

TEXAS OIL & GAS CORP.
88 I.D. 879

IBLA 81-423

Decided September 28, 1981

Appeal from a finding by the New Mexico State Office, Bureau of Land Management, that oil and gas lease NM-A 37903 (OK) had terminated for nonpayment of rental pursuant to 30 U.S.C. § 188 (1976), and that no petition for reinstatement had been filed by the lessee.

Reversed.

1. Administrative Procedure: Administrative Review--Appeals--Rules of Practice: Appeals: Generally

A finding by BLM that some statutory mechanism has been triggered which automatically divests a right does not and cannot mean that the adversely affected party is denied recourse to the appellate process. The Board of Land Appeals is the exclusive arbiter of its jurisdiction, and neither employees of BLM nor attorneys of the Office of the Solicitor may create or deny the right of appeal to the Board.

2. Oil and Gas Leases: Competitive Leases-- Oil and Gas Leases: Future and Fractional Interest Leases--Oil and Gas Leases--Reinstatement-- Oil and Gas Leases: Rentals--Oil and Gas Leases: Termination

Where a competitive fractional interest lease is issued with

conflicting and confusing rental provisions recited in the lease terms and in the attachment to the lease, a deficient rental payment by the lessee in reasonable reliance on the section providing for rental based upon the pro rata fractional interest of the United States will be considered justified so as to qualify the terminated lease for reinstatement.

APPEARANCES: Joseph R. Binford Esq., Dallas, Texas, for appellants; Gayle E. Manges, Esq., Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

An exposition of the background of this case will be conducive to an understanding of the issues raised and our disposition of the appeal.

In July 1979 a competitive oil and gas lease sale was conducted by the New Mexico State Office of the Bureau of Land Management (BLM). That sale included parcel 18, the subject tract of acquired land, embracing 90.39 acres in Oklahoma, in which the United States held a fractional mineral interest amounting to 50 percent. ^{1/} The high bidder was Hoover. H. wright. His bid was accepted by BLM's decision of August 21, 1979, which called upon him to submit the first year's advance rental in the amount of \$182, calculated on the basis of \$2 per acre or fraction thereof. Wright paid this rental amount and

^{1/} T. 8 N., R. 22 E., Indian meridian, Oklahoma. Sec. 6, S. 16.07 acres of lot 4, lots 5, 6, NW1/4SE1/4NW1/4 containing 90.39 acres, Haskell County.

complied with the other requirements, and was issued the leases effective October 1, 1979.

Wright had assigned the entire lease to Texas Oil & Gas Corporation prior to its effective date, and BLM approved the assignment, also with an effective date of October 1, 1979.

On September 24, 1980, Texas Oil & Gas Corporation paid the annual advance rental (due no later than October 1) in the amount of \$91. A receipt for this amount issued October 9 with the following statement printed thereon, "Under payment [sic] of \$91.00 unless other action is pending or the balance due is paid by the due date this lease may be terminated." 2/

Texas Oil & Gas Corporation then tendered a second payment in the amount of \$91, which was received by BLM on October 14, 1980. BLM apparently made no response until February 6, 1981, when it wrote a letter to the lessee, stating that the lease had terminated on October 1, 1980, that the annual rental was \$182, and that partial payment of \$91 would be refunded. No right of appeal was referred to.

Texas Oil & Gas Corporation responded with a letter, dated February 20, 1981, addressed to the Chief, Oil and Gas Section, New Mexico State Office. Although this letter is captioned "Notice of

2/ Of course, by the time this notice issued the "due date" had passed.

Appeal," it does not appear that it was intended to invoke the jurisdiction of this Board. Rather, it "requests your consideration of the letter of February 6, 1981, and that this lease be treated as in full force and effect. Should it be necessary that this matter be submitted to the Interior Board of Land Appeals and further filings need be made by Texas Oil & Gas Corp., please advise." The letter was an attempt to persuade the Chief, Oil and Gas Section, that the lease rental had been paid timely and in full, and had not terminated. The basis of this contention was stated in the letter as follows:

The lease provides that it is " subject to the terms and provisions of the Act of August 7, 1947 (61 Stat. 913), hereinafter referred to as the Act, and to all applicable regulations thereunder now or hereafter in force when not inconsistent with any express and specific provisions of this lease, which are made part hereof" (emphasis added). The lease provides specifically in Section 4 "Undivided fractional interest - Where the interest of the United States in the oil and gas underlying any of the lands described in Section 1 is an undivided fractional interest, the following terms and condition shall apply: (a) Rentals and royalties payable on account of each such tract shall be in the same proportion to the rentals and royalties provided for herein as the undivided fractional interest of the United States in oil and gas underlying such tract is to the full fee simple interest." We are aware of the September 30, 1976 amendment to section 3130.2 of Title 43 which predates the subject lease. However, when this lease was issued, as noted in the language quoted above, it became subject only to existing regulations not inconsistent with the express and specific provisions of the lease; and, as I have quoted above, the lease specifically and expressly provides for proportionate reduction of the rentals. Thus, by execution of this lease with the proportionate reduction provision specifically set forth, the lease provision prevails over the 1976 amendment. It is on this basis that rentals were tendered in the amount of \$91.00. Had it been intended that the lease be subject to the amended provision of Section 3103, then the provisions set forth in section 4(a) of the lease should have been struck.

Instead of considering and replying to this letter, BLM was guided by its caption ("Notice of Appeal"), and referred it, with the lease file, to the Field Solicitor with an inquiry concerning whether "an appeal from Texas Oil & Gas Corporation is warranted so we can transmit the case file to IBLA." Apparently the Field Solicitor replied in the affirmative, as the case was sent to this Board together with the Field Solicitor's entry of his appearance and his response to Texas Oil & Gas Corporation's "Statement of Reasons," which he treated the letter of February 20, 1981, as representing.

[1] The response by the Field Solicitor includes a motion for dismissal of the appeal, asserting first that this Board has no jurisdiction, because termination of an oil and gas lease for nonpayment of rental occurs automatically by operation of law without any administrative action by the Bureau to terminate the lease. "For this reason," the Field Solicitor says, "Appellant was not granted a right to appeal to the Board. The Board has no jurisdiction. It is a statutory matter."

We will dispose of this motion for dismissal before taking up the substantive issues. Neither BLM nor attorneys of the Office of the Solicitor may create or deny the right of appeal to this Board, and BLM's initial attitude that no appeal was "warranted" was clearly erroneous. The fact that BLM finds that some statutory mechanism has been triggered which automatically divests a right does not, and cannot, mean that the affected party is denied recourse to the appellate

process to assert that BLM's finding is wrong! This applies not only in cases of oil and gas lease terminations, but across the spectrum of statutory divestitures, including reverters of title under the Recreation and Public Purposes Act, conclusively deemed abandonments of mining claims under the recordation provisions of the Federal Land Policy and Management Act, the invalidation of land scrip pursuant to the Scrip Recordation Act, and the loss of forest lieu selection rights pursuant to the "Sisk Act." This Board is the exclusive arbiter of its jurisdiction. Under 43 CFR 4.410, any party who is adversely affected by a decision of BLM shall have a right of appeal to the Board. Denial of such right would contravene the Congressional policy enacted in section 102 (a)(5) of FLPMA, 43 U.S.C. § 1701(a)(5) (1976), providing for an "objective administrative review of initial decisions" of BLM. See Suzanne A. Halliday, 34 IBLA 219, (1978); United Park City Mines, Co., 33 IBLA 358, (1978); Fancher Brothers, 33 IBLA 262 (1978).

Moreover, it is specious to assert that BLM made no "decision" in this case. BLM is asserting that the rental fee for this lease is \$182 and that because that amount was not paid on or before the anniversary date the lease automatically terminated. Appellant disputes this, contending that the correct lease rental in this case is \$91, which was fully and timely paid, so that no termination could have occurred under the statute. This certainly gives rise to a justiciable issue, which is indisputably within the jurisdiction of this Board.

The motion to dismiss is denied.

[2] Appellant is correct in its assertion that the lease provides that it is "subject to the terms and provisions of * * * all applicable regulations now or hereafter in force when not inconsistent with express and specific provisions of this lease, which are made a part hereof," and that there is an "express and specific provision" in the lease form to the effect that the lease rental for fractional, undivided Federal interests in oil and gas shall be prorated in proportion to the full, fee simple interest in the tract. Lease Terms, section 4(a). Therefore, absent any other consideration, if the rental for a full 100 percent competitive lease is 42 per acre, the rental on a lease in which the United States owned a 50 percent undivided interest in the oil and gas would be \$1 per acre, notwithstanding any regulation to the contrary in effect when the lease issued.

There was a contrary regulation in effect at that time. As noted by appellant, 43 CFR 3130.2 was amended on September 30, 1976 in 41 FR 43149, to read as follows:

Rental shall not be prorated for any lands in which the United States owns an undivided fractional interest but shall be payable at the same rate as provided in Subpart 3103 of this chapter for the full acreage in such lands.

Significantly, the lease form, which contains the express provision for prorated rentals regardless of the existence of any regulation inconsistent with that provision, was published by the Department in August 1977, nearly a year after the regulation was amended. This, in itself, is a sufficient basis to entitle a lessee to assume that the

rental described in the text of the lease was knowingly and deliberately included by the Department, and represented its intention. There is, after all, a presumption of regularity which supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts must presume that they have properly discharged their duties. United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926). see 2 Am. Jur. 2d, Administrative Law § 748 (1962). In this same context, appellant's observation that if prorated rental was not intended, the provision should have been stricken is also germane, especially in view of the fact that in this same lease a portion of section 12 (pertaining to stipulations) was deleted as inapplicable, thereby demonstrating that BLM had reviewed the lease terms and acted to strike whatever was not intended to apply. This certainly would tend to reinforce the lessee's belief that the remaining lease provisions were deliberately unaltered and intended to control.

Moreover, it is a basic rule of contract law that a written contract is construed most strongly against its author, in this case the Department. 3/ 4 Williston On Contracts § 621 (3rd ed.).

Counsel for BLM, in his reply to appellant's statement of reasons, argues that various records in the case file indicated that the

3/ There is an exception to this rule to the effect that grants of franchises and contracts or agreements affecting the public interest are to be liberally construed in favor of the public. However, we do not regard it as applicable in this instance because, "To the extent that there is no general public interest to be safeguarded, contracts and agreements between a public body and a private person or corporation are interpreted in the same way as those between individuals." 4 Williston On Contracts § 626 (3rd ed.)

proper rental was \$182, not \$91. These records are (1) the BLM decision of August 21, 1979, addressed to Hoover H. Wright and informing him that his high bid had been accepted, and calling upon him to remit \$182 as the first year's rental; (2) Form 1370-41, "Receipt and Accounting Advice," indicating that Wright had paid \$182 as rental for this lease; and (3) Form 3120-9 (February 1965) "Rentals and Royalties For Oil and Gas Leases," which is appended to the lease form and which provides under "Schedule 'B' -Competitive":

RENTALS. To pay the lessor in advance on or before the first day of the month in which the lease issued and for each lease year thereafter prior to a discovery of oil or gas on the leased lands, an annual rental of \$2 per acre or fraction thereof.

We regard only the latter document as significant to this adjudication. with respect to the first two documents, even if appellant had actual knowledge that BLM had demanded \$182 of Wright and had been paid this amount by him, appellant would still be justified in relying on the "express and specific provisions of this lease," which state clearly and without the slightest ambiguity that the rental shall be in the proportion that "the undivided fractional interest of the United States * * * is to the full fee simple.

However, a distinct ambiguity was created by the appendage of the separate schedule of rentals and royalties to the basic lease form, which were not consistent with section 4(a). Nevertheless, even the effect of this form is diminished upon analysis. It addresses itself

only to competitive leases generally, and makes no reference whatever to competitive leases of undivided fractional interests, which section 4(a) of the leases does specifically. Moreover, when this appended form was adopted and published by the Department in February 1965 it was totally inapplicable to leases of fractional interests and not intended for use in connection with such leases. It was not until 11 years after the adoption of the form, in 1976, when the amendment of the regulation altered the method of calculating rentals for fractional-interest leases that the language of the form coincided with the provisions of the regulation. And, as we have noted, it was nearly a year after the regulatory change that the lease instrument was published by the Department with its "express and specific provision" of the proration of rental. Thus, notwithstanding the appendage of Form 3120.9, anyone examining the lease might still reasonably conclude that the \$91 prorated rental was correct, and the Form 3120-9 was attached in error.

This raises the question whether, under this particular lease, \$91 is the correct rental, or if \$182 is. ^{4/} If a \$91 rental is correct, no lease termination occurred. If \$182 is the legally imposed rental amount, the lease terminated automatically by operation of law, and we must consider the subsidiary questions of whether reinstatement is authorized, and if so, whether it is warranted in these circumstances.

^{4/} This case is distinguished from Thomas F. Keating, 53 IBLA 349 (1981), wherein BLM rejected a lease offer because it was accompanied only by an advance rental prorated on the basis of the Federal fractional interest, rather than by the rental fixed by the regulations.

We find that the lawful rental is \$2 per acre or fraction thereof, or \$182 per annum. We base this finding on the fact that the appendage and incorporation of Form 3120-9 ("Rentals and Royalties For Oil And Gas Leases"), notwithstanding its general application and ancient origin, was an accurate expression of the correct rental, and when read in conjunction with 43 CFR 3130.2, was sufficient to establish the rental at \$182 for this lease. Accordingly, we hold that lease NM-A 37903 (OK) terminated as a matter of law on October 1, 1980.

Counsel for BLM acknowledges that appellant paid the past-due balance within the statutory 20 days after the lease anniversary date, and appellant's letter of February 20, 1981, was received within 15 days of BLM's notice of termination. However, BLM takes the position that this document did not purport to be a petition for reinstatement (presumably because it was captioned "Notice of Appeal"), although BLM concedes that, "It did request that the lease be placed in full force and effect." As we have already noted, it requested the Chief, Oil and Gas Section in BLM's State Office, to reconsider his conclusion that the leases terminated, and offered a full explanation of appellant's reasons for its actions. Moreover, it referred in future terms to the possible necessity of involving the Board of Land Appeals. Under the circumstances, we think BLM should have regarded appellant's letter of February 20, 1980, as a petition for reinstatement.

On appeal, however, BLM contends that even if that letter is considered a petition for reinstatement, it should be denied because, "an

erroneous calculation of rentals based upon erroneous advice is no showing that could be satisfactory to the Secretary as required by 43 CFR 3108.2(c)," and also because, "The business practices of appellant which may have led to the wrong rental payment are no justification for reinstatement."

We reject both of these arguments. There is nothing in the record to suggest that any "business practice" peculiar to appellant's conduct of its affairs resulted in the underpayment. Cf. Melbourne Concept Profit Sharing Trust, 46 IBLA 87 (1980); Fuel Resources Development Co., 43 IBLA 19, (1979); Shell Oil Co., 30 IBLA 290 (1977); Phillips Petroleum Co., 29 IBLA 114 (1977); Mono Power Co., 28 IBLA 289 (1976). An effort by a lessee to pay rental in compliance with the express terms of his leases cannot be characterized as a "business practice" peculiar to him. Moreover, BLM is simply wrong in its argument that erroneous advice cannot serve to justify erroneous payment. In fact, the statute itself provides that where a payment is deficient because it was calculated in accordance with the acreage figure stated in the lease, or in any decision affecting the lease, or made in accordance with an erroneous bill or decision, "such leases shall not automatically terminate * * * ." 30 U.S.C. § 188(b) (1976). We might even hold properly that the issuance of this lease without the deletion of section 4(a) was sufficient to bring the case within the ambit of this statutory provision, so that no termination occurred. However, we would still be obliged to hold that the initial rental payment was deficient and that the correct rental is \$182, and

in view of our reinstatement of the lease, infra, such a holding would amount to a distinction without a difference.

We conclude that the lease instrument issued by BLM created a sufficient ambiguity by its conflicting provisions to justify appellant's payment of the deficient amount; that its remittance of the balance was within the statutory time; and that the letter of February 20, 1980, should have been considered appellant's petition for reinstatement; and that it was timely filed.

Oil and Gas lease NM-A 37903 (OK) is hereby reinstated at an annual rental of \$182 per annum.

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 reversed.

Edward W. Stuebing
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

