

RICHARD G. FOWLER

IBLA 85-248

Decided October 11, 1985

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying petition for Class I reinstatement for an oil and gas lease terminated by operation of law for failure to timely pay the annual rentals.

Affirmed.

1. Oil and Gas Leases: Reinstatement

Under 30 U.S.C. § 188(c) (1982) which provides for Class I reinstatement, the Department has no authority to reinstate a lease which has terminated for nonpayment of rental unless the rental payment has been paid or tendered within 20 days of the anniversary date.

2. Accounts: Payments--Oil and Gas Leases: Reinstatement--Oil and Gas Leases: Rentals--Payments: Generally--Words and Phrases

"Tender." Placing a check for annual rental for oil and gas leases in the mails does not constitute a tender of payment of annual rental, within the meaning of 43 CFR 3108.2-2(a)(1). Rather, a lessee makes a tender of payment only when he submits payment to the BLM office administering his leases, and when BLM has the opportunity either to receive or decline it. Accordingly, placing rental in the mails does not constitute a tender of payment which would allow the Department to consider the merits of a Class I petition for reinstatement of an oil and gas lease terminated for failure to make timely payment of annual rental.

APPEARANCES: Richard G. Fowler, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Richard G. Fowler has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated December 14, 1984, denying his petition for Class I reinstatement of terminated oil and gas lease AA-48108AJ. The base lease, AA-48108, was issued on August 23, 1982, with an effective date of September 1, 1982. As issued, this lease embraced 10,240 acres. Numerous partial assignments were made from this lease, including one embracing 40 acres, described as the SW 1/4 SE 1/4 sec. 12,

T. 20 S., R. 22 E., Kateel Meridian, to appellant. This assignment was approved on December 12, 1983. In the decision approving the assignment, appellant was expressly advised that his first rental payment was due on September 1, 1984.

No rental payment for the subject parcel was received on or before the anniversary date of the lease. A rental payment was received, however, on September 24, 1984. Accordingly, by notice of October 24, 1984, the State Office informed appellant that his lease had terminated when the rental was not timely paid and further advised him of his right to apply for reinstatement under either Class I or Class II.

By letter dated November 9, 1984, appellant advised the State Office of his desire to have his petition adjudicated under the provisions of Class I. In his petition he admitted that he had not sent his check until September 19, 1984, but noted that this was due to a move to a new home during which time he temporarily misplaced his records of the lease. He requested either that the letter of termination be rescinded or that his petition for a Class I reinstatement be granted.

By its decision of December 14, 1984, the State Office rejected his petition for reinstatement under Class I but advised him that he could qualify for reinstatement under Class II. He was further informed that a petition under Class II would be favorably received if filed by January 9, 1985, accompanied by the sum of \$790.

The State Office premised its rejection of the Class I petition on the fact that appellant had not paid or tendered the rental payment within 20 days of the anniversary date. Therefore, the petition under Class I was statutorily barred. Additionally, upon a review of the facts presented, the State Office concluded that appellant had shown neither reasonable diligence nor a justifiable reason for the delay in submission of his payment. Thus, even were reinstatement under Class I not precluded by the terms of the statute, the State Office concluded that appellant had not made a showing which would justify reinstatement under Class I.

[1] Under the terms of 30 U.S.C. § 188(b) (1982), any lease on which there is not a well capable of producing oil or gas in paying quantities terminates, by operation of law "upon failure of a lessee to pay rental on or before the anniversary date of the lease." It is admitted that the rental in this case was not even transmitted until 18 days after the anniversary date. There can be no question that the lease terminated pursuant to the statute.

The Act of May 12, 1970, 84 Stat. 206, 30 U.S.C. § 188(c) (1982), provided a procedure by which leases which had terminated pursuant to 30 U.S.C. § 188(b) (1982) might be reinstated. ^{1/} These procedures are now

^{1/} The Act of May 12, 1970, supra, was not the first Act of Congress to deal with reinstatement of terminated oil and gas leases. The Act of Oct. 15, 1962, 76 Stat. 943, made similar provision for the reinstatement of terminated leases. The 1962 Act, however, had no prospective effect being in the nature of a curative act for past errors. See generally Louis Samuel, 8 IBLA 268 (1972).

referred to as Class I reinstatement. Reinstatement under Class I is conditioned upon two separate showings. First, appellant must show that the rental was paid or tendered within 20 days of the anniversary date of the lease. Absent such a showing, it is irrelevant why the rental was untimely received. This Department simply has no authority to reinstate a lease under Class I in such a circumstance.

Congress clearly understood this when it adopted the Act of May 12, 1970, supra. Thus, it was noted:

It is recognized that this 20-day limitation on reinstatements means that a small percentage of terminated leases, otherwise deserving, may not be reinstated under this legislation. However, in balancing the advantage of a more liberal relief provision against the committee's desire to reduce the incentive for "intentional" mistakes, the latter course was chosen. In the event truly deserving cases arise that cannot meet the 20-day provision recourse to private relief legislation may be necessary.

H.R. Rep. No. 1005, 91st Cong., 2nd Sess., reprinted in 1970 U.S. Code Cong. & Ad. News 3005. Indeed, this specific 20-day requirement was partially responsible for the addition of Class II reinstatement authority by section 401 of the Act of January 12, 1983, 96 Stat. 2463, which expressly provided authority to reinstate leases when the annual rental was not paid or tendered within 20 days of the anniversary date of the lease. Appellant, however, declined to accept reinstatement under Class II.

[2] Appellant argues that he has met the statutory requirement in that he mailed the payment 18 days after the due date. This, he suggests, constitutes a "tender" within the contemplation of 30 U.S.C. § 188(c) (1982). We do not agree.

This same argument was expressly rejected in our decision in Mobil Oil Corp., 35 IBLA 265 (1978). Therein, we quoted from the decision of the United States Court of Appeals for the District of Columbia in Kerr v. United States, 108 F.2d 585 (1939), which stated that "the word 'tender' is usually held to mean that the thing offered must be actually produced and placed in such position that control over it is relinquished by the tenderer so that the tonderee may reach out and lay hold of it." Id. at 586. After reviewing the Department's consistent practice of requiring all payments to be actually received by the due date, the Board concluded that a lessee makes a tender of payment only when he or she submits payment to the proper BLM office, which office then has the opportunity either to receive or decline it. The mere placement of the payment in the mails would not constitute such a tender. In the instant case, since the rental was not received by BLM until the 24th of the month, the rental was neither paid nor tendered within 20 days as required for reinstatement under Class I.

In any event, even if this Board had authority to consider the petition for reinstatement under Class I on its merits, we would be constrained to affirm the rejection of the petition. A petition for reinstatement under Class I may be granted only if it is shown that appellant exercised reasonable diligence or that his failure to exercise reasonable diligence was

justifiable. The reasonable diligence standard is an objective test. See Louis Samuel, *supra*. Thus, reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date so as to account for normal delays in the collection, transmittal and delivery of the payment. See Arthur M. Solender, 79 IBLA 70 (1984). Thus, under this standard, mailing the payment after the due date cannot constitute reasonable diligence. See NP Energy Corp., 72 IBLA 34 (1983).

Assuming that the rental had been paid or tendered within 20 days, the petition might still be granted if it could be shown that there was a "justifiable" reason for the failure to exercise reasonable diligence. Thus, this Board has noted that a failure to make timely payment may be justifiable if it is demonstrated that, at or near the anniversary date, there existed sufficiently extenuating circumstances outside of the lessee's control which affected his actions in untimely paying the rental. See Eleanor L. M. Dubey, 76 IBLA 177 (1983).

The key component of this test is that the factors which caused the late payment must be outside the control of the lessee. See Ramoco Inc. v. Andrus, 649 F.2d 814 (10th Cir. 1981), *cert. denied*, 454 U.S. 1032. Such factors might be illness or national disasters such as floods or earthquakes. In the instant case, however, appellant clearly knew in advance that he would be moving and could have made provision for payment of the rental before the tumult of changing living quarters began. He did not do so. Thus, the failure to pay is properly attributed to inadvertence rather than a cause over which appellant had no control. Inadvertence, however, is not a proper basis upon which to reinstate a lease under Class I, though it is an express grounds for reinstatement under Class II. We must find BLM's rejection of the reinstatement petition under Class I to be fully in accord with the law.

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 affirmed.

James L. Burski
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

