

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting oil and gas lease application, M 52612, for failure to submit the first year's rental.

Reversed.

1. Administrative Procedure: Generally -- Notice: Generally

Where documents sent to a prospective oil and gas lease offeror are returned because the addressee has moved, and, on appeal from a rejection of his application for failure to submit an offer and tender the first year's rental, the applicant establishes that he had left a current forwarding address with the postal authorities, the provisions of 43 CFR 1810.2(b) relating to constructive receipt do not apply, and the rejection of the application will be reversed.

Frank C. Lytle III, 69 IBLA 210 (1982), overruled to extent inconsistent.

APPEARANCES: L. Lee Horschman, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

L. Lee Horschman has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated May 20, 1982, which rejected his simultaneously filed oil and gas application for failure to submit the first year's rental in accordance with 43 CFR 3112.4-1(a).

Appellant's application had been drawn with first-priority for parcel MT 35 at the July 1981 simultaneous drawing. By notice dated March 24, 1982, appellant was advised that he was required to submit \$80 as the first year's rental payment and sign the offer to lease, and that both the payment and the signed lease offer must be received by BLM within 30 days. The notice and the accompanying documents were transmitted by certified mail in an envelope correctly addressed to L. Lee Horschman at his address of record

"3838 East Avenue, Rochester, N. Y., 14618." The envelope was subsequently returned to the State Office, undelivered, with the notation "MVD." Upon the passage of 30 days, BLM issued the instant decision.

[1] The applicable regulation, 43 CFR 1810.2(b), provides:

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 post office authorities. [Emphasis supplied.]

Appellant has submitted a statement from the postmaster for Rochester, New York, to appellant which states, in relevant part:

Inquiry reveals that this letter was, in fact, returned as the result of an error in handling by one of our clerical employees. The piece although addressed to 3838 East Avenue, Rochester, NY 14618 should have been forwarded to your current address in Pittsford, NY. The appropriate disciplinary actions have been taken with the employees responsible for this error.

On the basis of this, appellant argues that "the requirements for communicating by mail so stated in Title 43, paragraph 1810.2 have not been met."

In Jack R. Coombs, 28 IBLA 53 (1976), a similar situation arose with reference to the failure of a lessee to submit a required deficiency payment within 30 days. In Coombs, as in the instant case, the lessee established that a proper and current forwarding address had been left with the Postal Service. The Board focusing in on the language "moved without leaving a forwarding address" noted that, in fact, the lessee had not moved without leaving such a forwarding address. Based on this fact, the Board set aside the cancellation of Coombs' lease.

However, in a more recent decision, styled Frank C. Lyte III, 69 IBLA 210 (1982), the Board again examined this question. In that decision, the Board stated:

Although the Postal Service is the agent of BLM to deliver written communications to the address of record of an applicant, where the applicant changes his address giving notice only to the Postal Service and not to BLM, the Postal Service then becomes the agent of the applicant who must bear the responsibility and consequence for failure of the Postal Service to properly deliver mail from BLM to the changed address, where the mail was originally properly dispatched to the address of record of the applicant.

Id. at 212. While this statement was in the nature of dictum, since the Board also found that the appellant in Lytle had failed to establish that a current forwarding address had been in effect at the time of the attempted delivery, it must be recognized that the language is directly contrary to the holding in Coombs. The question, then, is which case correctly states the law.

We think that the language in Lytle, insofar as it relates to general agency law, was correct; that is, normally the post office would be seen as the agent of the sender insofar as delivery of mail at the address affixed on the envelope. Any arrangements to forward mail beyond that point would arise out of a mutual undertaking between the addressee and the Postal Service, and, in such forwarding, the Postal Service would work as the agent of the addressee. Thus, where the Postal Service failed to forward mail beyond the point to which the mail was addressed, such a failure is properly chargeable to the addressee.

This having been said, however, we think the Lytle decision erred fatally in failing to consider the effect of the specific regulatory language of 43 CFR 1810.2(b) on these general agency principles. The purpose of 43 CFR 1810.2(b) is to establish constructive service in those instances where actual service is impossible. As we have pointed out in a number of cases, such a rule is "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." Michele M. Dawursk, 71 IBLA 343, 345 (1983).

In particular, the second sentence of 43 CFR 1810.2(b) contains an enumeration of those circumstances in which an attempt to deliver which has not been consummated may, nevertheless, constitute constructive service. While the circumstances actually listed consist of only three specific conditions, it has been recognized that the list is not exclusive. Thus, where mail is returned "unclaimed," the Department has consistently held that constructive service has been accomplished even though there is no regulatory language relating to "unclaimed" transmissions. See, e.g., Michele M. Dawursk, *supra*; John Oakason, 13 IBLA 99 (1973). In effect, the Department has consistently applied this regulation in light of its primary intent to protect the efficient operations of BLM in those circumstances where actual delivery of needed mail is prevented due to action or inaction on the part of the addressee.

Since, as we have indicated, failure by the Postal Service to forward mail could properly be charged to its principal, the addressee, BLM might well have drafted the regulation to provide merely that inability of the Postal Service to deliver the mail as addressed "because the addressee had moved therefrom" would constitute constructive service. This, however, BLM did not do. Rather, it expressly limited the scope of the regulation by excepting those situations where the addressee has left a forwarding address.

By including the qualifying phrase "without leaving a forwarding address" in the regulation, the Department has affirmatively recognized the fact that it is a common practice for the Postal Service to forward mail and has chosen to, in effect, accept the Postal Service as its agent for ultimate

delivery of the mail. It has limited application of constructive notice to those circumstances in which an addressee has moved and left no subsequent mailing address with Postal authorities. Thus, where an addressee has provided the Postal Service with a current forwarding address, the regulation assumes the Postal Service will act in accordance with proper procedure. If it fails to do so, the provision in the regulation relating to constructive service cannot be invoked even though the negligence of the Postal Service might properly be chargeable to the addressee. Appellant, having clearly established that his failure to receive actual notice was occasioned by the Postal Service's error in not forwarding his mail, cannot be considered to have received constructive notice, and thus, rejection of his application cannot be sustained. To the extent that anything in Frank C. Lytle III, supra, implies an opposite conclusion, it is hereby expressly overruled. 1/

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.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

1/ We are not unmindful of the fact that because of this limitation on the use of constructive receipt, it is possible that years may pass before BLM will learn that an addressee has not received notice due to failure of the Postal authorities to forward mail, and this later recognition may require BLM to undo what it has long since done. We also realize that all problems relating to forwarding of mail could be obviated by requiring a prospective lessee or entryman to file a change of address with BLM. However, until such time as the regulations are amended to accomplish such ends, we are required to administer them in conformity with their language. If administrative problems do result of such magnitude so as to justify remedial action, BLM need only amend its regulations.