

ILEAN LANDIS

IBLA 80-568

Decided July 21, 1980

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting appellant's noncompetitive oil and gas lease offer, M 44847.

Appeal dismissed.

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

Notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

2. Appeals – Rules of Practice: Appeals: Notice of Appeal
In order to constitute a notice of appeal a document must state in an objectively ascertainable manner a present intent to appeal a final decision of the Bureau of Land Management. A petition for reconsideration of a decision with reasons directed to the office which issued the decision that expresses a conditional intent to file an appeal in the future if the relief requested by petitioner is not granted does not constitute notice of appeal. Where the decision is reconsidered in response to the petition and the petitioner is notified that the decision is reaffirmed with right of appeal, the decision will become final in the absence of a timely appeal.

APPEARANCES: Lynn J. Farnworth, Esq., Moscow, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Appellant filed an oil and gas lease offer for parcel MT 1077 on the September 1979 list of parcels available for the filing of simultaneous oil and gas lease offers posted by the Montana State Office, Bureau of Land Management (BLM). Appellant's offer received first priority in the drawing held pursuant to the regulations at 43 CFR Subpart 31.12.

Subsequently, BLM issued a decision dated November 13, 1979 which noted that the lease offer was made pursuant to the "Pool Agreement" ^{1/} submitted by the offeror. The decision found that Paul H. Landis, as agent, and the other parties to the pool agreement may participate in the proceeds derived from winning the lease in violation of 43 CFR 31.12.5-2. The BLM noted that Paul H. Landis and certain other members of the pool agreement had filed offers for the parcel for which appellant received first priority in the drawing. The BLM decision stated that appellant's lease offer was rejected subject to the opportunity to furnish evidence that neither Paul H. Landis nor the other parties to the pool agreement will share in the proceeds of the lease acquired through said agreement.

Counsel for appellant responded with a letter to BLM dated November 19, 1979, in which he stated in the opening paragraph that, "The purpose of this letter is to suggest that your decision is erroneously based and a request that a review of the decision be had prior to forcing this matter on to appeal before the Interior Board of Land Appeals." The letter set forth in considerable detail the basis for the contention that neither Paul H. Landis nor the other members of the pool agreement have an interest in the proceeds derived from a lease won through participation in the agreement which would constitute a multiple filing or interest in the lease violative of the regulations. Counsel closed the letter with a request that:

[T]he decision be reviewed and that the leases be accepted. In any event, should you find to the contrary that you refuse to review the decision, I would request an immediate response so that I might file the appeal within the proper time limits.

The BLM promptly responded to counsel's letter with a letter-decision dated November 28, 1979, stating that the prior decision of November 13, 1979, had been reviewed. BLM indicated in the letter that the decision to reject appellant's lease offer had been determined to be correct and that no change in the decision would be made.

^{1/} The full title of the contract is "Pool Agreement for the Filing of BLM Entry Cards."

The letter further specifically noted that the time limit for appeal expired 30 days from receipt by the offeror of the decision of November 13, 1979. The certified mail return receipt card discloses that counsel for appellant received the BLM letter on December 4, 1979.

The next contact with appellant which the case file discloses is a letter dated January 11, 1980, from counsel addressed to BLM stating that, "It was purely intended by my letter of November 19 that in the event you should not have reconsidered in our favor, that that letter be deemed a notice of appeal." Enclosed with the letter to BLM was a copy of counsel's letter of the same date addressed to the Interior Board of Land Appeals transmitting the brief in an appeal pending before the Board. In the letter to the Board counsel made the same contention that his letter to BLM dated November 19, 1979, constituted a notice of appeal and that the case should be considered to be before the Board.

In response to the assertion regarding the appeal, the Board obtained copies of the relevant documents in the case file from BLM. After reviewing the records, the Board explained in a letter to counsel dated February 13, 1980, that the timely filing of a notice of appeal is required to invoke the appellate jurisdiction of the Board and it did not appear that a notice of appeal was filed timely.

Subsequently, counsel filed with the Board on March 24, 1980, a request for reconsideration on the question of jurisdiction to entertain the appeal. It is contended that the letter of November 19, 1979, was a notice of intent to appeal in the event BLM should refuse to reconsider the decision rejecting the lease offer. Counsel asserts that the regulation at 43 CFR 4.411 merely requires notice of applicant's "present intent to file a future appeal" rather than the filing of an appeal itself.

At this point the Board docketed the appeal for the purpose of resolving the issue of whether an appeal was timely filed, as contended by counsel, and whether the Board consequently has jurisdiction over the case.

[1] The regulations require that a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. 43 CFR 4.411(a). This Board has held that the timely filing of a notice of appeal is required to establish the jurisdiction of the Board to review the decision below and the failure to file the appeal within the time allowed mandates dismissal of the appeal. Lavonne E. Grewell, 23 IBLA 190 (1976); see Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978); Pressentin v. Seaton, 284 F.2d 195, 199 (D.C. Cir. 1960). Although this Board is generally reluctant to take any action which would preclude review of appeals on the merits, the purpose of the rule is to establish a definite time when administrative proceedings regarding a claim are at an end in order to protect other parties to the proceedings and the public interest, and strict

adherence to the rule is required. See Browder v. Director, Ill. Dept. of Corrections, *supra* at 264.

If the notice of appeal is filed after the 10-day grace period provided in 43 CFR 4.401(a), the notice of appeal will not be considered and the case will be closed by the officer from whose decision the appeal is taken. 43 CFR 4.411(b). If the notice of appeal is filed during the 10-day grace period, the delay in filing will be waived if it is determined that the notice was transmitted or probably transmitted before the end of the filing period. 43 CFR 4.401(a). If it is assumed that the BLM letter of November 28, 1979, responding to counsel's arguments constituted another decision with respect to appellant's lease offer creating a right of appeal within 30 days of receipt thereof, counsel's letter of January 11, 1980, still would not constitute a timely notice of appeal. Since the BLM letter was received by counsel on December 4, 1979, the appeal period lapsed on January 3, 1980. Counsel's letter of January 11, 1980, was not transmitted until 8 days after the close of the appeal period. Consequently, even if the notice was received within the grace period the delay in filing could not be waived as it was not transmitted until after the close of the appeal period. 43 CFR 4.401(a); Michael J. S. Miller, 23 IBLA 224 (1976).

Accordingly, the key question is whether counsel's letter of November 19, 1979, to BLM requesting reconsideration of the November 13, 1979, decision constituted a notice of appeal of that decision. The letter expressly requested "that a review of the decision be had prior to forcing this matter on to appeal before the Interior Board of Land Appeals." Counsel closed his request for reconsideration with a statement that "should you find to the contrary that you refuse to review the decision, I would request an immediate response so that I might file the appeal within the proper time limits."

[2] In order to constitute a notice of appeal a document must state in an objectively ascertainable manner a present intent to appeal a final decision of BLM. A document requesting review or reconsideration of a decision with supporting reasons which expresses a conditional intent to file an appeal in the future if the relief requested by petitioner is not granted will not by itself suffice to constitute a notice of appeal where the decision is reconsidered and a new decision with right of appeal issued in response. Cf. Henry A. Alker, 49 IBLA 118 (1980). A decision issued in response to the petition for reconsideration with notice of the right of applicant to file an appeal becomes a final decision of the Department where no notice of appeal is filed within 30 days of receipt of the decision on reconsideration.

The only reasonable characterization of counsel's letter is that of a petition for reconsideration of the prior BLM decision. The letter indicates that an appeal will be filed if reconsideration is not granted with a favorable result. The subsequent filing of a notice of appeal would be unnecessary if counsel's letter of November 19, 1979,

constituted a notice of appeal. Further, if counsel's letter constituted a notice of appeal it would have the effect of depriving BLM of the jurisdiction to consider the arguments advanced by counsel in the letter. This Board has held that BLM has the authority to reconsider its decision prior to an appeal to the Board, but that the filing of a notice of appeal terminates that authority and transfers the case to the jurisdiction of the Board. John J. Sexton (On Reconsideration), 20 IBLA 187, 192 (1975).

Characterization of counsel's letter as a petition for reconsideration is also consistent with the terms of the initial BLM decision of November 13, 1979, which provided appellant with an opportunity to furnish evidence that neither Paul H. Landis nor the other members of the pool agreement would share in the proceeds of the lease. The conditional nature of the initial BLM decision of November 13, 1979, which invites submission of further evidence by applicant rendered that decision interlocutory in nature rather than a final decision subject to appeal. See State of Alaska, 41 IBLA 309, 313-314 (1979).

BLM promptly responded to appellant's request for review with a letter-decision dated November 28, 1979, to appellant's attorney indicating that upon review of the prior decision it was determined that rejection of appellant's lease offer was required and that any notice of appeal of the decision must be filed within the 30-day time limit. ^{2/} However, no appeal was filed within 30 days of receipt of BLM's letter-decision of November 28, 1979.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the subject appeal is dismissed.

Edward W. Stuebing
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

^{2/} Although BLM in its letter stated that the appeal period closed 30 days after appellant's receipt of the initial decision rejecting the lease offer, we have assumed for the purpose of this appeal that the 30-day appeal period commenced again with receipt by appellant's attorney of the BLM letter of November 28, 1979, reaffirming the decision of November 13, 1979, and declining to make any change therein.

