. Although its business practices normally allow sufficient time to ensure prompt rental payment, those practices do not establish that reasonable diligence was exercised in a particular case. Melbourne Concept Profit Sharing Trust, 46 IBLA 87, 90 (1980). Petro-Hunt's late payment emanated from its failure to place sufficient postage on the envelope containing the rental payment. This action, which was the causative factor precipitating the late payment, was clearly within Petro-Hunt's control. Although the Postal Service's delay in returning the envelope to Petro-Hunt may have prevented Petro-Hunt from rectifying its mistake, the Board has repeatedly held that one choosing the means of delivery of a document must accept the responsibility for and bear the consequences of delay or nondelivery. See, e.g., Conoco, Inc. (On Reconsideration), 113 IBLA 243, 249 (1990), and cases cited therein. Accordingly, we find that Petro-Hunt has failed to demonstrate that extenuating circumstances beyond its control justify its late rental payment.

Therefore, 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.

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE IRWIN CONCURRING:

Whatever one may think of our interpretation of the class I reinstatement provisions, 30 U.S.C. § 188(c) (1988), it has not just recently become restrictive, as our dissenting colleague suggests. This decision is consistent with our previous decisions. See Louis Samuel, 8 IBLA 268 (1972). In Richard L. Rosenthal, 45 IBLA 146 (1980), cited by our colleague, the delay was caused by BLM, not the lessee's mailing agent.

The Congress was aware of the limited discretion provided in the class I reinstatement provisions. See H.R. Rep. No. 859, 97th Cong., 2d Sess. 20-22 (1982), reprinted in 1982 U.S.C.C.A.N. 4268, 4274-76. That is why it enacted the class II reinstatement provisions, 30 U.S.C. § 188(d) and (e) (1988). Those provisions are available to lessees in appellant's circumstances. Henry Y. Yoshino, 108 IBLA 47, 50-51 (1989).

If we are to be consistent in our treatment of re-mailing items after the deadline they are due, we should reconsider Joe H. Vozza, 121 IBLA 370 (1991). Cf. Susan Bettles, 60 IBLA 75 (1981).

Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN DISSENTING:

This case and a recent Board decision caused me to pause and give thought to how restrictive the interpretation of the reinstatement provisions of 30 U.S.C. § 188(c) (1988) have become. In this dissent I will set out and compare two similar sets of statutes, regulations, and Board decisions. I believe this comparison will make my point.

In 1954 Congress passed the Act of July 29, 1954, providing for automatic termination of oil and gas leases if the lessee failed to pay rental on or before the anniversary date of the lease when there is no well capable of producing oil or gas in paying quantities. This provision is now found in 30 U.S.C. § 188(a) (1988). This act provided for no exceptions, and if the rental is not paid before the anniversary date, the lease automatically terminates by operation of law. See Oil Resources, Inc., 28 IBLA 394, 405, 84 I.D. 91, 97 (1977).

In 1976 Congress passed the Federal Land Policy and Management Act of 1976 (FLPMA) (P.L. 94-579). Among the provisions of this law is a section which provided for the recordation of, and filing of annual proof of labor for mining claims. See 43 U.S.C. § 1744 (1988). If the owner of an unpatented mining claim located on public land fails to file evidence of assessment work performed or a notice of intention to hold the mining claims with the proper Bureau of Land Management (BLM) office prior to December 31 of each year following the year in which the claim is located, the claim is conclusively deemed abandoned and void. Doyle C. Cape, 110 IBLA 239 (1989); Charlene Schilling, 87 IBLA 52 (1985); J. Neil Smith, 77 IBLA 239 (1989). There are no exceptions set out in the statute. The responsibility for complying with the 43 U.S.C. § 1744 (1988) rests with the owner of the claims, and the failure to comply will, in and of itself, cause the claims to be extinguished by operation of law. See United States v. Locke, 471 U.S. 84 (1985).

In 1970 Congress enacted P.L. 91-245, granting the Secretary of the Interior the authority to reinstate oil and gas leases that were terminated by operation of law because of the lessee's failure to pay rental in a timely manner, if it is shown to the satisfaction of the Secretary that the failure was justifiable or not due to lack of reasonable diligence. See H.R. Rep. No. 1005, 91st Cong., 2nd Sess. (1970), reprinted in U.S.C.C.A.N. 3002 et seq. This report noted four types of inequities that had resulted from the operation of the 1954 law. One was when the full rental payment was submitted, but was not received timely. Id. at 3003.

There is no comparable statute affording the Secretary authority to reinstate mining claims that had been extinguished by operation of law for failure to file the necessary FLPMA recordation documents.

A regulatory provision applicable to oil and gas reinstatement is found at 30 CFR 3108.2-2. The portion of that regulation important to

this comparison provides for reinstatement if the rental was paid or tendered within 20 days after the anniversary date and the failure to pay was not due to the lack of reasonable diligence. That section specifically states that "reasonable diligence shall include a rental payment which is postmarked by the U.S. Postal Service, common carrier, or their equivalent * * * on or before the lease anniversary date * * *." 30 CFR 3108.2-2(a)(2). Thus the regulation provides for class I reinstatement if the rental is paid or tendered within 20 days following the anniversary date and there is evidence of an attempt to make payment prior to the anniversary date in the form of a postmark or its equivalent.

The comparable regulation applicable to mining claim recordation is found at 43 CFR 3833.0-5(m). That regulation provides that if the evidence of assessment work performed or notice of intention to hold is received by BLM after December 30 of the calendar year for which it is filed but prior to the following January 19, the document will be considered "timely filed," provided the envelope containing the document bears a clearly dated postmark affixed by the U.S. Postal Service on or before December 30 of the preceding year.

In summary: Both laws provide for automatic termination by operation of law; Congress subsequently enacted a means to avoid inequities by allowing reinstatement of an oil and gas lease if the failure to pay the rental in a timely manner was justified or not due to a lack of reasonable diligence; no comparable relief is afforded a mining claimant; both recognize an exception if the rental or documents were posted before the deadline and received within 20 days after the deadline.

Now I will compare this case to another recently issued by this Board. In this case, the rental payment, which was due on or before July 1, was mailed by Petro-Hunt on June 4. When the Postal Service found the envelope to contain less than the required postage it was returned to Petro-Hunt, who received it on July 3. There is no explanation of why it took the Postal Service a month to return the letter. Petro-Hunt resent payment on the next business day (July 8), and it was received on July 9. The petition for reinstatement was filed in a timely manner and appears to be in order in all respects. Reinstatement was denied because of Petro-Hunt's failure to use reasonable diligence. ^{1/} +

A recent case, Joe H. Vozza, 121 IBLA 370 (1991), arose from BLM's declaring Vozza's claim abandoned and void because Vozza had failed to file either evidence of assessment work performed or a notice of intention to hold his mining claims with the proper BLM office prior to December 31, 1988. He put an outdated address on the envelope, however, and the envelope was returned to him because the Postal Service's forwarding order had expired. Vozza remailed the affidavit to BLM on January 5, 1989, and it was received by BLM on January 6, 1989.

^{1/} Compare Richard L. Rosenthal, 45 IBLA 146 (1980).

What are the results? In Vozza the Board reversed the BLM decision and effectively "reinstated" the mining claims because the envelope returned by the Postal Service was postmarked prior to the deadline. The second envelope which was received by BLM was dated after the deadline. 2/ In this case the majority rejects the postmark on the envelope returned by the Postal Service and the finds reinstatement unwarranted because the second envelope was dated after the deadline. 3/ I find this distinction arbitrary.

R.W. Mullen
Administrative Judge

2/ See also Oro Fino Dredging Co., 94 IBLA 11 (1986).

3/ Compare Estate of Kenneth F. Krammes, 40 IBLA 147 (1979; Ronald E. Stone, 37 IBLA 306 (1978). The class I reinstatement regulation, 30 CFR 3108.2-2 does not require payment of the full rental amount prior to the anniversary date. It does not state that the envelope must be properly addressed. It does not state that the proper postage must be affixed. The Secretarial discretion to grant class I reinstatement may be limited but the intended interpretation of the phrase "reasonable diligence" is clearly stated in the regulations.

