

**Editor's note: 88 I.D. 24**

GARLAND COAL & MINING CO.

IBLA 79-523

Decided January 9, 1981

Appeal from decisions of the New Mexico State Office of the Bureau of Land Management accepting relinquishment of several coal leases and advising of rental amounts due. NM 029179 Okla., NM 029180 Okla., BLM-C 030765 Okla., and NM 033508 Okla.

Reversed.

1. Coal Leases and Permits: Cancellation--Coal Leases and Permits: Rentals--Regulations: Applicability-- Regulations: Interpretation

An ambiguous regulation relating to "the proper office" in which to file a relinquishment of a coal lease should not be interpreted to the detriment of a coal lessee who sought to comply with its provisions.

2. Coal Leases and Permits: Cancellation--Regulations: Generally--Regulations: Validity

The Boards of Appeal of the Department of the Interior have no authority to declare

invalid a duly promulgated regulation of this Department. Where, however, the regulation was not properly promulgated, is lacking in statutory basis, and has been consistently ignored in actual practice, that regulation will be accorded no force or effect.

3. Coal Leases and Permits: Generally--Coal Leases and Permits: Cancellation

Under the provisions of 30 U.S.C. § 188a (1976) accrued rentals on mineral leases are to be prorated on a monthly basis where the failure to file a timely surrender was not due to a lack of reasonable diligence on the part of the lessee.

APPEARANCES: Jeffrey J. Kahn, Esq., Skelton, Oviatt, and O'Dell, Wheat Ridge, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Garland Coal & Mining Company (Garland) appeals decisions of the New Mexico State Office, Bureau of Land Management (BLM), dated June 20, 1979, accepting relinquishment of appellant's coal leases and advising of rental amounts due and payable 30 days after receipt of the decisions. The leases, BLM-C 030765 Okla., NM 029179 Okla., NM 029180 Okla., and NM 033508 Okla. are situate in Haskell and LeFlore Counties in Oklahoma. The leases had been in producing status, and were, therefore, administered by Geological Survey (Survey).

By letters dated December 27, 1976, and addressed to the Area Mining Supervisor of Survey, appellant stated its intent to relinquish

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the leases "upon the next anniversary date" of the leases, i.e., February 1, 1977. The letters requested information regarding "any questions or formal requirements concerning such relinquishment." The letters indicate that appellant did not send copies to BLM, and Survey did not undertake to do so. Eventually, appellant learned that BLM and not Survey was the proper office in which to file relinquishments of coal leases. By letter dated February 1, 1977, addressed to BLM, appellant purported to confirm its previous letters to Survey dated December 27, 1976. BLM considered the relinquishment as filed on February 4, 1977, the date it received appellant's letter. 43 CFR 3523.1-2 (1976).

In March 1977, BLM requested the report and recommendation of Survey regarding the relinquishment. Survey replied by memorandum dated March 10, 1977, that annual rentals for each of the subject leases had not been remitted on or before the February 1 anniversary date, and on that ground declined to "concur in any relinquishment."

By decision dated August 19, 1977, the relinquishments were accepted as effective February 4, 1977, and appellant was advised of its obligation to pay accrued rentals and royalties for the year commencing February 1, 1977, 1/ citing 43 CFR 3523.1-2 (1976). Appellant was allowed 30 days from receipt of that decision in which to remit payment. That decision was timely appealed.

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1/ The rental amounts are as follows: \$2,554 (NM 029179); \$1,924 (NM 029180); \$2,098 (BLM-C 030765); and \$634 (NM 033508).



In January 1979, appellant withdrew its appeal on the ground that the United States had withdrawn its claim for the rental amounts. BLM subsequently requested additional information concerning the purported release of the claim for rental, in response to which Garland submitted photocopies of statements of account prepared and issued by Survey. Those statements showed a zero balance in each lease account, the notation, "BALANCE ADJUSTMENT 06/01/78 BAL TRF TO BLM," and the statement, "NOTICE: LEASE ACCOUNT CANCELED OR TERMINATED. BALANCE SHOWN PAYABLE TO ISSUING OFFICE UPON RECEIPT OF THIS STATEMENT." Appellant construed these notations to mean that the United States had withdrawn the additional charges. By memorandum dated April 27, 1979, from Survey to BLM, it was explained that the above remarks were intended to show only that the account and outstanding balance had been transferred to BLM. Survey stated that the issue of whether rent is owed depends on which of Garland's letters of relinquishment--the December 1976 letters to Survey or the February 1977 letter to BLM--effected the intended action. As noted, BLM accepted the latter and, accordingly, reissued its earlier decision under date of June 20, 1979. An appeal was timely noted.

[1] Appellant argues, inter alia, that Survey should have either notified the BLM State Office of appellant's intent to relinquish or informed Garland that the proper office in which to file a relinquishment was the BLM State Office. Given the specific wording of appellant's submittal, however, we do not feel that Survey's actions, alone, would justify reversal of the decision below.

The letters of December 27, 1976, which Garland sent to Survey merely recited the following:

Garland Coal and Mining Co. intends to relinquish its leases from the United States numbered NM-033508, NM-029179, and NM-029180 in LeFlore and Latimer counties, Oklahoma upon the next anniversary date of said leases. If you have any questions or formal requirements concerning such relinquishment, please let me know. [2]

In response to a subsequent inquiry from Garland, dated October 17, 1977, seeking an explanation for the failure of Survey to either forward the letters to BLM or inform appellant of the necessity of filing relinquishment of the leases with BLM, Alex M. Dinsmore, the addressee of the December 27 letters, responded, in relevant part, as follows:

Reference is made to your letter of October 17, 1977, regarding the above referenced appeal.

Please be advised that the two Garland letters of December 27, 1976, were received in this office on December 28, 1976, and copies were not forwarded to any other office as they were addressed to this office. At that time we had no particular questions nor requirements concerning the intended relinquishments.

This explanation, particularly when viewed in conjunction with the specific wording of the December 27 letters, can easily be accepted. By the December 27 letters, Garland informed Survey of its future intent to relinquish the leases; only the subsequent events would have indicated

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2/ There were actually two letters involved herein. The only difference between the two was

that the second letter referred to coal lease BLM-C-030765 in Haskell County, Oklahoma.

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to the employees of Survey that Garland intended by these documents to relinquish the leases, with an effective date of February 1, 1977. While someone in Survey might have been induced by this letter to either forward a copy to BLM or inform Garland that relinquishments of leases should be filed in the State Office, we cannot say that the failure to so act, given the specific wording of the letters, can give rise to any estoppel.

On the other hand, a review of the regulations, which were in force at the time of appellant's actions, indicates that appellant's actions were not unreasonable. The regulation on relinquishment of coal leases presently provides that "[a] relinquishment shall be filed in triplicate by the lessee in the Bureau of Land Management State Office having jurisdiction over the lands involved (43 CFR Subpart 1821)." 43 CFR 3452.1-2. While this regulation explicitly notes that relinquishments are filed with BLM, the regulation which was applicable in 1976, 43 CFR 3523.1-1 (which now relates only to relinquishments of leases for minerals other than coal or oil and gas), provides that the relinquishment be filed "in the proper office." Though there are a number of other references in these regulations to "the proper office" (see 43 CFR 3503.1-2(a)), the term "proper office" is never really defined in the regulations as referring to BLM. We feel that the ambiguity in this regulation, particularly in light of the fact that appellant would be dealing with Survey on a number of matters for which it was "the proper office," would justify appellant's actions, herein,



particularly in the absence of any third party rights. Cf. A. M. Shaffer, 73 I.D. 293 (1966).

[2] We also note that BLM made no reference to 43 CFR 3523.3 (1976). While this regulation is still codified, it no longer applies to coal leasing. The regulation presently provides, as it did in 1976 when it was applicable to coal leasing, that:

Any lease shall terminate automatically if the lessee fails to pay the rental on or before the anniversary date of the lease. However if time for payment falls upon any day on which the proper office to receive payment is not open, payment received on the next official working day shall be deemed to be timely. The termination of the lease for failure to pay the rental must be noted on the official records of the proper office. Until such notation is made, the lands included in such lease are not subject to issuance of any other lease.

This provision, with a few exceptions, tracks 43 CFR 3108.2-1(a) which relates to termination of oil and gas leases for nonpayment of rentals. This latter regulation was issued under the provisions of the Act of July 29, 1954, 68 Stat. 585, 30 U.S.C. § 188(b) (1976), which provides for the automatic termination of oil and gas leases for the nonpayment of annual rental. The problem, however, is that the Act of July 29, 1954, supra, applied only to oil and gas leases. There is not now, nor has there ever been, any statutory provision terminating mineral leases, other than those issued for oil and gas, for nonpayment of annual rentals.

An analysis both of the promulgation of 43 CFR 3523.3, and the adoption of the Act of July 29, 1954, as well as the actions of the Department subsequent to the enactment of the provision for the automatic termination of oil and gas leases, clearly indicates that no termination occurs for failure to timely file annual rental on mineral leases other than those issued for oil and gas.

There is a certain degree of difficulty surrounding an analysis of the promulgation of 43 CFR 3523.3. This arises from the fact that the regulation was apparently never properly promulgated. It first appears in the 1970 recodification of regulations. See 35 FR 9716 (June 13, 1970). A review of the pre-1970 regulations discloses no antecedent for this regulation. Inasmuch as the recodification expressly stated that "[i]t is the Department's intent in this revision to make no substantive changes in the regulations" (35 FR 9502 (June 13, 1970)), it is open to doubt whether we may give this regulation any regard whatsoever.

The only regulations which arguably come close to 43 CFR 3523.3, are those provisions providing for the termination of mineral permits for nonpayment of annual rentals. No rentals were required for any mineral permits until October 6, 1959, when regulations were adopted relating to potassium permits requiring an annual rental of 25 cents an acre or fraction thereof, but not less than \$20 per year. See 24 FR 8067 (Oct. 6, 1959). Two years later, regulations were adopted relating to



sodium permits which provided for annual rental payments and also provided for the automatic termination of sodium permits for nonpayment thereof. See 26 FR 775 (Aug. 19, 1961). Finally, in 1963, the Department adopted regulations extending the permit rental requirements to coal and phosphate, and providing the automatic termination of coal, phosphate, and potassium permits for nonpayment of the annual rental. See 28 FR 1474 (Feb. 15, 1963). These regulations, though no longer applicable to coal exploration licenses, are presently codified at 43 CFR 3511.4-2(b)(1).

As noted above, however, the first appearance of an automatic termination provision relating to issued leases occurred in the 1970 recodification. The applicability of an automatic termination provision to mineral permits is fundamentally different than the application of the same provision to leases. Thus, the regulations relating to automatic termination of mineral permits were issued under the general rulemaking authority of 30 U.S.C. § 189 (1976), as well as the specific authority of section 261 (sodium) and section 281 (potash), which concern the adoption of rules for the issuance of prospecting permits for those substances. Section 26 of the Mineral Leasing Act, 30 U.S.C. § 183 (1976), provides that:

The Secretary of the Interior shall reserve and may exercise the authority to cancel any prospecting permit upon failure by the permittee to exercise due diligence in the prosecution of the prospecting work in accordance with the terms and conditions stated in the permit, and shall insert in every such permit issued under the provisions of this chapter appropriate provisions for its cancellation by him. [Emphasis supplied.]

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Section 31 of the Mineral Leasing Act, 30 U.S.C. § 188(a) (1976), however, which relates to the cancellation of mineral leases, provides a totally different method of cancellation. Thus, that section provides:

Except as otherwise herein provided, any lease issued under the provisions of this chapter may be forfeited and canceled by an appropriate proceeding in the United States district court for the district in which the property, or some part thereof, is located whenever the lessee fails to comply with any of the provisions of this chapter, of the lease, or of the general regulations promulgated under this chapter and in force at the date of the lease; and the lease may provide for resort to appropriate methods for the settlement of disputes or for remedies for breach of specified conditions thereof.[3/] [Emphasis supplied.]

The opening proviso of section 188(a), "Except as otherwise herein provided" was not part of the original Mineral Leasing Act. It was added by the Act of August 8, 1946, 60 Stat. 956, which consolidated, within section 188, the provisions relating to cancellation of oil and gas leases, enacted by the Act of August 21, 1935, 49 Stat. 674, 676, and which had formerly been located in section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1976). The 1935 Act provided for cancellation by the Secretary of the Interior of oil and gas leases for noncompliance with any of the provisions of the lease, after 30 days' notice to the lessees, provided such leases were not known to contain

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 3/ We recognize that regardless of the specific wording of this section, the Supreme Court has ruled that the Secretary of the Interior has the authority to administratively cancel leases for prelease violation of regulations or invalidity at their inception. See Boesche v. Udall, 373 U.S. 472 (1963). Failure to pay annual rentals in advance, however, is clearly not a prelease event.

valuable deposits of oil or gas. This provision presently appears as the first part of 30 U.S.C. § 188(b).

Under these provisions, the Department took the consistent position that failure to pay the advance rental did not constitute a relinquishment of the lease. On the contrary, the rental was properly deemed to have accrued and to have become a debt due and owing the Government. This proved to be a particular problem in oil and gas leasing where the normal practice in private and state leases was that a failure to pay annual rental worked an automatic termination of the lease. While the failure of a lessee to pay the annual rental would constitute a default under section 188, and lead to cancellation of a lease if the default continued for a period of 30 days after notification, the lessee was, nevertheless, still liable for the unpaid rentals. Robert E. O'Keefe (On Rehearing), 57 I.D. 216 (1940). Moreover, any relinquishment must have been received prior to the anniversary date to avoid accrual of the rentals. Thomas H. Fee, 58 I.D. 125 (1942). In order to alleviate some of the hardships that resulted from the accrual of rentals, Congress enacted first, the Act of November 28, 1943, 57 Stat. 593, 30 U.S.C. § 188a (1976), which allowed the proration of rentals on a monthly basis from the date of the accrual of the rentals to the filing of the surrender, and subsequently, the Act of August 8, 1946, 60 Stat. 956, 30 U.S.C. § 187b (1976), which provided that the relinquishment of an oil and gas lease was effective upon its filing "subject to the continued obligation of the lessee and his surety to make payment of all accrued rentals."

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Problems, however, particularly involving oil and gas leasing, continued. Finally, in 1954, Congress amended section 188 to provide for the automatic termination of oil and gas leases for failure to file the annual rental on or prior to the anniversary date of the lease. See Act of July 29, 1954, supra. The legislative history of this amendment makes it clear that it was directed solely to oil and gas leases.

Under existing law, a noncompetitive oil and gas lease is issued without the necessity of filing a bond, unless a bond is required by law, on the agreement of the lessee, which is a provision in the lease, that he will pay rental or file a bond 90 days prior to the rental due date. \* \* \* Administratively, it often has occurred where a lease in which rental was not paid for the fourth year, the 30 days' notice was not received by him in time so that cancellation could be effected prior to the anniversary date of the lease. Consequently, a lessee who no longer desired a lease was required to pay a full year's rental for the fourth year and in many cases also for the fifth year. This was entirely inequitable to the lessee who followed the practice of State leases and leases on private lands, which have an automatic default clause on nonpayment of rental, and who felt that by not paying the rental when due his lease automatically would terminate.

H.R. Rep. No. 2238, 83rd Cong., 2nd Sess., reprinted in [1954] U.S. Code Cong. & Adm. News 2699.

Not only do both the language of the 1954 amendment and the legislative history make clear that automatic termination applied only to oil and gas leases, subsequent actions of the Department have never proceeded on any other basis. Thus, in Relinquishment of a Coal Lease, M-36511 (June 17, 1958), the Associate Solicitor noted that acceptance of a relinquishment related back to date of filing. The Associate

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Solicitor noted that "[t]he general practice has been to accept a relinquishment upon payment of rentals accrued prior to the filing date." See also Southwest Salt Co., 2 IBLA 81, 78 I.D. 82 (1971); Walter Scott, A-28148 (December 16, 1960); Michael L. Moauro, A-27576 (May 29, 1958). If, however, a coal lease terminated for failure to pay the annual rentals, there could never be accrued rentals.

Not only is it clear that the statute did not effectuate an automatic termination, it must also be pointed out that this Board has, on at least one occasion since the appearance of 43 CFR 3523.3, ignored the existence of that regulation. Thus, the Board affirmed the accrual of rentals on a phosphate lease in Cuyama Phosphate Corp., 12 IBLA 367 (1973). It is equally obvious that BLM did not apply this regulation in the instant appeal.

Thus, we are faced with a codified regulation which: (1) was improperly promulgated; (2) lacks any statutory support; and (3) has been consistently ignored by the Department in actual practice. It is, in fact, a derelict on the sea of the law. We hold, therefore, that this regulation can be accorded no validity whatsoever.

[3] Finally, we would note that the above discussion also illustrates that, quite apart from our ruling on the ambiguity of the "proper office" for purposes of relinquishment, the State Office should have prorated the rentals under 30 U.S.C. § 188a (1976), rather than assessed the full annual rental, since it was clear that the failure to timely

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relinquish in the BLM office was not due to a lack of reasonable diligence. Inasmuch as we have determined that no rental is due here, it is unnecessary to prorate the rentals in the instant case.

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 reversed.

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James L. Burski  
Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Bruce R. Harris  
Acting Administrative Judge