

Editor's note: Reconsideration denied by order dated Dec. 13, 1976

LONE STAR PRODUCING COMPANY

IBLA 76-372 Decided November 19, 1976

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease NM 12289 (Okla).

Affirmed.

1. Notice: Generally--Oil and Gas Leases: Generally-- Rules of Practice: Generally

A document which is sent by the Bureau of Land Management to an oil and gas lessee by certified mail is considered to be served upon the lessee when a receptionist in lessee's office signs the return receipt card, and the lessee will be charged with notice as of that date as to the contents of such document.

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

Where a lessee makes a deficient rental payment for his oil and gas lease claiming that such payment was determined in accordance with the rental or acreage figure stated in the lease, he will not be entitled to a Notice of Deficiency, pursuant to 43 CFR 3108.2-1, when it is shown that he received notice of an increase in the lease rental and, therefore, was not justified in relying on the original rental figure in the lease.

3. Oil and Gas Leases: Reinstatement--Oil and Gas Leases: Rentals

An oil and gas lease terminated by operation of law for failure to pay the full advance

rental timely can only be reinstated when the lessee shows that his failure to pay the rental on or prior to the anniversary date was justifiable or not due to a lack of reasonable diligence.

APPEARANCES: Clarence E. Hinkle, Esq., Hinkle, Bondurant, Cox & Eaton, Roswell, New Mexico, and Eugene D. Gulland, Esq. and Peter J. Nickles, Esq., Covington & Burling, Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Lone Star Producing Company ^{1/} has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated November 14, 1975, denying its petition for reinstatement of oil and gas lease NM 12289 (Okla.). The lease terminated automatically on September 2, 1975, by operation of law for failure to pay the balance of the annual rental in a timely manner under the provisions of 30 U.S.C. § 188(b) (1970).

Noncompetitive oil and gas lease NM 12289 (Okla.), embracing 246.07 acres in Beckham County, Oklahoma, was issued to Harriet Ann Wheeler, as the successful drawee in a simultaneous oil and gas lease drawing. The effective date of the lease was September 1, 1970. The lease was assigned to Lone Star, and the assignment was approved on March 6, 1972. Lone Star made timely payment of the annual rental, \$123.50, for the lease in 1972, 1973 and 1974.

On January 2, 1975, the New Mexico State Office issued a decision notifying appellant that all or part of NM 12289 (Okla.) had been determined to be within an undefined known geologic structure, and that consequently, pursuant to 43 CFR 3103.3-2(b)(1), the annual rental for the lease would be increased to \$2.00 per acre or fraction thereof. The decision was sent to Lone Star at 202 Oil and Gas Building, Oklahoma City, Oklahoma. The return receipt card indicated that the decision was delivered on January 5, 1975, and received by one S. P. Landreth.

On August 11, 1975, Lone Star paid rental in the amount of \$123.50. Subsequently, BLM sent a receipt for payment to Lone Star addressed to 202 Oil and Gas Building, Oklahoma City, Oklahoma. The receipt was returned with the notation "address unknown." It was remailed by BLM to 301 S. Harwood St., Dallas, Texas 95201, ^{2/}

^{1/} Lone Star Producing Company is now known as Enserch Exploration, Inc.

^{2/} Checks for rental payments on this lease had originated in the Cash Management Group of the Lone Star Gas Company and Subsidiary Companies, 301 S. Howard Street, Dallas, Texas 75201, but the record does not indicate that this Dallas address was ever given as the address of record for this lease.

and stamped received by "Land Department, Exploration Division," on September 12, 1975. The receipt stated that there was a \$370.50 balance due on lease NM 12289 (Okla.) and the notice that "unless other action is pending or the balance due is paid by the due date this lease may be terminated."

By letter dated September 17, 1975, one Jimmy H. Williamson informed BLM of a change of address for Lone Star's Oklahoma City office from 202 Oil and Gas Building to 100 Park Ave. Building, Suite 606. Williamson indicated that he had been advised by the Dallas office (of Lone Star) that lease NM 12289 (Okla.) was considered to be within a known geologic structure. Appellant stated:

* * * Due to the notice on the rentals having been sent to our old address, it was received by our Dallas office after the rentals had been paid at the old rate. This letter is to advise that the additional amount due under the new rental increase is in the process of being paid by our Dallas office. The additional payment of \$370.50 was received by BLM on September 18, 1975.

On October 2, 1975, BLM issued a notice to Lone Star indicating that lease NM 12289 (Okla.) had terminated for failure to pay the balance of the annual rental in a timely manner. Lone Star petitioned for reinstatement contending that it had not received notice of the classification of the lease as being within a known geologic structure. The New Mexico State Office denied reinstatement of the lease by decision dated November 14, 1975, and this appeal followed.

On appeal Lone Star asserted that appellant did not receive actual knowledge of the increased rental due for the lease until after the anniversary date of the lease. In an affidavit from one R. J. McCall, District Manager of appellant's Oklahoma Office, McCall states that he has supervisory authority over the employees in the Oklahoma office and that he made a diligent search of all files pertaining to the lease and he found no evidence that notice was ever received prior to September 1, 1975, from the BLM regarding the increased rental rate. He stated that Miss S. P. Landreth was employed by appellant until she terminated her employment on March 21, 1975. During her employment, she was a receptionist and she had no authority or control over any matters pertaining to any lease held by the Company. He stated that she could not have signed the return receipt card on January 5, 1975, because January 5 was a Sunday and the office is closed on Sundays.

Appellant argues that actual notice of the rental increase was not given to an employee whose job responsibility related to

the company's oil and gas operations. Appellant cites the case of NLRB v. Vapor Recovery Systems Company, 311 F.2d 782 (9th Cir. 1962), as standing for the legal principle that when a contract or statute provides for notice, the preferred form of notice is personal service and the party obliged to provide notices bears all risks of non-notification if he elects to make use of any other form of notice.

While the court in Vapor Recovery does, in fact, say that personal service is the preferred method, it states further that " * * * it is sufficient to show that the party to be notified received written notice." Id. at 785.

BLM was obligated, pursuant to 43 CFR 3103.2-1(b), to give Lone Star notice of the increased rental. BLM undertook to notify the company in an accepted manner – certified mail, return receipt requested. Therefore, the question is whether Lone Star actually received notice of the increased rental.

[1] The pertinent Departmental regulation governing communications by mail, 43 CFR 1810.2(b), states:

(b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by post office authorities.

The January 2, 1975, decision was sent to appellant's address of record: Lone Star Producing Company, 202 Oil and Gas Building, Oklahoma City, Oklahoma. Appellant apparently had not informed BLM to direct communications with the company to any specific person; therefore, upon delivery to appellant's address the certified mail return receipt card was signed by a receptionist, S. P. Landreth.

Appellant does not deny that S. P. Landreth signed the return receipt card or that S. P. Landreth had the authority to accept certified mail for appellant; rather, appellant states that such

decision or notice of such decision could not be found in appellant's files; that S. P. Landreth had no authority or control over the lease; that the receipt date on the return receipt card was a Sunday, and that the office is not open on Sundays.

The above-quoted regulation provides for constructive notice by mailing to a person's address of record. This Department has held on a number of occasions that transmission of a decision to a person's address of record by certified mail constitutes constructive service even though the attempt by the Post Office to deliver the document at that address was unsuccessful. John Oakason, 13 IBLA 99 (1973); Beryl Shurtz, 4 IBLA 66 (1971); James W. Heyer, 2 IBLA 319 (1971). The legal effect of constructive service is exactly the same as actual service. Beryl Shurtz, supra; Duncan Miller, A-31054 (August 21, 1969).

It is inescapable that Lone Star received notice of the increased rental in the present case when a receptionist in appellant's office signed the certified mail return receipt card for the decision. Whether or not S. P. Landreth transferred the decision to an appropriate official in the company is beyond the control of BLM. See G. Wesley Ault, 16 IBLA 291 (1974). BLM did all it was required to do by addressing the decision to appellant's address of record and entering the signed return receipt card in the case file. Such evidence of delivery is sufficient to conclude that appellant had actual, or, at the very least, constructive notice of the increased rental.

Appellant's assertion that S. P. Landreth had no authority to act concerning the lease is of no moment. S. P. Landreth was an employee of appellant and it was apparently within the scope of her employment to accept certified mail. Appellant should have provided for the transfer of important documents from the one receiving them to one with authority to act concerning them. Appellant may not hide behind the complexity of its corporate structure to avoid notification of actions affecting its business. Cf. Monturah Company, 10 IBLA 347 (1973).

The fact that the date on the certified mail return receipt card was a Sunday does not vitiate the effect of the receipt. It is obvious that the date is wrong, as the Post Office is closed on Sundays. However, the decision was, in fact, delivered to appellant's address as it was received by an employee of appellant. Since the employee terminated her employment on March 21, 1975, the decision was received sometime after the date of the decision, January 2, 1975, yet before March 22, 1975. Regardless, the date of receipt is insignificant because any day within such limits would be sufficiently in advance of the anniversary date of the lease, September 1, to afford appellant the proper notice.

[2] Lone Star also argues that it is entitled to invoke the exception to automatic termination in 30 U.S.C. § 188(b) (1970). The exception states:

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

The regulations, 43 CFR 3108.2-1(b), provide that in such a case the authorized officer will send a Notice of Deficiency to the lessee allowing the lessee 15 additional days from the date of receipt in which to pay the balance of the rental.

In order to be entitled to a Notice of Deficiency, the lessee must have relied upon an erroneous acreage figure or erroneous rental amount stated in the lease, a bill, or a decision of the authorized officer which results in a deficiency.

Herein, the acreage figure in the original lease was correct and the January 1975 decision, calling for increased rental, merely stated that the rental would be increased to \$2.00 per acre or fraction thereof from \$.50 per acre or fraction thereof. It is true that appellant relied on the original lease rental of \$123.50 in making its 1975 rental payment, but such reliance was not justified in that appellant had, in the eyes of the law, received notice of the increased rental. There was no erroneous rental amount or incorrect acreage figure. Appellant should have known that the rental had increased because it had received notice of such increase. Nor may the receipt for payment received by appellant on September 12, 1975, be considered a Notice of Deficiency as appellant was not entitled to such a notice.

Appellant also intimates that the receipt for payment failed to reach it until after the rental was paid at the old rate because such notice was sent to appellant's old address. Any reliance on such a reason as justifying a late payment would be illfounded because the lessee of an oil and gas lease on federal lands is responsible for keeping BLM informed of any change in his record address. For that reason, appellant's failure to timely notify BLM of the change could not work to appellant's advantage.

[3] Appellant has been unable to show that its failure to pay the full advance rental on or prior to the anniversary date

was either justifiable or not due to a lack of reasonable diligence. See Oil Resources Inc., 13 IBLA 359 (1973). Therefore, BLM acted properly in denying appellant's petition for reinstatement of lease NM 12289 (Okla.).

The dissenting opinion quotes at length from the legislative history of the Act of May 12, 1970, 84 Stat. 206. The points raised in the dissent have been fully considered earlier by this Board and rejected in Louis Samuel, 8 IBLA 268 (1972), and in Louis J. Patla, 10 IBLA 127 (1973). The principles which the dissent attacks have been consistently reaffirmed by this Board, and in many cases, by the federal courts. See, e.g., Maisano v. Morton, Civil No. 39720 (E.D. Mich. 1973); Samuel v. Morton, Civil No. CV-74-1112-EC (C.D. Cal. 1974); Goad v. Morton, Civil No. 9948 (D.N.M. 1974); Laatz v. Morton, Civil No. 03266 (E.D. Mich. 1975).

Moreover, the dissent completely misinterprets the meaning of the phrase "such failure was justifiable." 30 U.S.C. § 188(c) (1970). The phrase quite obviously means that appellant must show that his failure to submit the rental timely was "justifiable." The focus is clearly to be on the justification for the failure to pay timely the annual rental for the lease. The dissent, however, focuses exclusively on the alleged loss to the appellant should the lease not be reinstated. The effect is that, under the rationale of the dissent, if the lease was deemed to be worthless the failure to make timely payment of the annual rental, given the exact fact situation herein, would somehow metamorphose itself so that it would no longer be deemed "justifiable." Such a clear misreading of the Act should be rejected out-of-hand. This Board should not put itself in the position of determining the relative value of oil and gas leases so as to decide which ones it deems are worthy of reinstatement.

The dissent reads the Act of May 12, 1970, supra, as repositing within the Department some vast grant of equitable powers to relieve all oil and gas lease holders of the consequences of their failure to pay annual rental timely. It is clear, however, that Congress intended no such grant. The original reinstatement Act of October 15, 1962, 76 Stat. 943, was curative of past defects only, and had no prospective application, owing in part from the desire of Congress not to vest future discretionary authority to reinstate leases within the Department. S. Rep. No. 87-2165, 87th Cong. 2d Sess., at 3. The 1970 Act contained an express provision that no oil and gas lease could be reinstated, no matter how justifiable the failure to pay timely the annual rental, unless the rental was received within 20 days following the due date. Congress noted:

It is recognized that this 20-day limitation on reinstatements means that a small percentage of terminated leases, otherwise deserving, may not be reinstated under this legislation. However, in balancing the

advantage of a more liberal relief provision against the committee's desire to reduce the incentive for "intentional" mistakes, the latter course was chosen. In the event truly deserving cases arise that cannot meet the 20-day provision recourse to private relief legislation may be necessary.

H.R. Rep. No. 91-1005, 91st Cong. 2d Sess., at 5.

Had Congress desired to give the Department of the Interior broad, unfettered authority to act as it deemed best, it could easily have done so. We will not assume powers which it is clear Congress did not intend to grant.

The dissent tries to convey the impression that a well was being drilled in connection with the subject lease. The record does not support this position. No notice of intention to drill on this lease was ever filed with the Geological Survey. 30 CFR 221.3. Nor has there been filed any application to communitize this lease with adjoining land on which drilling may have been in progress. We do not understand why the dissent stresses that diligent drilling was being conducted in connection with this lease.

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.

Douglas E. Henriques
Administrative Judge

I concur.

Newton Frishberg
Chief Administrative Judge

ADMINISTRATIVE JUDGE GOSS, DISSENTING:

Based on the facts alleged for the first time on appeal, and the legislative history of the 1970 amendments to the Mineral Leasing Act, 30 U.S.C. § 188(b) and (c) (1970), the Board should remand the case to the Bureau of Land Management for a consideration of such facts.

Payment was required by September 2, 1975. Payment of \$123.50, the amount due during previous years, was made on August 11. The deficiency of \$370.50 was paid September 18, within the 20-day statutory period in which equitable relief may be granted. 43 CFR 1810.2(a) and (b). Termination might have been avoided if BLM had been able to communicate the deficiency to Lone Star; however at some point Lone Star had moved its office. The August 11 payment, and also payments for the previous 2 years, were made on behalf of Lone Star by "Lone Star Gas Company and Subsidiary Companies" from a Dallas, Texas, address. That address appeared in the three vouchers. 1/

Appellant has submitted on appeal an affidavit certifying that it owes some \$60,000 for its share of costs for the drilling of a well in which it participated as lessee of the disputed leasehold, and that based on the estimated reserves and the prevailing interstate prices for the natural gas involved, it will lose in excess of \$700,000 net revenue if the lease is not reinstated. 2/ The Board

1/ While the regulations do not provide a particular means of notification for change of address, a change should be brought specifically to the attention of the State Office. Nevertheless, the fact that the Dallas address was on three vouchers in the file does indicate good faith on the part of appellant.

2/ The affidavit submitted by Robert J. McCall states in part:

"* * * Enserch Exploration, Inc. participated in the drilling of the No. 1-A Cupp Well, wherein Helmerich and Payne are operators, for a working interest of 3.89 %. Based upon preliminary estimates of the final cost of this well the percentage owned by Enserch Exploration, Inc. will amount to approximately \$60,000. The estimated gas reserves for this well amounts to 14.6 billion cubic feet of gas. Based upon these reserves, Enserch Exploration's portion is estimated at 468,504 million cubic feet of gas. At prevailing intrastate prices the net revenue from this well would have a value in excess of \$700,000, to Enserch Exploration, Inc.' Under the Operation Agreement, the loss of this lease by Enserch would result in Enserch having to pay its share of the drilling costs of the well without sharing to pay its share of the drilling costs of the well without sharing in the proceeds from the sale of the gas. Thus, Enserch would effectively lose \$760,000.00."

should consider this as a question of equity, and address itself to the hardships involved, liberally construing the 1970 amendment in accordance with Congressional intent. Louis J. Patla, supra at 131 (dissent). In Louis Samuel, supra at 271, the Board stated:

Appellant contends first that P.L. 91-245 is remedial legislation and should, under dictates of normal statutory construction, be construed liberally. We agree. See 3 SUTHERLAND, STATUTORY CONSTRUCTION, § 5701 (1943). But while the terms used to convey Congressional intent in the statute may be liberally construed to give effect to that intent, the paramount question remains: what was the intent, what was the focus of concern which led to the enactment of P.L. 91-245? Certainly it was designed to afford relief in some of the past case situations where Congress felt that such action was warranted. * * *

None of the court decisions 3/ involving the 1970 amendment have concerned facts similar to those under consideration. In none of those cases was a good faith payment made prior to termination of the lease, nor have the courts discussed such a situation in dictum. It is therefore appropriate to review the legislative history of the amendment.

In 1970 Congress authorized reinstatement of a terminated oil lease where (1) payment is tendered in full within 20 days from the anniversary date and (2) failure to make full and timely payment was either "justifiable" or "not due to lack of reasonable diligence." In enacting the amendments, Congress intended that relief be granted as a matter of equity in all cases similar to those brought to Congressional attention, despite the fact that a lessee was to some degree at fault. The House Interior and Insular Affairs Committee report on the 1970 amendments, H. R. Rep. No. 1005, 91st Cong., 2d Sess. (1970), states:

The proposal would enable the Secretary to do equity and would also obviate the need for Congress to continue to consider many private bills for the relief of individual lessees.

* * * * *

Notwithstanding efforts on the part of the Government to eliminate all possible errors in billing and in the computation of lease acreages or rentals, and despite diligence on the part of most lessees to pay the full rentals on time, errors continue to occur

3/ See Appendix A.

which bring about the termination of leases under circumstances not fair or equitable to the lessee, but beyond the present authority of the Department to correct.

* * * * *

Among the most frequent errors on the part of the lessees are the inadvertent submission of insufficient rental and the late payment of rental. The former is usually the result of clerical errors, and the latter results either from unusual delays in the mails or merely because the lessee failed to allow sufficient time for the rental payment to reach the designated office before the due date. In most cases brought to the committee's attention, the failure of the lessee to pay the full amount of the rental or to pay it timely appears to have been either justifiable, or at least, not due to lack of reasonable diligence.

* * * * *

The committee wishes to emphasize that reinstatement of an oil and gas lease under the provisions of section 2, where the error, although inadvertent, is entirely the responsibility of the lessee, is not automatic but requires a petition by the lessee.

A reinstatement may be made by the Secretary only after he is fully satisfied that the mistake was justifiable or not due to lack of reasonable diligence on the part of the lessee. The Committee expects the Secretary of the Interior to examine carefully each petition for reinstatement and to adjudicate favorably only those cases where it is clearly shown that the failure was, as indicated above, either justifiable or not due to lack of reasonable diligence. The committee is fully aware of the advantage that could result from "intentional" mistakes whereby unethical operators could knowingly underpay or submit rentals late and thereby gain additional time while an oilfield "play" is developing. However, S 1193 as amended provides the Secretary with ample authority to determine the merits of each petition for reinstatement and reinstatement need not be made until the Secretary is fully satisfied. [Emphasis added.]

1970 U.S. Code Cong. and Ad. News 3002 et seq. It will be noted that the only example cited by the Committee as a nonqualifying payment is where the "mistake" was intentional.

In his August 6, 1969, letter to the Chairman of the House Interior Committee, the Under Secretary of the Interior recommended that the 1970 amendment be enacted, in part for the following reasons:

After 1954 the automatic termination provision resulted in the termination of a number of oil and gas leases for failure to pay a timely rental in circumstances which appeared to warrant equitable consideration and relief. The Secretary was not authorized to grant this relief. To correct this situation, legislation was proposed in 1962 which would give the Secretary discretionary authority to reinstate these leases where the failure of payment was justifiable or not due to a lack of reasonable diligence on the part of the lessees. * * * Congress, however, limited the authority to past cases only.

* * * * *

Some of the deficiencies result * * * from an error on the part of the lessee (see Private Law 90-294 [Elwyn C. Hale, discussed *infra*]). In most cases, the failure of the lessee to pay the full amount of the rental or to pay timely was either justifiable or not due to a lack of reasonable diligence.

We believe that a general legislative solution to this problem is needed. S. 1193 would provide such a solution. * * * It attempts to provide a remedy for all the situations for which private relief legislation had to be enacted in the 90th Congress.

* * * * *

[The bill] sets fort a reinstatement procedure to be followed in two types of cases. * * * [T]he second involves cases where there is an error on the part of the lessee. * * * In the second case, the reinstatement procedure would apply where the lessee failed to pay the rental on time, but payment was made within 20 days after the anniversary date and he can show that the failure was either justifiable or not due to a lack of reasonable diligence on his part.

* * * * *

The "justifiable" and "reasonable diligence" tests are patterned after the 1962 act.

1970 U.S. Code Cong. and Ad. News 3007-08.

In Elwyn C. Hale, Las Cruces 063610 (June 22, 1966), the lessee alleged that he had spent \$8,974 on a drilling operation in progress at the time his lease automatically terminated. After the Department upon appeal affirmed the BLM holding that the Hale lease had expired by operation of law, the 90th Congress enacted Private Law No. 294, 2d Sess. (1968), 82 Stat. 1409. The statute provides in part:

* * * The Secretary may reinstate said lease in accordance with the provisions of section 31(c) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 188(c)): Provided, That it is shown to the satisfaction of the Secretary that the failure to pay timely was either justifiable or not due to lack of reasonable diligence. If the Secretary grants a reinstatement of the terminated lease and finds that such reinstatement will not afford the lessee a reasonable opportunity to continue operations under the lease, he may extend the term of the lease for a period not to exceed two years from the date the Secretary grants the petition. [Emphasis added.]

The Department subsequently reinstated the lease in an August 27, 1968, decision of the New Mexico State Office, holding:

All of the facts and circumstances involved have been carefully weighed and considered. The fact that drilling operations were being diligently prosecuted on the expiration date of the lease and because Mr. Hale desires to continue drilling operations, this office is of the opinion that Mr. Hale acted in good faith and his failure to timely pay the rentals was not due to a lack of reasonable diligence, and he should receive the benefits provided under the Act.

Therefore, in accordance with the provisions of Section 31(c) of the Mineral Leasing Act of 1920, as amended, and Private Law 90-294, the petition for reinstatement of the lease is hereby granted.

It will be noted that appellant herein also alleges diligent drilling in connection with the lease. There is no reason to doubt appellant's good faith in attempting to tender payment promptly.

After the above-noted developments in Hale, the Under Secretary wrote his 1969 letter, supra, to the House Interior Committee. With that letter, he enclosed a "summary of the fact situations relative to the private laws enacted in the 90th Congress * * *." 4/ The summary in part states:

4. Elwyn C. Hale - Private Law 90-294

* * * * *

Mr. Hale explains the reason for the late payment in a letter dated June 8, 1965, as follows:

"In April of this year, I began arrangements to drill a new well on the property. I obtained the necessary drilling bonds and the necessary permits from the owners of the potash rights in the surface and from the Bureau of Land Management. Drilling operations were commenced on April 29, 1965 and I have expended \$8,974.37 on the drilling operations since that time. When drilling operations are commenced, the term of the lease is automatically extended to two years. While I was in New Mexico arranging the necessary permits and getting the drilling operations under way, the due date for advance rental payment (May 1) came up. As is customary when I am away, all routine business operations are carried on by my secretary who occupies my office with me. My present secretary had only been with me a couple of months, and misunderstood my instructions and the lease and assumed that the commencement of drilling operations was all that was necessary to keep the lease in effect. Unfortunately, the annual rental payment of \$520 was thus overlooked." [5/]

4/ 1970 U.S. Code Cong. and Ad. News 3009.

5/ In the BLM decision of June 22, 1966, supra, it is stated in part:

"The appellant asserts, without substantiation, that he believes a complete audit of the rental account in connection with this lease and the prior lease on which it was based would reveal a credit in excess of the \$520 rental concerned * * *.

* * * * *

"The appellant has furnished no evidence to support his belief concerning an unused credit applicable to the lease rental account. The record contains no such showing."

The Department thus held that despite the mistake of Hale's secretary, Hale had been reasonably diligent. It will also be noted that Hale had already obtained his private relief bill and Departmental reinstatement, supra, when the Department chose to submit the Hale case to Congress as the only example of when a mistake by a lessee should and would be corrected through equitable relief under the proposed amendment.

Congress thereupon patterned the 1970 amendments to provide the relief requested by the Department, including relief under facts similar to those in Hale. The Lone Star mistake apparently involved the receptionist who received the notice that the land had been classified as within a KGS. Lone Star, however, acted with a greater degree of diligence than Hale, and made timely payment of part of the amount due.

The legislative history of the 1962 amendments, Pub. L. 87-222, 76 Stat. 943, and the Departmental construction of that act, are also helpful in analyzing the intent of the words "justifiable" and "reasonable diligence." The Assistant Secretary in his letter of March 6, 1962, to the President of the Senate, 6/ listed the following among other reasons for proposing the bill:

A number of cases have arisen where the oil and gas lessees' rights in leases have terminated due to failure to pay rental timely in circumstances which appear to warrant equitable consideration and relief.

* * * * * * *

This proposal would supply the statutory authority to grant equitable relief by reinstating the leases upon payment of all rental obligations. The authority to grant relief under the Mineral Leasing Act under this proposal would be the counterpart to that authority contained in R. S. 2450, 2451, 2456, as amended (43 U.S.C. 1161-1163), 7/ relating to "Suspended entries

6/ 1962 U.S. Code Cong. and Ad. News 3239.

7/ It will be noted that 43 U.S.C. § 1164 (1970) is not referred to in the 1962 Act. That section requires substantial compliance with the law, which requirement is not a prerequisite to equitable relief under either the 1962 or 1970 statute. Relief is to be accorded if the failure to pay was justifiable or not due to lack of reasonable diligence, even where there was not a substantial compliance prior to termination. In many instances wherein the board has granted relief, there was no payment whatsoever prior to the termination. E.g., Mrs. Charles H. Blake, 10 IBLA 175 (1973).

on public lands" and covered by the departmental regulations in 43 CFR, part 107. 8/

In S. Rep. No. 2165, 87th Cong., 2d Sess., on the 1962 legislation, the Senate Interior Committee stated:

The House approved amendments by its Interior Committee limiting the discretionary authority granted the Secretary of the Interior to reinstating leases which already have terminated as a result of past errors on the part of the Department * * *. Thus, the provisions would be retroactive only, and not prospective as recommended by the Department, and the relief authorized could not be accorded lessees who were in any way at fault themselves, even through minor, honest mistakes.

* * * * *

The Department of the Interior * * * vigorously objected to the House amendments.

* * * * *

The Senate committee amended H.R. 11049 by striking all after the enacting clause, and substituting the language of the administration's bill, S. 3030, with amendments. These amendments provide that the legislation shall apply to past actions only. The committee is sympathetic to those whose leases have been terminated automatically in the the past, and feels that they are entitled to the legislative relief offered. However, your committee does not feel that legislation is justified which would forgive future acts of neglect, either on the part of the lessee or the Department of the Interior.

The committee is pleased to note that the Department itself is taking steps to remedy situations brought about by its own unnecessarily restrictive regulations and interpretations of the act.

Your committee further amended the bill by adding a new subsection, subsection (d), to section 31 of the Mineral Leasing Act which would afford relief to those actually drilling on the last day of the term of their lease, but who failed to make timely payment of the rental due. Your committee feels that this relief is

8/ Renumbered as 43 CFR 1871.1-1 "Cases subject to equitable adjudication."

particularly appropriate, in view of the obvious intent of the act of September 2, 1960, to reward those who are spending money, time, and effort in developing reserves, by a further extension of their lease.
[Emphasis added.]

1962 U.S. Code Cong. and Ad. News 3238-39. The statutory scheme as provided in the 1962 legislation thus was intended to allow that equity be done, particularly where, as alleged here, a lessee was "expending money, time and effort in developing reserves."

The Department construed the 1962 Act in dictum in Hunt Oil Company, A-30101 (June 23, 1964):

Of course, the statute as enacted is not specifically limited only to the two classes of cases but it seems apparent that Congress had in mind lessees * * * who acted with promptness in attempting to make rental payments. ^{9/}

In addition to the legislative history of the statute, the history of the 1971 revision of 43 CFR 3108.2-1 is significant. After comments were received in connection with a notice of proposed rulemaking, the Department accepted the suggestion that section 3108.2-1(c)(2), 36 F.R. 2871 (Feb. 11, 1971), be made less restrictive as to reasonable diligence by insertion of the word "normally." The Assistant Secretary explained:

The regulations have been revised to broaden what constitutes reasonable diligence so as to permit such a finding in special circumstances even when the lessee has not sent or delivered payments in advance of the due date.

36 F.R. 21035 (Nov. 3, 1971). The revised regulations referred to by the Assistant Secretary reads:

* * * Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment. [Emphasis added.]

^{9/} Contrary to the case under consideration, in Hunt Oil Company no payment was made prior to the termination of the lease. In addition, the lessee willfully disregarded the Department's reminder notice. No oil well was being drilled. These facts would seem to distinguish Hunt Oil from both the Lone Star situation and that in Elwyn C. Hale, *supra*.

36 F.R. 21036 (Nov. 3, 1971), 43 CFR 3108.2-1(c)(2). Such advance "sending or delivering" was not intended to be required in every instance. "Reasonable" diligence is not equivalent to "absolute" diligence.

In submitting the deficient payment, Lone Star acted under a mistake of fact. Besides being reasonably diligent under the Hale test, it can be said that Lone Star's error was justifiable. In Townsend v. United States, 95 F.2d 352, 358 (D.C. Cir. 1938), the Court construed "justifiable" in a criminal statute:

Justification may also be based upon a mistake of fact by the defendant, where his mistake is a reasonable one and where the fact – if it were as he believed it to be – would have constituted justification.

The Board applied equitable principles in Joseph E. Steger, 20 IBLA 206 (1975). Despite decisions holding failure to receive courtesy notices does not absolve a lessee of the requirement to seasonably tender the annual rental, the Board held in Steger that where a lessee received an illegible courtesy notice and demonstrated his reliance thereupon by his actions, his delay in making payment was not due to a lack of reasonable diligence.

If at the time of the termination, a well was in fact being drilled, which well, if successful, would benefit the holders of Federal mineral rights, this is a special reason for carefully weighing appellant's equities. See Great Basins Petroleum Co., 24 IBLA 117 (1976) and S. Rep. No. 2165 at 3239, quoted supra. Where there has been a considerable sum spent on development, and where the amount owing is relatively insignificant, it could be argued that even without the equitable relief amendment, the lessee had substantially complied with his obligations. In such a situation it is especially inequitable for a lessee to lose the benefits of his efforts through a procedure similar to forfeiture; and in some such situations courts grant relief even where there is no equitable relief statute. E.g., Hutchinson v. McCue, 101 F.2d 111 (4th Cir. 1939). An agency's authority to invoke conceptions of equity, even without an equitable relief statute, are discussed in City of Chicago v. Federal Power Commission, 385 F.2d 629, 642-43 (D.C. Cir. 1967), cert. denied, 390 U.S. 945 (1968), in which the Court stated:

* * * It is argued to us that Section 4(e) "does not confer equity powers" upon respondent Commission. It may readily be agreed that a commission does not have the same range as an equity court to summon powers to the call of justice. * * * However, when an agency is exercising powers entrusted to it by Congress, it may have recourse to equitable conceptions in striving

for the reasonableness that broadly identifies the ambit of sound discretion. Conceptions of equity are not a special province of the courts but may properly be invoked by administrative agencies seeking to achieve "the necessities of control in an increasingly complex society without sacrifice of fundamental principles of fairness and justice."

Without expressing an opinion as to other circumstances wherein equitable relief should be granted, and assuming the truth of appellants' allegations, I feel that Congress intended that a lease be reinstated where (1) lessee has incurred a substantial obligation in a development well being drilled in connection with the lease, (2) lessee is likely to lose an interest in substantial estimated gas reserves unless the lease is reinstated, (3) lessee's good faith is not in question, (4) 22 days prior to due date lessee made payment of a substantial portion of the rental due, (5) lessee through a mistake in fact which may have been caused by clerical error neglected to pay the additional amount due for a KGS lease, and (6) lessee made full payment promptly upon receipt of notice of deficiency and well within the 20-day period provided by statute.

Joseph W. Goss
Administrative Judge

Appendix A

The majority opinion cites four court decisions as reaffirming the Board decisions in Samuel and Patla, both supra.

The Court in Samuel v. Morton, supra, granted summary judgment for defendant because plaintiff had not initiated his action for judicial review within the required 90-day period. 30 U.S.C. § 226-2 (1970). Samuel had alleged that having suffered a number of financial reverses he found himself unable, despite diligent efforts to obtain the rental money by the anniversary date.

Upon stipulation of the parties, the Court dismissed Goad v. United States, supra. The facts in Goad and the other two cases are not comparable to the situation of appellant as described in the McCall affidavit. The cases are summarized by the Board in Samuel at 277-79:

Joseph & Jean Maisano; IBLA 72-267; Wyo. 24285-A

Lessees experienced difficulty in contacting the assignor of their assigned lease, who assured them the land office would accept late payment. Payment was post-marked 2 days late, was received 5 days late and the enclosed check was dated one day before the due date.

Charles M. Goad; IBLA 72-304; NM 10425, 10426, 10508, 10509, 10510, 10552

Lessee was in the process of selling his lease interest to another party. The check by which payment was tendered was returned by the bank as uncollectible due to a lack of sufficient funds. Lessee subsequently made payment fifteen days late.

Gordon & Alleyne Laatz; IBLA 72-269; Wyo. 24286

Lessees suffered a number of deaths in their family. In addition, there was a lack of understanding on the lessee's part of the requirement of rental payments on non-producing leases. We have closely considered appellant's case and find that the succession of illnesses and death was not sufficiently proximate to fall within the confines of the term "justifiable" as elucidated supra.

Santor v. Morton, 383 F. Supp. 1265 (D. Wyo. 1974), should also be distinguished. Santor made no payment prior to termination, the reason given for his failure did not bear up under analysis, and there is no indication he had made any expenditures to develop the lease.

