

TESORO PETROLEUM CORP.

IBLA 82-573

Decided June 24, 1982

Appeal from a notification by the Wyoming State Office, Bureau of Land Management, that oil and gas lease W 61985 had terminated for nonpayment of rental pursuant to 30 U.S.C. § 188 (1976).

Affirmed.

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

Where the owner of a lease that has terminated pursuant to 30 U.S.C. § 188(b) (1976) for failure to make timely annual rentals fails to pay the full rent within 20 days of the lease anniversary date, a petition for reinstatement is properly denied.

2. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals --
Oil and Gas Leases: Termination

The notice of termination referred to in 43 CFR 3108.2-1 is sent to an oil and gas lessee only if the full amount of the rental due has been paid or tendered within 20 days after the lease anniversary date.

3. Administrative Authority: Generally -- Constitutional Law: Generally
-- Statutes

The Department of the Interior, as an agency of the executive branch of the Government, is not the proper forum to decide whether or not a statute enacted by Congress is constitutional.

APPEARANCES: David M. Castro, Esq., San Antonio, Texas, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Tesoro Petroleum Corporation (Tesoro) appeals from a notification by the Wyoming State Office, Bureau of Land Management (BLM), dated March 4, 1982, that oil and gas lease W 61985 had terminated on January 31, 1982, for nonpayment of rental. BLM cited 30 U.S.C. § 188 (1976) and 43 CFR 3108.2-1 as the basis for the automatic termination of lease W 61985 upon Tesoro's failure to submit rental in the amount of \$880 to BLM on or before the lease anniversary date, January 31, 1982. Although Tesoro paid rent in the amount of \$440 on December 21, 1981, the \$440 balance was not submitted to BLM on or before the lease anniversary date.

Upon receiving BLM's letter of March 4, 1982, Tesoro contacted the Wyoming State Office and stated that it was advised to file a notice of appeal as soon as possible, not realizing that the filing of such notice would cause the State Office to refrain from deciding any petition for reinstatement which Tesoro might submit. The file shows that on March 9, 1982, Tesoro filed a notice of appeal and requested that the letter announcing its notice of appeal also be considered a petition for reinstatement. A check in the amount of \$440 representing the unpaid balance was included with this letter.

In its statement of reasons on appeal, Tesoro claims that the advice it received from the State Office urging it to file an immediate appeal deprived Tesoro of an important appellate procedure. In the absence of an opportunity for the State Office to consider its petition for reinstatement, Tesoro claims that it was deprived of its constitutional entitlement to due process and fundamental fairness, in violation of the due process clause of the Fifth Amendment, United States Constitution.

As we view the facts, we believe that it would have been proper for the State Office to have adjudicated Tesoro's petition for reinstatement rather than sending the case on to this Board. As we explained in California Association of Four Wheel Drive Clubs, 30 IBLA 383 (1977), to do otherwise is to foreclose consideration by the local, authorized officer of the merits of the petition. Though it would have been proper for the State Office to have acted on the petition for reinstatement, its failure to do so does not compel a remand. In isolated cases, this Board has addressed the merits of an appeal without the benefit of a specific State Office decision.

In Texas Oil and Gas Corp., 58 IBLA 175, 88 I.D. 879 (1981), for example, the Board addressed the merits of a petition for reinstatement that BLM had not considered below because the petition had been captioned a notice of appeal. Conoco, Inc., 61 IBLA 23 (1981), and Julie Adams, 45 IBLA 252 (1980), are additional examples of cases in which the Board addressed the merits of a protest without the benefit of a specific BLM decision. In these latter two cases, BLM's position had been communicated to the Board while the cases were

on appeal. In this regard, we note that Tesoro alleges in its pleadings that the Chief, Oil and Gas Section, has stated that she would likely deny a request for reinstatement if it were to be submitted to her.

[1] If we were to remand this case to the State Office, we can conceive of only one answer to Tesoro's petition for reinstatement, and that is to deny the petition for Tesoro's failure to pay the rental in full within 20 days of the lease anniversary date. In the absence of full payment of the rent by Tesoro within 20 days of its lease anniversary date, BLM is precluded by 30 U.S.C. § 188 (1976) from taking any other action. John Oakason, 13 IBLA 80 (1973).

The applicable statute, 30 U.S.C. § 188 (1976), states in part:

(c) Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease if --

(1) a petition for reinstatement, together with the required rental, including back rental accruing from the date of termination of the lease, is filed with the Secretary; and

(2) no valid lease has been issued affecting any of the lands covered by the terminated lease prior to the filing of said petition. * * *

Thus, the statute is clear that in the absence of full payment within 20 days of the lease anniversary, there is no opportunity for BLM even to consider whether Tesoro's tardiness was justifiable or not due to a lack of reasonable diligence. Rather than remand the case file to have BLM apply the statute to appellant's petition, we believe it prudent for this Board to retain jurisdiction of this case. If there were a need for fact-finding below or if BLM were permitted the opportunity to reach issues calling for the exercise of its discretion, our decision would perhaps be different. In these circumstances, we believe that appellant's due process arguments are without merit. There being no material facts at issue, appellant's request for a hearing is denied.

[2] Appellant contends in its statement of reasons that it did not make full payment of its rental within 20 days of the lease anniversary date because it did not receive a notice of termination until 36 days (March 8) after the anniversary date. "The clear intent of the regulations," appellant states, "is to provide a Lessee with a Notice in sufficient time to allow it

to make payment within twenty (20) days of the Lease anniversary date." The regulation referred to, 43 CFR 3108.2-1(c), is set forth in the footnote. ^{1/}

Prior case law of this Department points out the error in appellant's argument. In C. J. Iverson, 21 IBLA 312, 82 I.D. 386 (1975), and Amoco Production Co., 16 IBLA 215 (1974), the Board noted that a notice of termination is sent to a lessee only if the full amount of the rental due has been paid or tendered within 20 days after the lease anniversary date. The notice of termination is intended to toll the 15-day period for submission of a petition for reinstatement. Thus, in appellant's case, it was not entitled to a notice of termination, because it did not submit the rent within the 20 days.

Following its partial payment of rental on December 21, 1981, Tesoro received from BLM a receipt for payment dated January 5, 1982, and bearing the following words: "Under payment of \$440.00 unless other action is pending or the balance due is paid by the due date this lease may be terminated." Tesoro acknowledges receiving this receipt on January 11, 1982, but states that it was "misfiled by a novice lease analyst who apparently noted that the annual rental payment for 1982 had already been made." Having received the receipt for payment, Tesoro was not entitled to a notice of deficiency as provided by 43 CFR 3108.2-1(b). Lone Star Producing Co., 28 IBLA 132, 137 (1976).

The file reveals that the origin of appellant's difficulties was its failure to heed BLM's letter of August 11, 1981, informing it of an increase in the rental rate for lease W 61985. Because the lands in this lease were now within the known geologic structure (KGS) of an unnamed and undefined oil and gas field, rent had doubled from \$440 to \$880 per year. Appellant acknowledges receiving this letter, but concedes that "[a]s a result of an internal reorganization within Tesoro's Denver office, resulting from a turnover in personnel, the August 13, 1981, letter was misfiled and not brought to the attention of the proper parties." If there were a need to address the merits of appellant's petition for reinstatement by inquiring into its diligence and justification for a tardy payment, we believe that this admission

^{1/} "(c) Reinstatement. (1) Except as hereinafter provided, the authorized officer may reinstate a terminated lease which has been or is hereafter terminated automatically by operation of law for failure to pay on or before the anniversary date the full amount of rental due, provided that (i) such rental was paid or tendered within 20 days thereafter, and (ii) it is shown to the satisfaction of the authorized officer that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, and (iii) a petition for reinstatement, together with the required rental, including any back rental which has accrued from the date of termination of the lease, is filed with the appropriate office within 15 days after receipt of Notice of Termination of Lease due to late payment of rental. The Notice of Termination will be sent by certified mail, return receipt requested."

and its previous admission of misfiling would compel a finding that it lacked justification for its actions. International Resources Enterprises, Inc., 55 IBLA 386 (1981); Columbia Gas Transmission Corp., 13 IBLA 243 (1973).

[3] Appellant's final argument on appeal is the contention that the automatic termination provisions of 43 CFR 3108.2-1 violate due process by depriving a person of property without the right to a prior hearing. As noted above, the authority for automatic termination is set forth at 30 U.S.C. § 188(b) (1976). The regulations at 43 CFR 3108.2-1 were issued pursuant to 30 U.S.C. § 189 (1976). To decide whether the automatic termination provisions of the regulation violate the due process clause is in effect to decide whether or not a statute enacted by Congress is constitutional. As we have stated numerous times, the Department of the Interior, as an agency of the executive branch of the Government, is not the proper forum to decide whether or not a statute enacted by Congress is constitutional. John Murphy, 58 IBLA 75 (1981). See Ram Petroleums, Inc. v. Andrus, 658 F.2d 1349 (9th Cir. 1981), for a discussion of the statute.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the action of the State Office is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

