

Editor's note: 82 I.D. 386; Appealed -- dismissed, Civ.No. 75-106 (D.Mont. Sept. 9, 1976)

C. J. IVERSON

IBLA 75-405

Decided August 14, 1975

Appeal from a decision by the Montana State Office, Bureau of Land Management, holding oil and gas lease M-24227 to have terminated for failure to pay rental timely.

Affirmed.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases:
Termination -- Secretary of the Interior

Before relief may be granted to the lessee of a terminated oil and gas lease, he must comply with the prerequisites set forth in 30 U.S.C. § 188 (1970). The Secretary has no authority to waive such statutory prerequisites.

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

Reliance upon receipt of a courtesy notice can neither prevent the lease from terminating by operation of law nor serve to justify a failure to pay the lease rental timely.

3. Federal Employees and Officers: Authority to Bind Government -- Oil
and Gas Leases: Termination

Advice or information received over the telephone from personnel of the Bureau of Land Management does not constitute a "bill or decision rendered by" the Department under 30 U.S.C. § 188(b) (1970).

4. Oil and Gas Leases: Termination

Only when a lessee has made a deficient rental payment on or before the anniversary date of an oil and gas lease will a Notice of Deficiency be sent. If no payment at all is made, the lease

will not qualify for consideration under the exceptions to automatic termination set forth in 30 U.S.C. § 188(b) (1970).

5. Oil and Gas Leases: Reinstatement

The Secretary has no authority to reinstate a terminated oil and gas lease unless the rental payment is tendered within twenty days of the due date. Such authority also does not exist if a valid oil and gas lease has been issued covering any of the lands in the terminated lease.

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

A Notice of Termination is sent to the lessee of a terminated oil and gas lease only if he has tendered payment of the rental within twenty days after the anniversary date.

7. Oil and Gas Leases: Communitization Agreements

In order for a communitization agreement to qualify a lease as containing a "well capable of producing oil or gas" within the meaning of 30 U.S.C. § 188(b) (1970) and thus not subject to rental requirements, the agreement must be approved by the Secretary of the Interior.

APPEARANCES: Richard L. Beatty, Esq., of Shelby, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

C. J. Iverson appeals from the February 20, 1975, decision of the Montana State Office, Bureau of Land Management (BLM), upholding the automatic termination by operation of law of oil and gas lease M-24227 for failure to pay rental due on or before the anniversary date, April 1, 1974. Events leading up to appellant's failure to pay the rental are somewhat involved. We will therefore briefly describe the background of this appeal before discussing the merits of appellant's arguments.

Lease M-24227 covered certain lands in sections 23, 24 and 31, T. 32 N., R. 14 E., M.P.M. It was created in January 1973 out of oil and gas lease M-6113-A. At that time, certain lands in M-6113-A were unitized and the remaining lands were placed under a new lease, M-24227. The anniversary date of both leases remained April 1. Prior to the 1973 anniversary date, appellant received conflicting notices regarding rental due for M-6113-A. He telephoned the BLM Montana State Office and was advised to call the U.S. Geological Survey (USGS) office in Casper, Wyoming. The USGS office advised appellant not to pay the rental for M-6113-A because it was part of a unit agreement and, therefore, only minimum royalty was due. Appellant followed this advice, which later proved to be correct.

In October 1973, appellant filed by certified mail a communitization agreement for section 23 with USGS for its approval. 1/ Appellant owned, or partially owned, a producing gas well on non-federal land in section 23. This proposed communitization agreement apparently was lost by USGS and thus it was never approved. 2/ Appellant also owned, or partially owned, a producing gas well on non-federal

1/ By order dated February 19, 1970, the Oil and Gas Conservation Commission of the State of Montana limited the development of gas fields to one well per 640 acres. Sections 23 and 24 were included within this order.

2/ By affidavit dated January 10, 1975, the Area Oil and Gas Supervisor, USGS, Casper, Wyoming, acknowledged that a certified mail return receipt, which appellant states was attached to the proposed communitization agreement, was signed by a USGS employee in Casper, who is now deceased. The Area Supervisor further states that the contents of the package thus accepted cannot be located.

land in section 24. No communitization agreement was filed for this section prior to April 1, 1974. Meanwhile, a dry hole had been drilled on section 31, and appellant states that he had decided to drop the section 31 acreage from lease M-24227.

By affidavit, appellant states that he received no courtesy notice from BLM with regard to rental due on April 1, 1974, for lease M-24227. He further states that he telephoned the BLM State Office and was informed "that since the well in Section 23 had been commercially producing prior to the 1973 rental payment, he would have a refund coming or a credit balance for overpayment in that particular lease account when it was transferred to the USGS, and that the non-payment of the 1974 rental would drop the acreage in Section 31." He adds that he relied on this advice, as he relied upon the USGS advice the previous year, and did not submit any rental payment for lease M-24227 prior to the 1974 anniversary date. ^{3/}

As no rental was paid on or before April 1, 1974, the BLM State Office noted that lease M-24227 automatically terminated under 30 U.S.C. § 188(b) (1970). Appellant states he received

^{3/} We note that to drop specific acreage from an oil and gas lease, a lessee must file a relinquishment describing the acreage in the proper office as set forth in 43 CFR 3108.1. Nonpayment of rental, or partial nonpayment, alone will not accomplish this. D. Miller, 65 I.D. 281 (1958); cf. Charles E. Boardman, A-27327 (June 6, 1956).

neither a notice of this termination nor a notice that his rental payment was "deficient." In September 1974, the lands in sec. 31 which were formerly covered by lease M-24227 were announced open for simultaneous filings and subsequently awarded to Dorothy D. Rupe of Los Angeles (M-30377). Appellant did not discover that lease M-24227 had terminated until November 1974. On January 15, 1975, he filed a protest of the termination and submitted a check to BLM for the rental due April 1, 1974.

Appellant contends that either his lease did not terminate because his failure to pay the rental timely falls within an exception to termination set forth in 30 U.S.C. § 188(b) (1970), or he is entitled to reinstatement of the lease under 30 U.S.C. § 188(c) (1970). The basis of both contentions is, in essence, that appellant's failure to pay his rental timely was a direct result of erroneous information from BLM and that BLM compounded this error by failing to notify appellant of the "deficiency" or of the termination. The BLM State Office decision on the protest stated that appellant's case did not fall within the provisions of 30 U.S.C. § 188(b) or (c) (1970) and therefore must be rejected. Appellant argues that the BLM decision was an unnecessarily inflexible application of the law and that the Department has been granted by Congress sufficient discretion to rule in his favor. We cannot agree with appellant and must affirm the BLM decision.

[1] The extent of the discretion granted to the Secretary of the Interior by section 31 of the Mineral Leasing Act, 30 U.S.C. § 188 (1970), is overstated by appellant. The legislative history of the 1970 amendments to that section states:

The purpose of S. 1193 is to confer limited authority on the Secretary of the Interior to prevent the automatic termination of certain oil and gas leases on Federal lands and to permit the reinstatement of terminated leases under certain conditions.
* * * (Emphasis added.)

H. REP. NO. 91-1005, 91st Cong., 2d Sess. (April 14, 1970), 1970 U.S. CODE CONG. & ADM. NEWS 3002. Before relief may be granted under the 1970 amendments to section 31 of the Mineral Leasing Act, the statutory prerequisites must be met. See e.g., William C. Morgan, 13 IBLA 60, 62 (1973); Louis Samuel, 8 IBLA 268, 271 (1972). The Secretary has no authority to waive such statutory prerequisites.

4/ We must, therefore, determine whether appellant has in fact complied with the necessary prerequisites.

4/ In his appeal, appellant also argues that the words "shall automatically terminate by operation of law" in 43 CFR 3108.2-1(b) are not necessarily mandatory. He compares the word "shall" with decisions which construed the word "must" in 43 CFR 3106.1-3 as not mandatory. We note that 43 CFR 3108.2-1(a) is taken directly from 30 U.S.C. § 188(b) (1970), whereas 43 CFR 3106.1-3 is "imposed by the Department for administrative convenience" and for the protection of third parties. Newton Oil Co., A-30774 (Sept. 29, 1967). However the Department interprets its own administrative regulations, it must comply with clear statutory requirements.

[2, 3] The exception to automatic termination in 30 U.S.C. § 188(b) (1970), upon which appellant relies, states:

* * * Provided, That if the rental payment due under a lease is paid on or before the anniversary date but * * * (2) the payment was * * * made in accordance with a bill or decision which has been rendered by him [the Secretary] and such figure, bill, or decision is found to be in error resulting in a deficiency, such lease shall not automatically terminate * * *.

The statute plainly requires that part of the rental payment be "paid on or before the anniversary date" in order for this exception to take effect. However, appellant argues that he received no courtesy notice and that he acted in reliance on advice received from BLM personnel over the telephone. He concludes that these circumstances fall within the "plain language and meaning of the act and the regulations."

We cannot agree. This Board has consistently held that reliance upon receipt of a courtesy notice "can neither prevent the lease from termination by operation of law nor serve to justify a failure to timely pay the lease rental." Louis J. Patla, 10 IBLA 127, 128 (1973); Jimmy V. Bowling, 20 IBLA 146 (1975); cf. Joseph E. Steger, 20 IBLA 206 (1975). Further, we cannot equate a telephone conversation between a lessee and an unidentified person in a BLM

office to a "bill or decision rendered by" the Department. The mere fact that appellant relied successfully upon advice received over the telephone from USGS the previous year does not validate this procedure.

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[4] Appellant also argues that he has never received a Notice of Deficiency as required by 43 CFR 3108.2-1(b). BLM cannot be expected to interpret the absence of any rental payment as a deficiency. Both 30 U.S.C. § 188(b) (1970) and 43 CFR 3108.2-1(b) use the same language: "if the rental payment due under a lease is paid on or before the anniversary date" (emphasis added). Only when this occurs will a notice be sent to the lessee that his payment was deficient. Since appellant did not make such a payment he does not qualify for consideration under the exceptions to automatic termination set forth in § 188(b), supra.

[5] Appellant has argued in the alternative that his lease should be reinstated under 30 U.S.C. § 188(c) (1970). That statute reads in pertinent part:

Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or

5/ The alleged telephone conversation in 1974 is discussed further, infra.

before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, * * * the Secretary may reinstate the lease if --

(1) a petition for reinstatement, together with the required rental, * * * is filed with the Secretary; and

(2) no valid lease has been issued affecting any of the lands covered by the terminated lease prior to the filing of said petition. * * *

We have consistently held that the Secretary has no authority to reinstate a terminated lease unless the rental payment has been tendered within twenty days of the due date. E.g., Aaron V. Barson, 18 IBLA 156 (1974). This prerequisite was not met here. Moreover, oil and gas lease M-30377 has been issued for part of the lands formerly covered by appellant's terminated lease. Appellant's offer to relinquish the land contained in M-30377 will not cure the statutory prohibition against reinstatement where a lease has been issued affecting any of the lands in the terminated lease.

[6] However, appellant argues that both his failure to tender payment within twenty days and the issuance of lease M-30377 are a direct result of the failure by BLM to send him a Notice of Termination. He further argues that this failure was in violation of 43 CFR 3108.2-1(c)(1). In this argument, appellant misconstrues the purpose of a Notice of Termination. The Notice of Termination is intended to toll the 15-day period for submission of a petition for reinstatement. Such a Notice is sent only if the lessee has tendered payment

of the rental within twenty days after the anniversary date. Amoco Production Co., 16 IBLA 215, 219 (1974).

[7] Appellant further argues that in not paying the rental he acted in reliance on the advice he received over the telephone from BLM. This Board is not prepared to accept appellant's summary of a telephone conversation with an unidentified BLM employee. We do not know what facts were presented by appellant during the conversation nor in what context the advice was given. Moreover, 30 U.S.C. § 188(b) (1970) clearly states that a lease "on which there is no well capable of producing oil or gas in paying quantities" will automatically terminate by operation of law if the rental is not paid on or before the anniversary date. In order for a communitization agreement to qualify a lease as containing a "well capable of producing oil or gas," and thus not subject to rental requirements, the agreement must be approved by the Secretary of the Interior. 43 CFR 3105.2; see Harry D. Owen, 13 IBLA 33 (1973). That USGS misplaced appellant's communitization agreement is irrelevant. The fact remains that appellant did not have an approved agreement for section 23 and had not even filed an agreement for section 24.

Inasmuch as appellant has failed to comply with the statutory prerequisites as described above, we are without authority to grant

him either form of requested relief from the termination of his lease. William C. Morgan, supra. Appellant has argued that it would be in the public interest to grant him relief because production royalties due the United States would otherwise be lost. A similar argument was made in Cayman Corporation, 8 IBLA 248 (1972). In a concurrence to that decision it was stated:

If appellant's analysis of the situation is accurate, and it seems to be, the public interest has indeed suffered by the termination of the leases and the failure to offer the lands for lease again, this time by competitive sale. The remedy offered seems a feasible method of recouping the loss. Nonetheless, the leases having terminated, there is no authority for reviving them. * * *

Cayman Corporation, supra at 253-254 (Concurring Opinion). This rationale applies here.

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.

Joan B. Thompson
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Martin Ritvo
Administrative Judge

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