

Editor's note: appealed - reversed, Civ.No. 81-319 (D.Colo. Sept. 817, 1982), appeal dismissed, No. 82-2465 (10th Cir. Feb. 4, 1983)

VIRGIL T. HARTQUIST

IBLA 80-539

Decided December 29, 1980

Appeal from decision of the Colorado State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease C 27405.

Affirmed.

1. Oil and Gas Leases: Termination -- Oil and Gas Leases: Reinstatement

A lease terminated automatically for untimely payment of annual rental may be reinstated only upon proof that reasonable diligence was exercised, or that lack of diligence was justified. In the absence of such proof, a petition for reinstatement is properly denied.

2. Oil and Gas Leases: Termination

Pursuant to 30 U.S.C. § 188(b) (1976) an oil and gas lease will not automatically terminate when an annual rental payment is deficient if the deficiency is nominal. A deficiency is nominal if it is not more than \$10 or five per cent of the total payment due, whichever is more.

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

Reasonable diligence ordinarily requires mailing the payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal,

and delivery of the mail. Submission of a deficient payment, even though received in advance of the due date, does not constitute reasonable diligence.

4. Oil and Gas Leases: Termination -- Oil and Gas Leases:
Reinstatement

Untimely payment of the annual rental may be justified if proximately caused by extenuating circumstances outside the lessee's control which occurred at or near the anniversary date of the lease. No justifiable excuse arises where a discrepancy as to total acreage exists between the parcel listing and lease, BLM notifies the lessee at his address of record of the correct amount and the notice is returned as not deliverable, and the lessee, relying on the advice of his leasing service and landman, submits the incorrect amount.

APPEARANCES: Craig R. Carver, Esq., Head, Moye, Carver, and Ray, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Virgil T. Hartquist appeals the decision of the Colorado State Office, Bureau of Land Management (BLM), dated March 5, 1980, denying his petition for reinstatement of oil and gas lease C 27405. The lease had terminated by operation of law because appellant failed to timely pay the full amount of rental due by February 1, 1980.

BLM published its October 1978 simultaneous listing of available parcels showing that parcel No. CO-20 contained 458.19 acres. Appellant submitted a simultaneous drawing entry card for this parcel which was drawn with first priority and thereafter BLM issued a lease to appellant effective February 1, 1979. The terms of the lease showed the parcel acreage to be 485.19 acres instead of 458.19 acres and the accompanying rental due notice requested payment of \$486, the amount of rental due on 485.19 acres. Appellant states that he noted the discrepancy in the acreage figure and consulted his advisors, Stewart Capital Corporation (Stewart) (which was providing him its usual filing services) and a landman, R. K. O'Connell, as to the appropriate payment to make. Stewart advised appellant to pay rental for the higher acreage because "even if in error, [the higher payment] would not have any adverse consequences to the lessee."

In August 1979 Stewart orally requested that BLM check the acreage figures for appellant's lease to determine the proper acreage and advise appellant. BLM then recalculated the parcel acreage, finding that 485.19 acres as stated in the lease was correct and notified appellant by a letter sent to his address of record. The letter was returned to BLM as not deliverable.

In December 1979 BLM sent appellant a courtesy notice that rental of \$486 was due on or before February 1, 1980. This notice was also returned as not deliverable. Appellant, though still uncertain of the proper acreage for the parcel, submitted a payment of \$459 calculated for the 458.19-acre figure based on a rental reminder from Stewart and O'Connell. BLM received this payment 9 days before the due date and sent a receipt for the amount paid indicating that the payment was deficient by \$27 to appellant's address of record.

Since BLM had received no further payment by February 1, 1980, the lease terminated by operation of law as of that date. Soon thereafter O'Connell discovered this fact and notified appellant. On February 20, 1980, appellant's attorney submitted the \$27 deficiency and a petition for reinstatement of the lease which BLM has denied.

In his statement of reasons, appellant asserts that the deficiency in his rental payment was nominal and therefore pursuant to 30 U.S.C. § 188(b) (1976) the lease should not have terminated automatically. Alternatively, if the lease is considered to have terminated, he argues that his failure to make full payment on the lease was justifiable because Stewart and O'Connell relied on the incorrect acreage calculation in the BLM parcel listing and plat and because the Post Office failed to forward his mail so that he did not receive the BLM communications previously described. He further explains that his original address of record was that of Stewart, his leasing service, and that Stewart moved its offices after his lease was issued. Although Stewart submitted a change of address card in his name, his mail was not forwarded by the Post Office.

[1] Failure to pay the annual rental for an oil and gas lease on or before the anniversary date of the lease results in the automatic termination of the lease by operation of law. 30 U.S.C. § 188(b) (1976). The Secretary of the Interior may reinstate oil and gas leases which have terminated for failure to pay rental timely only where the rental is paid within 20 days and upon proof that such failure was either justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1976). In absence of such proof, a petition for reinstatement is properly denied. See, e.g., Alice M. Conte, 46 IBLA 312 (1980); J.R. Oil Corp., 36 IBLA 81 (1978); Lone Star Producing Co., 28 IBLA 132 (1976).

[2] The only exception to the rule of automatic termination occurs when payment is deficient and the deficiency is nominal or the amount of the payment made was based on an erroneous figure stated in the lease or in a bill or decision rendered by BLM. 30 U.S.C. § 188(b) (1976). The latter case is not before us as the lease sale parcel listing was not a lease, bill, or decision. Moreover, both courtesy notices sent to appellant contained the proper amount and the correct acreage was reflected on the face of the lease.

The applicable statute, 30 U.S.C. § 188(b) (1976), leaves the determination of what is nominal to the Secretary of the Interior. Departmental regulations state that "[a] deficiency will be considered nominal if it is not more than \$10 or five per centum * * * of the total payment due, whichever is more." 43 CFR 3108.2-1(b). Appellant's deficiency of \$27 is more than 5 percent and therefore not nominal under the regulation. In response appellant urges that while Congress left the definition of nominal to the Secretary of Interior, the legislative history indicates that Congress felt that 10 percent was a reasonable percentage, that regardless of the percentage adopted, a rule of reason was to be applied and that cases should be adjudicated on a liberal but equitable basis. The Departmental regulation does not provide for leeway in determining what is nominal, but rather provides a definition which indicates with certainty what nominal means. It was within the Secretary's discretion and reasonable to promulgate the regulation in this fashion so that decisions as to nominal deficiencies could thereafter be uniform and equitable. We find that appellant's payment was not nominally deficient and therefore the lease terminated automatically by operation of law.

[3] The showing of reasonable diligence necessary for reinstatement ordinarily requires mailing payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the mail. 43 CFR 3108.2-1(c)(2). Under the circumstances of this case we must find a lack of due diligence since the full amount of the annual rental was not paid by the due date and the deficiency was not transmitted and received until 20 days thereafter.

[4] Untimely payment of the annual rental may be justifiable for purposes of reinstatement if proximately caused by extenuating circumstances outside the lessee's control which occurred at or near the anniversary date of the lease. Harold W. Fullerton, 46 IBLA 116 (1980); Hubert W. Scudder, 35 IBLA 58 (1978); Lloyd M. and Adelheid A. Patterson, 34 IBLA 68 (1978). We do not find that such extenuating circumstances exist. Appellant has indicated that from the time that his lease issued he was aware of a discrepancy in the acreage figure. On the advice of Stewart, he paid rental for the first year of the lease based on the higher acreage figure to protect himself, but did not seek to resolve the discrepancy until approximately 7 months later. Although he did then pursue it, the fact that

appellant was not notified of the correct acreage, and later the appropriate rental amount, was due in large part to the fact that appellant had not notified BLM as to any change in his address of record. It is clear under Departmental regulations that BLM had no obligation but to communicate to appellant at his last address of record. 43 CFR 1810.2. Instead of informing BLM of a change in address, appellant through his leasing service, Stewart, chose to rely on Post Office mechanisms for forwarding mail. He must accept the consequences of that reliance. William M. Steiskal, 42 IBLA 304 (1979). When it came time to pay the 1980 rental, appellant again relied on the advice of Stewart and O'Connell who calculated rental based on the lower acreage figure despite the fact that the lease itself clearly provided that the total acreage was 485.19 acres. Appellant, as lessee of record, had the responsibility of making the correct payment timely or making certain that the correct rental was paid timely. Lynn Schusterman, 29 IBLA 182 (1977). Where appellant chose to rely on the advice of an agent, he must bear the consequences of that reliance. Appellant has no better excuse in these circumstances than if he had been acting without outside advice and failed to comply. Cf. Saxe, Bacon and Bolan, P.C., 40 IBLA 5 (1979), and cases cited (where lessee entrusted payment of rental to agent, failure of agent to pay timely does not justify late payment). The described circumstances were not beyond the control of appellant and therefore we do not find appellant's failure to pay full rental timely justifiable.

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.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

