

Editor's note: Reconsideration granted; decision modified by order dated Oct. 7, 1980 -- See 48 IBLA 151A th C below.

UNION OIL CO. OF CALIFORNIA

IBLA 80-477

Decided June 9, 1980

Appeal from decision of the Geological Survey dismissing appeal as untimely filed. GS-153-O&G.

Affirmed.

1. Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

An appeal to the Director, Geological Survey, is properly dismissed where the appellant failed to file a timely notice of appeal in the proper office within 30 days from service of the decision appealed from in order to comply with the requirements of the applicable regulations in 30 CFR 290.

APPEARANCES: Kenneth L. Riedman, Jr., Esq., Los Angeles, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Union Oil Company of California (Union) appeals from a decision dated January 30, 1980, by the Director, Geological Survey (Survey), which dismissed as untimely filed Union's appeal from a Survey letter-order requiring royalty payments based on gross proceeds from sales of gas produced from the Kenai Unit in Alaska, including State tax reimbursements.

The Survey order here at issue was dated October 1, 1979, and received by appellant on October 5. Appellant filed a notice of appeal and appeal of the order on November 6, 1979. The Director's decision, GS-153-O&G, dismissed the appeal as untimely since it was not filed within 30 days after receipt of the order, as required by 30 CFR 290.3.

On appeal to this Board appellant states that it would have asked for an extension of time had it anticipated that its appeal would arrive 1 day after the filing deadline. Relying on the dissent in Mesa Petroleum, 44 IBLA 165 (1979), appellant urges that the 1-day delay is a procedural shortcoming of minimal import and should be overlooked in the interest of providing appellant "full due process considerations." Page 4 of the appeal.

[1] In Mesa Petroleum, supra, the majority stated:

The governing regulation 30 CFR 290.3(a) provides the procedures for perfecting appeals to the Director, U.S. Geological Survey, where it states that: "An appeal to the Director * * * may be taken by filing a notice of appeal in the office of the official issuing the order or decision within 30 days from service of the order of decision." [Emphasis added.]

Unlike the procedures governing appeals to this Board (43 CFR 4.401(a)), the U.S. Geological Survey appeal regulations do not allow a grace period of 10 days beyond the mandatory 30-day time period for filing of a notice of appeal. 30 CFR 290.5 authorizes the Director to extend the time for filing any document in connection with an appeal except the notice of appeal. There is no latitude allowed for the filing of this document. The notice of appeal must be received within the 30-day period.

Thus, even a notice of appeal, one day late is clearly insufficient to meet the jurisdictional requirements of 30 CFR 290.3. 1/ Cf. Lavonne E. Grewell, 23 IBLA 190 (1976) aff'd sub nom. Grewell v. Kleppe, Civ. No. A-76-270 (D. Alas. May 9, 1978) (L-912); see Robert B. Ferguson, 23 IBLA 29 (1975) (Judge Goss concurring); Martha Charlie, 22 IBLA 287 (1975); Shelly Anne Trainor, 21 IBLA 326 (1975) (Judge Goss concurring); Gerald D. Heden, 6 IBLA 291 (1972) (Judge Goss concurring).

The timely filing of a notice of appeal is a jurisdictional requirement and may not be waived. Cf. Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969), citing Pressentin v. Seaton, 281 F.2d 195, 199 (1960). In United States v. Robinson, 261 U.S. 220, 229-230 (1960), the Supreme Court of the United States recognized the inflexibility of a jurisdictional requirement, stating:

Rule 45(b) says in plain words that "* * * the court may not enlarge * * * the period for taking an appeal."

1/ While Judge Fishman is sympathetic to appellant's legal posture for the reasons expressed in his dissent in Mesa Petroleum, he feels constrained to follow the precedent set by the majority in that case.

The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional. The history of Rule 45(b) shows that consideration was given to the matter of vesting a limited discretion in the courts to grant an extension of time for the taking of an appeal, but, upon further consideration, the idea was deliberately abandoned. It follows that the plain words, the judicial interpretations, and the history, of Rule 45(b) not only fail to support, but actually oppose, the conclusion of the Court of Appeals, and therefore its judgment cannot stand.

That powerful policy arguments may be made both for and against greater flexibility with respect to the time for the taking of an appeal is indeed evident. But that policy question, involving, as it does, many weighty and conflicting considerations, must be resolved through the rulemaking process and not by judicial decision. United States v. Isthmian S. S. Co., 359 U.S. 314. If, by that process, the courts are ever given power to extend the time for the filing of a notice of appeal upon a finding of excusable neglect, it seems reasonable to think that some definite limitation upon the time within which they might do so would be prescribed; for otherwise, as under the decision of the court below, many appeals might--almost surely would--be indefinitely delayed. Certainly that possibility would unnecessarily * * * produce intolerable uncertainty and confusion. Whatever may be the proper resolution of the policy question involved, it was beyond the power of the Court of Appeals to resolve it.

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 Director, Geological Survey, is affirmed.

Frederick Fishman
Administrative Judge

I concur:

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

While I recognize the merit of the majority position, I respectfully dissent.

Assuming that on October 31, 1979, appellant deposited the appeal in the United States mails, properly addressed to the correct office, with proper postage prepaid, I would hold that appellant has substantially complied with 30 CFR 290.3(a). That section does not define "filing" with the same precision as 43 CFR 3833.1-2. The Director, Geological Survey, and the Board therefore have more discretion to apply the regulation in the interest of justice. Due process would require some limit to strict construction of section 290.3(a). In Howell v. Shannon, 170 F. Supp. 139 (D. Mont. 1959), the District Court granted relief in a situation wherein for good reason the plaintiff had failed to comply with the requirement of 7 U.S.C. § 1363 (1976). The statute required that application for review of a farm marketing quota be made within 15 days of mailing of notice thereof. The court held at 141-43:

It is undoubtedly true that in most instances, 15 days from the date of mailing is sufficient time for a farmer to receive the notice and apply for review. Occassionally, however, a situation may arise where a notice is lost in the mail or where, as here, the failure of the farmer to receive the notice and apply for the review within the 15 day period is either unavoidable or clearly excusable. In such cases, I do not believe that Congress intended that the review committee, in its discretion, might not consider a tardy application, if promptly filed after actual receipt of the notice.

Undoubtedly one of the purposes of the provision making the determination final after 15 days was to enable the review committee to carry out its functions without harassment from tardy appeals. It would appear, however, that to allow the committee, in its discretion, to consider a tardy application where good cause is shown, does not militate against the general purpose of the statutes.

* * * A court must not decide that a statute is unconstitutional if there is any way in which it can be interpreted to be constitutional. In Wong Yang Sung v. McGrath, 1950, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616, the Supreme Court held that the requirements of the Administrative Procedure Act, 5 U.S.C.A. § 1001 et seq., applied to administrative hearings in proceedings for the

deportation of aliens, in spite of the absence of statutory language to that effect. The Court said that to otherwise "construe the Immigration Act might again bring it into constitutional jeopardy." It is conceivable that a strict construction of section 1363 might likewise bring that section into constitutional jeopardy.

In general, the rules governing administrative proceedings are not as rigid as those governing judicial proceedings. "However, in the exercise of judicial or quasi-judicial powers, the elementary and fundamental principles of a judicial inquiry should be observed. The same general conduct must be pursued by administrative bodies as would be pursued by a court in safeguarding the fundamental constitutional rights of the citizen." 42 Am. Jur. 446, Public Administrative Law, § 114.

In some respects, the granting by a court of an extension of time for an appearance is analogous to a determination by the review committee that it could, in its discretion, consider an appeal although the 15 days have expired. It is stated in *Corpus Juris Secundum*, "Except in so far as prohibited or restricted by statute, the court has power to grant an extension of time for appearance." 6 C.J.S. *Appearances*, 9, p. 15. Under the Federal Rules of Civil Procedure, 28 U.S.C.A., when by the rules "or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion * * * upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect * * *" (except in certain instances specified in the rule). Rule 6(b). In *Edenfield v. C. V. Seal Co., Inc.*, 1925, 74 Mont. 509, 241 P. 227, 228, a demurrer was filed after the time in which defendants were allowed to answer had expired, but before the clerk had entered a default. The applicable statute provided: "If no * * * demurrer * * * has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted * * * the clerk must enter the default of the defendant; and thereafter the plaintiff may apply for the relief demanded in the complaint." R.C.M.1921, § 9322(2) (now R.C.M.1947, § 93-4801). The court held that the judgment entered on the default should be set aside stating that the provisions of the statute were "directory rather than mandatory."

* * * True, these rules and decisions, which accord with general authority, are not directly in point. They are cited to illustrate a recognition of the necessity of giving courts and administrative bodies some discretion in granting extension of time for appearance where the failure to appear within the prescribed time is clearly excusable. I feel this principle is applicable here, and that the Review Committee should determine whether plaintiff's failure to file his application within the prescribed period was unavoidable or clearly excusable. If so, the committee should afford him a hearing on his application. [Emphasis added.]

In view of the Departmental policies expressed in 43 CFR 4.401(a) and 1821.2-2(g), I submit that the Secretary would not have intended that the Board apply section 290.3 with utmost strictness in every situation. In our case, appellant allowed October 31, November 1, 2, 3, 4, and 5 for transmittal. Appellant has done everything which can reasonably be expected for substantial compliance with the purpose of the regulation. See Stasher v. Harger-Haldeman, 58 Cal. 2d 23, 372 P.2d 649 (1962); 2A C. Sands, Statutes and Statutory Construction at 459-60 (1973); Norman E. Brooks, 48 IBLA (1980).

Mesa Petroleum Co., *supra*, should be distinguished. In Mesa, the appeal was mailed to an incorrect office on August 10, and was due in a different city on August 13.

The Department should recognize its special relationship with the United States Postal Service. An agency's authority to invoke conceptions of equity, even without an equitable relief statute, is recognized 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 sacrifices of fundamental principles of fairness and justice."

Cf. as to estoppel, Edward L. Ellis, 42 IBLA 66 (1979); Public Service Co. of Oklahoma, 38 IBLA 193, 203-10 (1978) (dissent).

Joseph W. Goss
Administrative Judge

October 7, 1980

IBLA 80-477 : GS 153-0&G
 :
UNION OIL COMPANY OF : Petition for Reconsideration
CALIFORNIA :
 : Granted; Decision of June 9,
 : 1980, modified, case remanded

ORDER

The Board's decision of June 9, 1980, 48 IBLA 145, affirmed the decision of the Director, Geological Survey (Survey), which dismissed as untimely filed Union's appeal from a Survey letter order requiring royalty payments based on gross proceeds from sales of gas produced from the Kenai Unit in Alaska, including State tax reimbursements. The Union Oil Company of California (Union) filed a petition for reconsideration in banc.

In view of the peculiar factual milieu of this case, it appearing that Union's letter of September 7, 1979, reasonably could be considered as an appeal to the Director of the Survey from the Survey's accountant's determination, albeit later reiterated by the Area Oil and Gas Supervisor's letter of October 1, 1979, we deem it appropriate to modify our decision of June 9, 1980, to (a) consider the appeal to the Director of the Survey as timely filed, and (b) remand the case for appropriate consideration of the merits of the appeal by the Director of the Survey.

48 IBLA 151A

This order is in no way to be considered as a departure from the holding enunciated in the June 9, 1980, decision that the filing of a notice of appeal is jurisdictional and must be filed timely.

Frederick Fishman
Administrative Judge

We concur:

Joan B. Thompson
Administrative Judge

James L. Burski
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

Douglas E. Henriques
Administrative Judge

APPEARANCES:

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ADMINISTRATIVE JUDGE GOSS CONCURRING:

There has been no refutation of the points set forth in petitioner's argument, nor of the court's due process analysis in Howell v. Shannon, 170 F. Supp. 139 (D. Mont. 1959). For the reasons explained in my dissent herein, I concur in the result. If a Board decision is to be substantially changed, I would favor setting aside the previous decision by a new formal decision which can be more readily indexed by headnote. E.g., D.E. Pack (On Reconsideration), 38 IBLA 23, 85 I.D. 408 (1978). See 5 U.S.C. § 552 (1976).

Joseph W. Goss
Administrative Judge