

Editor's note: Appealed -- dismissed by stipulation (lease reinstated), Civ. No. C-78-111 (D. Utah Dec. 22, 1978)

EVELYN CHAMBERS

IBLA 77-180

Decided January 5, 1978

Appeal from a decision of the Utah State Office, Bureau of Land Management, canceling oil and gas lease U-33973.

Affirmed as modified.

1. Notice: Generally -- Oil and Gas Leases: Generally -- Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Noncompetitive Leases -- Oil and Gas Leases: Rentals

30 U.S.C. § 188(b)(1970), and its implementing regulation 43 CFR 3108.2-1, requiring a notice of deficiency on a form approved by the director apply only to rental payments due on the anniversary dates of noncompetitive oil and gas leases, and are inapplicable to deficient initial rental payments for noncompetitive oil and gas lease offers.

2. Notice: Generally -- Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Rentals

Where the Bureau of Land Management notifies an oil and gas lessee of a deficiency in initial rental and the deficiency is not paid to the Bureau within the time prescribed, but is paid some 5 months later, the delay being ascribed to "oversight" the lateness of the payment will not be excused and the cancellation of the lease for failure to pay the rental timely is properly sustained.

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

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Evelyn Chambers appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated February 1, 1977, canceling oil and gas lease U-33973 for a deficiency in the first year's annual rental.

Appellant filed an oil and gas drawing entry card for a simultaneous filing list for June 1976. Appellant was notified she was entitled to an oil and gas lease for Parcel No. U 1169 by a notice of rental due, dated July 9, 1976. The notice informed appellant the payment of the first year's rental of \$ 1,060.50 must be received by the BLM State Office within 15 days from receipt of the notice in accordance with 43 CFR 3112.4-1. Appellant's agent received the notice on July 17, 1976, and on July 21, 1976, the State Office received Appellant's check in the amount of \$ 1,060.50. A lease was issued on August 4, 1976, effective August 1, 1976, and a further notice dated August 4, 1976, was received by Appellant on August 7, 1976. That notice informed Appellant her first year's rental was deficient in the amount of \$ 0.50. The notice bore the following stamped notation: "The above numbered oil and gas lease is deficient in the first year's rental in the amount indicated (\$ 0.50). You are hereby notified that in accordance with 43 CFR 3103.3-1, the additional rental must be paid within 30 days from notice under penalty of cancellation of the lease."

Thus the \$0.50 payment was due and payable no later than September 6, 1976. However, payment was not received until February 17, 1977. Appellant ascribes her failure to pay the additional rental timely to "oversight." BLM canceled the lease in accordance with 43 CFR 3103.3-1 in its decision of February 1, 1977.

Appellant sets forth two arguments in the statement of reasons. The first argument is constructed on the language in 30 U.S.C. § 188(b) (1970). It states in pertinent part:

Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease * * * the lease shall automatically terminate by operation of law * * *. Provided, that if the rental payment due on a lease is paid on or before the anniversary date but either * * * (1) 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 unless * * * (2) the lessee fails to pay the deficiency

within the period prescribed in a notice of deficiency sent to him by the Secretary.
[Emphasis added.]

43 CFR 3108.2-1 was adopted to implement the statute. The regulation states where there is a deficiency "the authorized officer will send a Notice of Deficiency to the lessee on a form approved by the Director." However, both the cited statute and implementing regulation 43 CFR 3108.2-1(b) are in terms addressed to rental payments other than the initial one, i.e., to rental payments due on the anniversary dates of the lease.

Appellant asserts a deficiency notice can only be sent on Form 3108-3 (December 1971) as the sole form approved by the Director, Bureau of Land Management, for this purpose. Appellant points to other oil and gas lease regulations requiring certain applications be made "on a form approved by the Director."

Appellant's second argument is that 43 CFR 3103.3-1, which does not require a notice of deficiency but merely notice, is inapplicable to the present situation. The argument goes on to state that once Appellant timely paid the rental stated in the bill rendered by the Secretary, 43 CFR 3108.2-1(b), requiring lessee to be furnished with a notice of deficiency, becomes effective.

[1] 30 U.S.C. § 188(b) (1970) and its implementing regulation 43 CFR 3108.2-1(b) are the linchpins of Appellant's argument.

Appellant is correct when stating a notice of deficiency on a form approved by the Director is required by the aforementioned regulation. The Director has established such a form, and Appellant asserts she is entitled to be notified of a deficiency in an initial rental payment on this form.

Both the statute 30 U.S.C. § 188(b) (1970), and the implementing regulation 43 CFR 3108.2-1(b) address themselves to rental payments other than the initial one. There is a consistent reference in both the statute and regulation, to payments due on or before the anniversary date of a lease. The anniversary date is the day upon which the rental payments for other than the genesis of the lease are due.

We hold that Appellant was not entitled to a notice of deficiency on a form approved by the Director, since 30 U.S.C. § 188(b) (1970) does not apply to the case at hand.

[2] Appellant contends 43 CFR 3103.3-1 is inapplicable when the first year's rental has been paid in accordance with a bill rendered by the Secretary. We do not regard 43 CFR 3103.3-1 as controlling. It applies only to an over-the-counter offer, which is not present here.

43 CFR subpart 3112 is addressed solely to simultaneous oil and gas lease offers. In a simultaneous offer the rental must be paid within 15 days from the date of receipt of notice such payment is due. 43 CFR 3112.4-1. There is no mention in subpart 3112 of the situation where an initial rental payment received by the BLM is deficient in the first year's rental. What is present here is the need to comply with a State Office decision timely and the existence, if any, of circumstances which would serve as a sufficient predicate for excusing the late payment. "Oversight" is not a sufficient predicate for relief. It does not reflect reasonable diligence. Forgetfulness is not a sufficient excuse for us to disregard a 5-month delay in making payment. We therefore sustain the decision below as modified.

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 as modified.

Frederick Fishman
Administrative Judge

I concur:

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

Appellant's difficulty stems from what was originally a Government mistake in sending an incorrect bill. The payment was deficient but 50 cents, or 1/2322 of the amount due.

Appellant's situation is substantially different from that where no timely 90-percent payment was made and the offeror is automatically disqualified to receive the lease; there, the rights of other offerors are involved. 43 CFR 3112.4-1. 1/ Here, the Government accepted \$ 1,160.50 from Appellant. When Appellant received the lease, her interest vested against the Government and against other offerors, subject only to cancellation. Appellant's interest is much greater than the preference right of a successful drawee, which right could be worthless if the Government declined to lease. It is possible that a vested interest could be of immense value, under circumstances similar to those of Appellant.

Whether to subject Appellant's lease to cancellation is within the discretion of the Department, and should not be done for such a minor deficiency. 2/

It is submitted that the practical aspects of oil leasing procedures should be considered in construing the regulation -- including the expense to the Government from issuance of the lease, loss of rental until a new lease is issued, and the expense of termination and issuance of the new lease. Obviously, no proposed mandatory regulation having such an expense to the Government, in connection with a 50-cent deficiency, would have survived budgetary scrutiny.

Absent a regulation providing that other offerors in the simultaneous offer drawing have some preference right to the lease, there

1/ There is apparently no regulation which states that one of the other offerors in the drawing under 43 CFR 3112.2-1 has a preference right to the lease, even if appellant's lease is canceled.

2/ Contra Albert J. Finer, 27 IBLA 61 (1976), involving a \$ 20 deficiency on a total rental of \$ 576.50.

is no question of a third party rights being involved. An approach consonant with 43 CFR 1821.2-2(g) 3/ should therefore be applied.

Joseph W. Goss
Administrative Judge

3/ Section 1821.2-2(g) provides:

"(g) When the regulations of this chapter provide that a document must be filed or a payment made within a specified period of time, the filing of the document or the making of the payment after the expiration of that period will not prevent the authorized officer from considering the document as being timely filed or the payment as being timely made except where:

1. The law does not permit him to do so.
2. The rights of a third party or parties have intervened.
3. The authorized officer determines that further consideration of the document or acceptance of the payment would unduly interfere with the orderly conduct of business."

