

STEVE DWYER

IBLA 85-267 Decided August 29, 1986

Appeal from a decision of the California State Office, Bureau of Land Management, dismissing protest challenging termination of sodium prospecting permit. CA-2468.

Affirmed.

1. Mineral Lands: Prospecting Permits -- Sodium Leases and Permits:  
Permits -- Sodium Leases and Permits: Rentals  
A sodium prospecting permit terminates automatically pursuant to 43 CFR 3511.4-2(b)(1) and the terms of the permit where the permittee fails to pay the annual rental on or before the permit anniversary date, regardless of whether the permittee received a courtesy notice of rental due prior to that date.

APPEARANCES: Patrick H. Dwyer, Esq., Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Steve Dwyer has appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated December 18, 1984, dismissing his protest challenging the termination of sodium prospecting permit CA-2468.

Effective August 1, 1983, BLM issued a 2-year sodium prospecting permit to appellant for 370.12 acres of land situated in secs. 1, 2, 11, and 12, T. 18 S., R. 11 E., Mount Diablo Meridian, San Benito County, California, pursuant to section 23 of the Mineral Leasing Act, as amended, 30 U.S.C. § 261 (1982). By decision dated November 2, 1984, BLM notified appellant that his prospecting permit had "terminated by operation of law August 1, 1984," the permit anniversary date, and hence, BLM was terminating appellant's period of liability under the compliance bond which appellant had furnished for the permit.

By letter dated November 16, 1984, BLM further explained to appellant that his prospecting permit had terminated by operation of law for failure to pay the annual rental on or before August 1, 1984, pursuant to the terms of the permit and the applicable regulation. The letter stated appellant could file a "protest" challenging the termination of his permit which would be

adjudicated by BLM. On November 30, 1984, appellant submitted a letter challenging the termination of his permit on the basis of "special circumstances." Appellant stated that he had never been notified the annual rental was due and that the termination of his permit in such circumstances was unwarranted. Appellant requested reinstatement of his permit. <sup>1/</sup>

In its December 1984 decision, BLM dismissed appellant's "protest," stating that BLM was not required to notify permittees of rental due, but would do so only as a courtesy, and that appellant's permit properly terminated on August 1, 1984, when the annual rental was not paid on or before that date.

Appellant asserts in his statement of reasons for appeal that BLM is estopped from enforcing the automatic termination provision found in the regulations at 43 CFR 3511.4-2(b)(1) because BLM voluntarily abandoned enforcement of this provision by implementing a computerized system to provide notice of rental due dates to holders of prospecting permits. Appellant contends he relied upon timely receipt of notice of rental due to his detriment in that his first notice of rental due was the BLM letter advising him the lease had terminated.

Further, appellant argues there is no statutory authority for automatic termination of a prospecting permit for failure to timely pay rental, citing the provision of section 26 of the Mineral Leasing Act, 30 U.S.C. § 183 (1982), which authorizes cancellation of a permit for failure to exercise due diligence in the prosecution of prospecting work. Appellant asserts that a prospecting permit is a vested property right, citing Peterson v. Department of the Interior, 510 F. Supp. 777 (D. Utah 1981). Termination of the permit is alleged to violate the due process clause of the Constitution because it deprives appellant of a vested property interest without notice, opportunity for a hearing, or an opportunity to cure the defect. Appellant contends the appropriate regulation to apply in the circumstances is 43 CFR 3511.4-3 which provides for 30-day notice to the permittee of default with an opportunity to cure prior to cancellation of the permit.

[1] The regulation at 43 CFR 3511.4-2(b)(1) provides in relevant part: "Any prospecting permit shall terminate automatically if the permittee fails

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<sup>1/</sup> We note that unlike the regulations relating to termination of oil and gas leases which provide for the filing of petitions for reinstatement with BLM (43 CFR 3108.2), the regulation involved herein, 43 CFR 3511.4-2, contains no such provision. A protest is, by definition, an objection raised by any person to an action proposed to be taken by BLM. 43 CFR 4.450-2. Thus, although a protest of the automatic termination which previously occurred for failure to pay on or before the anniversary date is technically a misnomer, we find no fault in BLM's giving appellant an opportunity to refute the indication in the record that payment was not made prior to issuing an appealable decision recognizing termination.

to pay the rental on or before the anniversary date of the permit." The regulation was first promulgated in substantially the same form in 1961, pursuant to the rulemaking authority of the Secretary under section 32 of the Mineral Leasing Act, 30 U.S.C. § 189 (1982). <sup>2/</sup> See 43 CFR 195.11(b)(1) (26 FR 7775 (Aug. 19, 1961)). <sup>3/</sup> Moreover, section 11(a) of the terms of appellant's permit (Form 3510-1 (November 1970)) replicates the language in the regulation. This Board has previously upheld application of this regulation and its predecessors in finding prospecting permits terminated for failure to pay the annual rental on or before the anniversary date of the permit. See Amax Chemical Corp., 45 IBLA 335 (1980) (potassium); Cortella Coal Corp., 35 IBLA 172 (1978) (coal); International Energy Co., 14 IBLA 348 (1974) (coal); Western Standard Corp., 14 IBLA 45 (1973) (coal).

With respect to the question of statutory authority for the termination regulation, we note that in Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981), the Board had occasion to consider the issue in determining the effect of the regulation at 43 CFR 3523.3 purporting to provide for automatic termination of Mineral Leasing Act leases (other than oil and gas) for failure to pay the rent on or before the anniversary date. In finding the latter regulation inconsistent with section 31 of the Mineral Leasing Act, 30 U.S.C. § 188(a) (1982), authorizing suit in the United States District Court for cancellation of mineral leases for failure of the lessee to comply with the provisions of the Mineral Leasing Act, the regulations promulgated thereunder, or the lease itself, the Board expressly distinguished the regulation providing for automatic termination of prospecting permits. *Id.* at 68-69, 88 I.D. at 28. We reaffirm this distinction.

Appellant's reliance on Peterson v. Department of the Interior, *supra*, in asserting a prospecting permit is a valid existing right immune from termination for failure to pay the rental by the anniversary date, as required by the regulation, cannot withstand scrutiny. In the context of outstanding applications for extension of coal prospecting permits and a history of routine approval of such applications by the Department, the Peterson court held that where the applicants have met the statutory and regulatory requirements for extension of the prospecting permits and expended substantial time and money to develop their prospecting permits, they have a valid existing right to have their applications adjudicated under the law as it existed at the time they were filed. 510 F. Supp. at 783. This precedent does not militate against termination of a prospecting permit for failure to pay the

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<sup>2/</sup> Section 32 of the Mineral Leasing Act provides general authority for the Secretary "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter." 30 U.S.C. § 189 (1982).

<sup>3/</sup> Although the regulation as initially promulgated was limited to sodium prospecting permits, the automatic termination provision was subsequently added to the regulations governing coal, phosphate, and potassium prospecting permits. See 28 FR 1474 (Feb. 15, 1963).

annual rental on or before the anniversary date where such a result is mandated by the terms of the regulations as well as the terms of the prospecting permit itself. Further, we note that due process does not always require notice and an opportunity to be heard before a person is deprived of an asserted property right as long as the claimant is given notice and an opportunity to be heard before the adverse decision becomes final. Appeal to this Board satisfies the due process requirements. George H. Fennimore, 50 IBLA 280 (1980).

In addition, appellant's claim that BLM is estopped to find the lease terminated for failure to pay the rental on or before the anniversary date must be rejected. Reliance upon receipt of a billing notice is simply not reasonable in light of the express provisions in both the prospecting permit and the regulation at 43 CFR 3511.4-2(b)(1) to the effect that any prospecting permit shall terminate automatically for failure to pay the rental on or before the anniversary date of the permit.

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.

C. Randall Grant, Jr.  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

John H Kelly  
Administrative Judge

