

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application, M 48700 Acq.

Affirmed.

1. Notice: Generally -- Oil and Gas Leases: Rentals -- Rules of Practice: Generally

Where, pursuant to 43 CFR 3112.4-1, BLM sends notice by certified mail to a simultaneous oil and gas lease applicant at her record address that she must execute and return the enclosed lease form with the required stipulations and rental, and the notice is returned to BLM marked "Unclaimed" by the Postal Service, and where nondelivery did not occur as a result of the negligence of the Postal Service, the applicant is considered to have been served at the time of return to BLM by the Postal Service of the undelivered certified letter, such constructive service being equivalent in legal effect to actual service of the notice.

APPEARANCES: Michele M. Dawursk, pro se.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Michele M. Dawursk has appealed the decision of the Montana State Office, Bureau of Land Management (BLM), dated May 19, 1982, rejecting her simultaneous oil and gas lease application, M 48700 Acq., for failure to sign and return the lease forms with the required stipulations and first year's rental of \$40 within 30 days of receipt of notice from BLM.

Appellant's application received second priority for parcel MT 110 in the July 1980 drawing. On March 22, 1982, BLM sent the lease form, stipulations, and rental request to appellant by certified mail. On April 12, 1982, the certified notice was returned to BLM by the Postal Service marked "Unclaimed."

BLM rejected appellant's application pursuant to 43 CFR 3112.6-1(d) for failure to file the lease offer in accordance with 43 CFR 3112.4-1. The decision refers to 43 CFR 1810.2(b) which, BLM states, provides that a person is considered to have received a communication "if delivery is attempted to his address of record regardless of whether it was, in fact, received by him."

In her statement of reasons appellant claims that she did not receive the BLM lease notice or any notice of attempted delivery of certified mail. Appellant contends that examination of the Postal Service claim check (Postal Service form 3849-A) on the envelope in which the BLM lease offer was sent reveals that the envelope was received in Delafield, Wisconsin, on March 26, 1982, that only one attempted delivery was made on April 1, 1982, and that the letter was returned on April 8, 1982. She notes that the envelope was properly addressed but BLM's return receipt card failed to indicate to whom the envelope was addressed. ^{1/} Appellant argues that the Postal Service Domestic Mail Manual (DMM), section 912.55, requires two attempted deliveries and a period of 15 days before a letter is returned. She also argues that 43 CFR 1810.2(b) only applies in cases where the Postal Service substantiates one of three situations: The addressee moved without leaving a forwarding address, delivery was refused, or the specified address did not exist, and that none of those circumstances is the situation before us.

[1] Departmental regulation 43 CFR 3112.4-1(a) provides in part:

§ 3112.4-1 The lease offer and payment of first year's rental.

(a) The lease agreement, consisting of a lease form approved by the Director, Bureau of Land Management, and stipulations included on the posted list or later determined to be necessary, shall be forwarded to the first qualified applicant for signing, together with a request for payment of the first year's rental. * * * The executed lease agreement and the applicant's rental payment shall be filed in the proper Bureau of Land Management office within 30 days from the date of receipt of notice. Timely receipt of the properly signed lease and rental constitutes the applicant's offer to lease.

The Board has affirmed the rejection of simultaneously filed oil and gas lease offers where all the requirements of 43 CFR 3112.4-1(a) have not been met. See Paul H. Landis, 61 IBLA 244 (1982); Keith B. Livermore, 59 IBLA 232 (1981).

The issue in this case, however, is whether appellant received notice of the requirements of 43 CFR 3112.4-1(a). ^{2/} 43 CFR 1810.2(b) states:

^{1/} Although the appellant's name and address were not entered into the space designated for such, the return receipt card was noted with the lease number and date of the notice by which BLM could identify to whom the receipt related.

^{2/} Although the Board's recent decision in Ann C. Rehrig, 69 IBLA 376 (1983), would appear to settle this issue, the question raised by the appellant in that case, as in this one, of whether a certified letter returned to BLM as "unclaimed" constitutes notice to a BLM client under 43 CFR 1810.2(b), dealing with communications sent by BLM, was not addressed. The analysis in the

(b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by the post office authorities.

In John Oakason, 13 IBLA 99 (1973), the Board characterized 43 CFR 1810.2(b) as follows:

That regulation generally provides for constructive notice by mailing to a person's address of record. It has been long established under the Department's rules of practice that transmission by registered or certified mail of a decision to the address of record of an applicant and the unsuccessful attempt by the Post Office to deliver the document at that address constitutes constructive service. Cornell Shelton, A-26441 (October 17, 1952).

13 IBLA at 102. The Board has found that the rule is reasonable and necessary to expeditious administration of BLM's business because the conduct of Government business cannot be compelled to wait the pleasure or convenience of those persons who seek to deal with it. Charles M. Brady, 33 IBLA 375, 377-78 (1978), quoting Jack Koegel, 30 IBLA 143, 144 (1977); Robert D. Nininger, 16 IBLA 200 (1974), aff'd, Nininger v. Morton, Civ. No. 74-1246 (D.D.C. Mar. 25, 1975).

The second sentence of the regulation delineates the instances in which an attempt to deliver will constitute delivery where such attempt is substantiated by the Postal Service. The primary intent of this provision is to protect BLM when the failure to realize delivery is the fault of the person to receive delivery. Jack R. Coombs, 28 IBLA 53, 56 (1976). But fault on the

fn. 2 (continued)

Rehrig decision focused on the failure to make a timely filing with BLM and relied on decisions in which the BLM client or someone on behalf of the client actually received the BLM communication and the BLM client then failed to make payment or file documents timely because of the client's negligence or that of the Postal Service, as the client's agent. Appellant's argument was dismissed in a footnote by reference to a regulation that governs the issue of whether a filing made by a BLM client may be considered as timely filed without addressing the crux of appellant's complaint that she received no notice from BLM. Since the Rehrig decision did not analyze the primary issue of whether the "unclaimed" communication constitutes notice under BLM regulations and Board decisions and focused on the result of the lack of notice, i.e., untimely filing, we do not find it applicable to this case.

part of the BLM client is not essential to a finding of constructive service. In addressing arguments similar to appellant's in John Oakason, *supra* at 104, the Board found that

although the Post Office stamp may have separate check offs for "refused" and "unclaimed," that does not restrict the meaning of this Department's regulations. It is within the ambit of meaning of regulations 43 CFR 1810.2(b) and 43 CFR 4.401(c)(2) referring to mail that is "refused" to encompass mail which is undeliverable because it is "unclaimed" by the addressee. Mail which has been returned as "unclaimed" has been considered as validly constructively served within the meaning of the Department's rules. *E.g.*, Duncan Miller, A-31054 (August 21, 1969).

There is an exception to this constructive service rule, however. The Board has held that where the negligence of the Postal Service, acting as agent for BLM for transmitting notice, has precluded effective actual notice, the Board will not consider notice to have been constructively served pursuant to 43 CFR 1810.2(b). Joan L. Harris, 37 IBLA 96 (1978); Jack R. Coombs, *supra*.

In summary, constructive service occurs whenever a registered or certified document is returned to BLM, regardless of the actions of the intended recipient, except where the negligence of the Postal Service, BLM's agent, has precluded effective actual notice.

In this case appellant argues that the Postal Service was negligent and did not follow its established procedures, as evidenced by the claim check on the BLM envelope, and thus actual notice was precluded.

The DMM directs delivery of certified mail as follows:

912.5 Delivery

.51 Procedure. Certified mail for delivery by carriers will be taken out on the first trip after it is received, unless the addressee has requested that the postmaster hold his mail at the post office. Certified mail not restricted in delivery will be delivered to the addressee or his authorized representative.* * *

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.55 Notice of Arrival. The carrier will leave a notice of arrival on Form 3849-A, Delivery Notice or Receipt, if he cannot deliver the certified article for any reason. The article will be brought back to the post office and held for the addressee. If the article is not called for within 5 days, a second notice on Form 3849-B, Delivery Reminder or Receipt, will be issued. If the article is not called for or its redelivery requested it will be returned at the expiration of the period stated by the sender, or after 15 days if no period is stated.

.56 Delivery at Post Office

Hold certified mail at a place convenient for the public to call if addressed for box or general delivery or for firm callers, of [sic] if a Form 3849-A or 3849-B had been left for addressee to call. [Emphasis in italics in original.]

In response to an inquiry from the Board, the officer-in-charge of the Delafield Post Office explains that the Postal Service attempted delivery of the BLM envelope to appellant on March 26, 1982, and again on April 1, 1982, consistent with Postal Service policy. He also submits a copy of form 3849-B for the BLM envelope that shows that the envelope was returned on April 10, 1982, consistent with the postmark on the envelope. He admits that the April 8 date on the claim check was in error and asserts that proper time standards were adhered to in this case. We cannot conclude on the basis of the evidence that the Postal Service was negligent in its attempt to deliver the envelope.

Constructive service has been held to take effect at the time of return by the Postal Service of an undelivered certified letter to BLM. Betty Alexander, 53 IBLA 139 (1981); see also 43 CFR 4.401(c)(3). 3/ Since BLM

3/ The Board's reference to 43 CFR 4.401(c) in cases involving questions of constructive notice merits comment. The regulation is found in 43 CFR Subpart E -- Special Rules Applicable to Public Land Hearings and Appeals, and states:

"(c) Service of documents. (1) Wherever the regulations in this subpart require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered or certified mail, return receipt requested, to his address of record in the Bureau.

"(2) In any case service may be proved by an acknowledgment of service signed by the person to be served. Personal service may be proved by a written statement of the person who made such service. Service by registered or certified mail may be proved by a post-office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. Proof of service of a copy of a document should be filed in the same office in which the document is filed except that proof of service of a notice of appeal should be filed in the office of the officer to whom the appeal is made, if the proof of service is filed later than the notice of appeal.

"(3) A document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by post office of an undelivered registered or certified letter." (Emphasis added.)

By its terms, this regulation governs service of documents relating to hearings and appeals and it has been applied in such situations. See, e.g., James W. Heyer, 2 IBLA 318 (1971); United States v. Asbestos Development Corp., 73 I.D. 82 (1966). Nevertheless, the Board has also applied it to decisions and notices of the BLM without-elaboration where questions of

received the unclaimed envelope back on April 12, 1982, appellant's submission was due on May 12, 1982. In the absence of a timely filing, BLM properly rejected appellant's simultaneous lease application. Paul H. Landis, supra.

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

Will A. Irwin
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge

fn. 3 (continued)

constructive notice are at issue. See, e.g., Betty Alexander, supra; Lite Sabin, 51 IBLA 226, 87 I.D. 610 (1980); Charles M. Brady, 33 IBLA 375 (1978); John Oakason, supra; Beryl Shurtz, 4 IBLA 66 (1971).

