

ROBERT B. FERGUSON

IBLA 76-67

Decided December 2, 1975

Appeal from the Decision of the Director, Geological Survey, dismissing an appeal from the action of the Acting Area Oil and Gas Supervisor concerning appellant's ratification and joinder of a unit agreement with respect to appellant's oil and gas lease W 0279705-A.

Affirmed as modified.

1. Appeals--Rules of Practice: Appeals: Generally--Rules of Practice:
Appeals: Dismissal

An appeal to the Director, Geological Survey, is properly dismissed by him where the appellant failed to comply with the procedure prescribed by the applicable regulations with respect to the form and content of the notice of appeal, the time afforded for the filing of additional reasons, arguments or briefs, and the procedure for obtaining an extension of such time, and no valid reason is given which would warrant excusing such failures as an exercise of administrative discretion.

APPEARANCES: C. M. Peterson, Esq., Poulson, Odell and Peterson, Denver, Colorado, for the appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Robert B. Ferguson's oil and gas W 0279705-A was due to expire on October 31, 1973. The Monument Butte II unit was being formed in the area which Ferguson was eligible to join by committing his

lease to the unit. The drilling of an exploratory well on the unit was scheduled to be in progress on October 31, 1973, which would have had the effect of extending Ferguson's lease for 2 years if his lease were committed to the unit at that time. 43 CFR 3107.2-3. However, at the time the Monument Butte II unit was approved by the Geological Survey (effective August 10, 1973), Ferguson had not joined. Subsequently, though, on August 28, 1973, he did execute a ratification and joinder of the unit agreement and unit operating agreement, which he transmitted to the unit operator, Energetics, Inc. Apparently, though, Ferguson's joinder of the unit was conditioned upon certain changes in the unit agreement and the operating agreement. After some discussion of the changes, Ferguson was allegedly informed by Energetics, Inc., that the unit had been approved and the changes could not be made, whereupon he waived the conditions and requested that his ratification and joinder be submitted to the Geological Survey for approval. This was sometime in September 1973, although the exact date is not reflected in the record before us.

By a letter dated October 1, 1973, an agent of the unit operator, C. C. Schmidt, transmitted Ferguson's joinder and several others to the Area Oil and Gas Supervisor of the Geological Survey for approval.

It is the Survey's practice to distinguish between "late" joinders and "subsequent" joinders. A "late" joinder is one which is executed prior to the effective date of the approved unit agreement but delayed for some acceptable reason from being filed prior to approval of the agreement. A "subsequent" joinder, on the other hand, is one which is executed and filed after the effective date of the agreement. "Late" joinders are given effect as of the effective date of the unitization, whereas "subsequent" joinders are made effective as of the first day of the month following their filing with the Supervisor. The provision as to such subsequent joinders was made an express provision of the Monument Butte II Unit Agreement. Also see 30 CFR 226.12 art. 29.

Because Ferguson's joinder was not executed until after the unitization was approved, it was treated as a subsequent joinder. Because it was not filed with the Supervisor until October 1973, it could not be effective under this provision until November 1, 1973. But the lease term expired on October 31, 1973, and not being subject to inclusion in the unit until a milli-second after midnight, the Supervisor concluded that if approval were granted to include the lease in the unit, the lease would expire simultaneously with the effective date of its unitization. Therefore, the Supervisor notified Schmidt of his finding, and Ferguson's joinder instrument was thereafter returned to Schmidt. In the

meantime Ferguson had paid his advance lease rental for the 11th lease year to BLM in the belief that his lease would be extended.

The unit operator, however, had apparently failed to inform Ferguson that the Supervisor had not accepted his joinder. Allegedly, Ferguson learned by accident in December that his lease was deemed to have expired on October 31. He then wrote a letter of inquiry to the Supervisor, suggesting that his joinder was not "subsequent" but, rather, "late," and that it should have been approved, with the consequent extension of the lease. He asked that this be done with retroactive effect and the lease reinstated.

On January 15, 1974, the Acting Supervisor responded, informing Ferguson of the essential background and rationale of the holding, and concluding that the joinder was not acceptable as to lease W 0279705-A, and that the lease had expired. This was the first "decision" in the case received by Ferguson, for the purpose of the procedural aspects of the case, which must be considered, infra.

By his letter of February 7, 1974, Ferguson notified the Acting Supervisor that he intended to appeal. He then filed an undated statement of reasons, which he addressed to the Board of Land Appeals, although the Director, Geological Survey, has intermediate appellate jurisdiction in such cases, and the statement should have been addressed to the Director. 30 CFR 290. This statement reached the Oil and Gas Supervisor's office on April 26, 1974, and was returned by the Supervisor to Ferguson to be correctly addressed. The statement was then refiled in the office of the Supervisor, who forwarded it to the Director.

By his decision of April 18, 1975, the Acting Director, Geological Survey, found that Ferguson had failed to file his notice of appeal in the Supervisor's office within the 30-day period prescribed by regulation, and dismissed the appeal for that reason.

On appeal to this Board from the Acting Director's decision, appellant has appended to his statement of reasons a certified copy of his notice of appeal dated February 7, 1974, well within 30 days from the January 15, 1974, date on the Supervisor's initial decision. 1/ Apparently through some error in the Supervisor's

1/ The appeal period would not begin until the decision was received by the applicant, and no record was made of that date. However, it is not relevant in this instance as Ferguson responded with his notice of appeal within 30 days of the date of the decision, which a fortiori, is within the prescribed time. On that basis, the statement of reasons was obviously filed long after that period had lapsed.

office, the notice of appeal was not included in the case record which was reviewed by the Director at the time he considered the appeal. The Director's decision, therefore, was made on the erroneous premise that no notice had been filed within the 30-day period. However, unlike the procedure governing appeals to this Board, the regulations which prescribe the procedure for perfecting appeals to the Director, Geological Survey, require that:

* * * The notice of appeal shall incorporate or be accompanied by such written showing and argument on the facts and laws as the appellant may deem adequate to justify reversal or modification of the order or decision. Within the same 30-day period, the appellant will be permitted to file in the office of the official issuing the order or decision additional statements of reasons and written arguments or briefs. [Emphasis added.]

30 CFR 290.3(a).

[1] Appellant's notice of appeal, which was filed timely in the proper office, did not incorporate or accompany any written showing of reasons for appeal. It was merely a statement that Ferguson intended to appeal and an identification of the case. While this would suffice under 43 CFR 4.411 (governing appeals to this Board), it is insufficient to meet the requirements of 30 CFR 290.3(a), supra.

Moreover, the written statement of reasons was not filed within the same 30-day period, as required. The deficient notice of appeal was received in the Supervisor's office on February 11, 1974, but the statement of reasons was first filed in the Supervisor's office on April 26, 1974; 74 days after the notice was filed and 102 days after the date of the Supervisor's letter "decision." It was re-filed with the correct address on May 31, 1974. 2/ Although 30 CFR 290.5 provides a means of obtaining extensions of time for the filing of documents in connection with an appeal (other than the notice of appeal), no extension was sought or granted under this provision, and no explanation was offered by appellant to justify the delay.

2/ We find it unnecessary to consider whether the failure to address the appeal to the proper tribunal required it to be returned, readdressed, and refiled, as the initial filing of reasons was so excessively tardy.

In construing the effect of late-filed statement of reasons under other appellate regulations it has been held that such tardy filings will make the appeal subject to dismissal at the discretion of the appellate authority. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969). No reason was given for excusing appellant's dilatory compliance. It thus appears that despite the error in the Director's decision, the appeal was properly dismissed either on the basis that the notice of appeal, although filed timely, was not in conformity with the requirements of the regulation, or on the basis that the statement of reasons was filed long after the prescribed time.

On appeal to this Board it is alleged that the Supervisor's letter of January 15, 1974, is not a "decision" which would have the effect of beginning the running of the 30-day period for perfecting an appeal. Appellant points out that the letter is not styled a "decision," that it does not advise of the right to appeal or the procedure for making an appeal, that it was not served or delivered in a manner that provided proof and time of service, and the copy received by the appellant did not show distribution to other parties such as the Bureau of Land Management and the Unit Operator, who would be the usual copy recipients of a final order or decision affecting the status of an oil and gas lease. In short, appellant alleges that there was nothing in the nature of the letter which would alert him to the fact that it constituted the final decision of the Supervisor and commenced the appeal period.

This argument might be more persuasive had not appellant's own actions tended to refute it. Regardless of appellant's argument that the Supervisor's letter of January 15, 1974, lacked the characteristics of a "final decision or order," the fact is that Ferguson treated it as though he understood it to be such and filed a timely notice of his intention to appeal in the proper office. This is entirely inconsistent with his contention that he didn't regard the letter as a final decision and that he was awaiting some further, more formal, declaration from the Supervisor.

Appellant states that when he filed his letter of February 7, 1974, in the office of the Supervisor "he did not intend it as a formal notice of appeal as he assumed the United States Geological Survey would issue a subsequent final decision from which he could appeal * * *." This allegation is wholly inconsistent with the content of the letter, the entire text of which is as follows:

United States Geological Survey
Mr. W. J. Linton
Acting Area Oil & Gas Supervisor
Post Office Box 2859
Casper, Wyoming 82601

Dear Mr. Linton:

This will serve to notify you that I intend to appeal your decision of January 15, 1974, cancelling my Lease W-027905-A in the Monument Butte Unit.

Very truly yours,

Robert B. Ferguson

Appellant's reference to the Supervisor's "decision of January 15, 1974," would seem to belie his present assertion that he did not regard that missive as a "decision." The use of the words "serve to notify you that I intend to appeal" is directly contradictory to appellant's present averral that he did not intend this letter as a notice of appeal.

We must conclude that the Supervisor's letter of January 15, 1974, was a written notice of a final action, adverse to the applicant, which gave rise to a right to appeal to the Director. We conclude further that it was recognized as such by the appellant, who promptly filed a notice of appeal from what he himself termed the "decision." We find also that despite appellant's recognition of the import of the Supervisor's letter and his stated intention to make an appeal therefrom, he did not comply with the procedure prescribed in 30 CFR 290 with respect to the form and content of the notice of appeal, the time afforded for filing additional statement of reasons, written arguments or briefs, or the procedure for obtaining an extension of that time, thus subjecting the appeal to dismissal.

Absent any persuasive reason which would justify such failure and warrant excusing them as an exercise of administrative discretion, we must find that the Director's dismissal of the appeal was not improper. United States v. Haskins, 3 IBLA 77 (1971).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Director, Geological Survey, is affirmed as modified.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joseph W. Goss
Administrative Judge

