

F. HOWARD WALSH, JR.

MAE LAMAR DAVIS AND NEWTON LAMAR

IBLA 86-98, 86-99

Decided September 9, 1986

Appeals from a decision of the Deputy Assistant Secretary for Indian Affairs finding a notice of appeal untimely and upholding an assessment of royalty against lessees of communitized lands for vented gas.

Reversed; assessment vacated; and hearing ordered.

1. Notice: Generally -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing

A decision dismissing an appeal as untimely will be reversed where it does not appear that appellant had notice of an adverse decision more than 30 days prior to filing the appeal. Constructive service of a decision by certified mail may be vitiated where the decision was improperly addressed and it appears from the record the error caused appellant to fail to receive the decision.

2. Oil and Gas Leases: Royalties -- Rules of Practice: Appeals: Timely Filing

Where a decision to assess royalty on vented natural gas fails to specify the extent of the lessee's liability and indicates it will be followed by a specific billing for the amount assessed, it is not a "final" appealable decision and a timely appeal from the billing will preserve the issue of the extent of the liability for vented gas.

APPEARANCES: Alan K. Palmer, Esq., Washington, D.C., for F. Howard Walsh, Jr.; Daniel S. Press, Esq., Washington, D.C., for Mae Lamar Davis and Newton Lamar; J. McLane Layton, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Indian Affairs.

#### OPINION BY ADMINISTRATIVE JUDGE GRANT

The appeal docketed as IBLA 86-98 is brought by F. Howard Walsh, Jr. (Walsh), the operator of a gas well on land communitized with certain Indian land oil and gas leases, from a decision of the Deputy Assistant Secretary -- Indian Affairs (Operations) (hereinafter referred to as the Deputy or the

Deputy Assistant Secretary) dated August 27, 1985. That decision denied appellant's motion to reconsider the Deputy's earlier decision of July 25, 1985, assessing royalty due in the amount of \$529,694.71. The appeal docketed as IBLA 86-99 is an appeal by Mae Lamar Davis and Newton Lamar (Davis and Lamar), the Indian lessors of certain communitized leases, from the same decision to the extent it suspended the obligation of the operator to pay the amount pending resolution of the controversy contingent upon posting a bond for the amount assessed. By order dated January 15, 1986, this Board consolidated these appeals for consideration in light of the similarity of the factual context and the legal issues. The Board's order of January 15, 1986, also denied a motion to dismiss the appeal of Walsh filed by Davis and Lamar. On March 5, 1986, Davis and Lamar, through counsel, filed a motion to withdraw their appeal of the Deputy's decision to suspend Walsh's obligation to pay pending resolution of the controversy on the ground the Board's consolidation order ensures the two matters will be considered simultaneously.

Appellant Walsh, in a motion concurred in by counsel for the Bureau of Indian Affairs (BIA), moved this Board for expedited consideration of the appeal in light of the substantial expense of the premium for the bond guaranteeing payment of the amount in dispute pending resolution of the controversy. For good cause shown, the Board has granted the motion and afforded this case expedited review.

The royalty assessment resulted from the alleged venting of natural gas on a shut-in well on communitized lands. On August 18, 1981, the Acting Director of the Anadarko, Oklahoma, Area Office, Geological Survey (GS), <sup>1/</sup> approved a communitization agreement (SCRI-11) covering sec. 23, T. 8 N., R. 10 W., Indian Meridian, in Caddo County, Oklahoma. The agreement affected three Indian oil and gas leases: 14-20-206-33413, Mae Lamar Davis, et al., Wichita 659; 14-20-206-33414, Mae Lamar Davis, Wichita 659; and 14-20-206-33415, Carrie Standing, Wichita 663. The lessees of record for these leases were F. Howard Walsh, Jr.; R. W. Moncrief; and Shell Oil Company. A producing well, the No. 1 Stevens, had been completed for natural gas and associated liquid hydrocarbons on April 30, 1981, on privately owned lands committed to the communitization agreement.

During the period at issue in this appeal, the No. 1 Stevens well was apparently shut in awaiting connection to a pipeline. On December 7, 1981, GS' District Oil and Gas Supervisor in Tulsa, Oklahoma, wrote Walsh and Moncrief to advise them BIA had reported gas was being vented from the

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<sup>1/</sup> The responsibility for regulating onshore oil and gas operations and collecting royalties on Federal and Indian oil and gas leases rested with the Conservation Division, Geological Survey, U.S. Department of the Interior, until February 1982, when these responsibilities were transferred to the Minerals Management Service (MMS) by Secretarial Order No. 3071, 47 FR 4751 (1982). Subsequently, by Secretarial Order No. 3087 and Amendment No. 1 thereto, dated Dec. 3, 1982, and Feb. 7, 1983, respectively, 48 FR 8983 (1983), all onshore minerals management functions of MMS not relating to royalty collection were transferred to the Bureau of Land Management (BLM). The latter order specifically transferred inspection and enforcement authority over onshore minerals on Federal and Indian lands to BLM.

shut-in well. The letter stated that inspections by GS personnel had confirmed there was a high-pressure gas leak in the tubing, and that venting was necessary to protect the casing from damage. Citing Notice to Lessees No. 4A (NTL-4A) 2/, the supervisor requested the operator to make an accurate measurement of the vented gas and report it to him as soon as possible in order to ascertain whether production from venting is "classified as avoidable or unavoidable."

The record does not disclose any response to this request from Walsh or Moncrief. Walsh contends he never received the letter and we note that since the letter was not sent by certified mail, there is no proof of receipt. On January 21, 1982, the Deputy Conservation Manager for the South Central Region, GS, Albuquerque, New Mexico, wrote the following letter to them:

By letter of December 7, 1981, the Tulsa District Oil and Gas Supervisor requested an accurate measurement of gas being vented from Well No. 1 Stevens due to a high pressure leak in the tubing. This well is located in W 1/2 NE 1/4 sec. 23, T. 8 N., R. 10 W., I.M., Caddo County Oklahoma, involving Communitization Agreement No. SCRI -- 11.

Accordingly, under provisions of NTA-4A and terms of the communitization agreement, you are charged royalty on the vented gas effective from the completion date of the well, April 30, 1981. Royalty will be billed by the Review and Analysis office based on the initial potential test of said well, 1328 MCFGPD [thousand cubic feet of gas per day], until venting ceases.

Procedures governing appeals from final decisions and orders by Conservation Division officials are contained in the regulations in 30 CFR Part 290. A notice of appeal must be filed in this office within 30 days of receipt of the final decision or order being appealed.

The letter was addressed to "F. Howard Walsh" at 1007 First National Bank Bldg., Ft. Worth, Texas 76102, and to "R. W. Moncrief, Jr. at 1407 Texas Street, Ft. Worth, Texas 76102." The record contains a photocopy of a return receipt indicating delivery at the Walsh address on January 23, 1982. The record does not disclose any response by Walsh or Moncrief to this letter.

On March 18, 1982, the Chief, Review and Analysis Office, MMS, in Tulsa, Oklahoma, 3/ sent a letter to Walsh, Moncrief, and Shell, billing them for royalty in the amount of \$ 529,694.71 for gas vented from the Stevens No. 1 well. The royalty was calculated on the basis of 1328 MCFGPD, the initial

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2/ NTL-4A requires that "[t]he volume of oil or gas produced, whether sold, avoidably or unavoidably lost, vented or flared \* \* \* must be reported on Form 9-329, monthly report of operations, in accordance with the requirement of this notice and the applicable provisions of NTL-1, NTL-1a."

3/ This letter followed the transfer of responsibility from GS to MMS (see note 1, supra).

potential test of the well, over the period from May 1981 through January 1982.

By letter dated April 1, 1982, Walsh, acting on behalf of all of the lessees, filed a notice of appeal of the March 18, 1982, letter of the Tulsa Review and Analysis Office. He challenged the decision to assess royalty on the vented gas. The cause of the vented gas was explained by an attached letter from a drilling contractor as follows:

As we have discussed, the gas leaking from the [annulus] of the well between the 2 7/8 tubing and the 7 inch casing evolves from a high pressure leak in the 2 7/8 tubing string. The shut in pressure of the Stevens No. 1 is 9500 psi. It is not uncommon for gas wells with shut in pressures in this range to develop high pressure leaks.

When the well was completed all equipment was tested to 10000 psi. with a hydrostatic test, and no leaks were evident. After completion, and while the well was shut in, the leak was noted. At this time a safety release system was installed to prevent pressures from exceeding the burst rating of the 7 inch casing. In order to keep pressures at the minimum a small amount of gas leaks from the well. A test was conducted by L. R. McBride Engineering of Oklahoma City, Oklahoma to determine the amount of gas leaking from the well. The test was conducted over a 24 hour period and indicates the volume to be in the range of 8 to 8.5 MCFD.

In our opinion repair of this leak is not justified. In order to make repairs it will be necessary to pull the tubing from the well. To pull the tubing from the well it will be necessary to bring the well under control by loading the hole with 16 ppg mud. Loading this well with mud after it has been completed could result in irreversible damage to the producing formation. It is also our opinion that once the well is placed on production and the tubing pressure is reduced to it's normal range of 6000 to 7000 psi. the leak will shut off. If the leak does not stop when the tubing pressure drops the well head can be connected to the separator, and any gas leaking from the well can be sold into the pipe line.

Walsh argued in the notice of appeal that the amount of royalty billed should be reduced because the gas vented was "unavoidably lost," and because any attempt to repair the leak would have impaired the productivity of the producing formation and, hence, been violative of Walsh's obligation to conserve producible resources. Alternatively, Walsh argued that the assessment should be reduced to reflect the amount of gas actually vented, measured as 7.62 (rather than 1328) MCFGPD in a test conducted by an engineering firm on March 24-25, 1982. Finally, he asserted that he had not received notice of the January 21, 1982, decision to assess royalty on the vented gas at the rate of 1328 MCFGPD because it had been erroneously addressed by MMS. Appellant argued that both the communitization agreement and the lease assignment

designate the name of the operator/lessee as "F. Howard Walsh, Jr." Appellant asserts that the decision was addressed to "F. Howard Walsh," and was received in the office of F. Howard Walsh, Sr., who was out of the country, rather than by the operator.

This notice of appeal was addressed to the office of the Deputy Conservation Manager in Albuquerque (who was not the officer who made the decision), but the record shows a copy was also filed in the Tulsa Office. Thus, a notice of appeal was filed in the office of the officer making the decision under appeal, as required by 30 CFR 290.3 (1982). Although there are no return receipt cards in the record, and the copies of the notice of appeal in the record bear no legible date of receipt stamp, this appeal was clearly filed within 30 days of Walsh's receipt of MMS' letter of March 18, 1982.

Since the matter concerns leases on Indian land, under the terms of 30 CFR 290.6 (1982), MMS was required to forward Walsh's appeal immediately to the Deputy Assistant Secretary, Indian Affairs, <sup>4/</sup> for action. (See discussion *infra*.) However, the appeal was not immediately forwarded to the Deputy. Instead, local MMS officials in Albuquerque and Tulsa continued to receive evidence bearing on the matter and to adjudicate it. A memorandum dated April 27, 1982, from the Chief, Review and Analysis Office, in Tulsa to the Deputy Minerals Manager, Oil and Gas, in Albuquerque, indicates that South Central Region oil and gas personnel scheduled a meeting with Walsh, as operator, to attempt to resolve the matter.

During the time MMS retained the case, the Tulsa Office did not enforce its order that Walsh pay the royalty assessed. Collection efforts were deferred until local MMS officials considered the facts raised in the appeal.

On May 6, 1982, Walsh and representatives of MMS met in Tulsa in an effort to resolve the case. The meeting did not include either the lessors of the three Indian leases or representatives of BIA. At this conference, Walsh was given the opportunity to present evidence bearing on the amount of gas actually vented at the well. The evidence regarding the volume of gas vented was subsequently summarized in a December 14, 1982, memorandum from the Deputy Minerals Manager, Oil and Gas, Albuquerque, to the Chief, Tulsa Royalty Compliance Office, as follows:

Evidence was presented at a meeting in Tulsa on May 6, 1982, with the operator that indicated the volume of gas vented varied between 7.62 and 8.5 MCFGPD. We recommend that you use the volume of 8.0 MCFGPD agreed to at the meeting for the time period May 1, 1981, to date of first sale on March 31, 1982. It was also brought out at the meeting that the operator's contract calls for a gas price of \$ 9.579/mcf. Consideration should also be given to assessment of late payment charges.

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<sup>4/</sup> The provisions of 30 CFR 290.6 (1982) actually referred to a right of appeal to the Commissioner of Indian Affairs. However, the functions of the Commissioner of Indian Affairs were transferred to the Deputy Assistant Secretary, Indian Affairs, in 1981. See 209 DM-8, dated Nov. 17, 1981.

On May 10, 1982, Walsh, through counsel, filed a letter with the Tulsa Office stating he was conditionally withdrawing his appeal, based upon an understanding reached at this conference that the amount of gas vented was approximately 8 MCF per day. Walsh stated further he agreed to pay the assessment based on this amount at current prices, less severance taxes. The withdrawal of his appeal was conditioned upon the acceptance by MMS of this amount as the amount due.

On May 17, 1982, Davis and Lamar, lessors of two of the Indian leases, acting through counsel, wrote a letter to the Acting Chief, Onshore Minerals Management Division, MMS, protesting MMS' treatment of this matter. They asserted that MMS' decision to reduce the royalty due to them violated the law and Federal regulations. They also challenged MMS' decision not to enforce compliance with its March 18, 1982, letter pending consideration of Walsh's appeal. Finally, they demanded documentation of the events surrounding the meeting and reserved the right to respond further concerning MMS' alleged violations of Departmental regulations.

Following receipt of this documentation, by letter dated July 1, 1982, to the Deputy Director, MMS, Davis and Lamar supplemented their objections to MMS' treatment of this matter, asserting (1) the January 21, 1982, MMS order requiring Walsh to pay was final, as it was not appealed timely; (2) any appeal was properly before the Deputy, not MMS; and (3) the leases should be canceled on account of failure to achieve production. <sup>5/</sup> Additionally, they requested that the Director review the manner in which the matter was handled by MMS field personnel, asserting they had violated their fiduciary responsibilities toward the Indian lessors. Davis and Lamar cited the refusal of the Tulsa Office to enforce the MMS order to pay and their exclusion from the meeting in Tulsa.

By cover memorandum dated September 8, 1982, MMS referred the record in this appeal to the Deputy Assistant Secretary for his consideration. In a memorandum dated October 22, 1982, the Assistant Secretary for Indian Affairs requested that MMS proceed with collection of \$529,694.71, the amount demanded in its March 18, 1982, assessment, pending consideration of the appeal.

Notwithstanding the foregoing, on December 17, 1982, the Tulsa Office issued appellant Walsh a letter "withdrawing" the previous assessment and making a new assessment in the amount of \$ 12,835.89. This amount was based on a rate of gas lost of 8.0 MCF per day, the amount established at the May 6, 1982, meeting in Tulsa, and the gas contract price of \$ 9.579 per MCF. Walsh paid this amount plus a late charge. Although this decision was clearly adverse to Davis and Lamar, it does not appear from the record that MMS served them with a copy of this reassessment.

On or around March 21, 1983, <sup>6/</sup> Davis and Lamar filed a notice of appeal under 30 CFR 290.6 to the Deputy Assistant Secretary, Indian Affairs,

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<sup>5/</sup> Davis and Lamar have not pursued their assertion that the leases should be canceled for lack of production on appeal before the Board.

<sup>6/</sup> The record does not contain a copy of a notice of appeal bearing a date-stamp showing receipt by the office of the officer who rendered the decision on appeal.

seeking review of MMS' decision of December 17, 1982, withdrawing the previous assessment and establishing a new assessment of \$ 12,835.89. A copy of the notice of appeal, however, was not served on Walsh. Thus, at this point, there were two separate appeals arising from MMS' assessment of royalty pending before the Deputy.

More than 2 years later, on July 25, 1985, the Acting Deputy Assistant Secretary issued a letter-decision addressing this situation. Although he did not expressly so state, this document was apparently intended as his decision on both appeals. The decision contains just one finding, which he treated as dispositive: MMS' letter of January 21, 1982, was final by reason of the failure of the lessees to appeal it within 30 days. As a result, he upheld the royalty assessment against the lessees of \$ 529,694.71. Accordingly, he directed that they remit this amount to MMS within 15 days. His decision concluded by advising the parties that his decision could be appealed to the Board of Indian Appeals (IBIA), Office of Hearings and Appeals (OHA), by filing a notice of appeal with IBIA within 60 days of receipt of the decision. <sup>7/</sup>

On August 19, 1985, Walsh filed a request for reconsideration of this decision, and a request that the effect of the order to comply be suspended pending resolution of the dispute. As grounds for the request, Walsh asserted that neither he nor any of the lessees was served a copy of the notice of appeal filed by Davis and Lamar from the December 17, 1982, MMS decision assessing royalty in the amount of \$ 12,835.89, in violation of the requirement to serve known interested parties. Hence, Walsh contends he was denied the opportunity to participate in the appeal before the Deputy Assistant Secretary.

Further, Walsh challenged on two grounds the determination that the January 21, 1982, decision had become final because of the failure to file a timely appeal. First, Walsh argued the decision to assess royalty on the gas was not a final decision. He contended the decision to assess royalty was not final until the March 18, 1982, letter billing the operator for an amount certain, and timely appeal was noted from that latter decision. In addition, Walsh elaborated on his earlier assertion that his appeal from the January 21, 1982, decision was, in fact, timely. He alleges that, as a result of the failure to address the decision properly, to "F. Howard Walsh, Jr.," the designated operator, the letter was delivered to the office of the operator's father and was not received by appellant himself until late March, shortly before the April 1, 1982, appeal was filed.

Finally, Walsh argued in his request that the royalty assessment of \$ 529,694.71 was calculated using an arbitrary formula and was, in fact, in

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<sup>7/</sup> This advice was erroneous as appeals from decisions of the Deputy Assistant Secretary regarding royalty assessments on Indian leases are subject to appeal to the Board of Land Appeals (IBLA) rather than the Board of Indian Appeals (IBIA). See 30 CFR 290.7. Such an error is potentially prejudicial in light of the 30-day time limit on filing appeals to IBLA as compared with the 60-day time limit for filing appeals with IBIA. Compare 43 CFR 4.411(a) with 43 CFR 4.332.

gross error. Walsh pointed out that MMS officials themselves acknowledged this in correcting the assessment to \$ 12,835.89.

On August 27, 1985, the Deputy <sup>8/</sup> issued a letter-decision denying Walsh's request for reconsideration of the merits of his July 25, 1985, decision. The letter-decision, citing as authority 25 CFR 2.3(b) and 43 CFR 3165.4 (formerly 30 CFR 221.66), granted Walsh's request for suspension of the requirement to pay the disputed amount pending appeal to OHA, on condition that he post a bond adequate to indemnify the lessors from loss or damage.

On September 23, 1985, Walsh filed a notice of appeal to IBIA under 43 CFR 4.310, directly with IBIA, where it was docketed as IBIA 85-51-A. The certificate of service attached to the notice of appeal reflects that a copy of the notice was simultaneously hand delivered to the deciding official, the Deputy Assistant Secretary, on September 23, 1985.

Davis and Lamar filed two timely notices of appeal of the Deputy's August 27, 1985, decision to suspend Walsh's obligation to comply with the order to pay pending review by OHA: A notice of appeal to IBIA, filed with IBIA on September 30, 1985, (docketed there as IBIA 85-52-A), and a second notice of appeal to the Interior Board of Land Appeals (IBLA), filed with the Deputy on September 27, 1985. <sup>9/</sup>

On November 5, 1985, IBLA issued an order dismissing both appeals (IBIA 85-51-A and IBIA 85-52-A) for lack of jurisdiction and referring the cases to IBLA for appropriate action. F. Howard Walsh, Jr., 13 IBIA 312 (1985). By order of November 27, 1985, IBIA denied Walsh's request for reconsideration of its order of dismissal. F. Howard Walsh, Jr., 13 IBIA 330 (1985). Both appeals have been docketed by IBLA, as set forth, supra.

Davis and Lamar challenged the jurisdiction of IBLA over Walsh's appeal, arguing the appeal of the July 25, 1985, decision was untimely, since it was not filed within the 30-day time period mandated by 43 CFR 4.411 for appeals to IBLA. The Office of the Solicitor moved the Board to assume jurisdiction over the appeal in light of the erroneous instructions given in the July 25, 1985, decision. In denying the motion to dismiss in an order dated January 15, 1986, the Board ruled:

We find it unnecessary to consider the questions of estoppel or whether jurisdiction may be conferred on this Board by transfer of an appeal filed timely with IBIA. On August 19, 1985, prior to the lapse of the period for filing a timely appeal of the July 25, 1985, decision of the Deputy, Walsh filed with that office a petition for reconsideration of that decision

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<sup>8/</sup> The decision was issued over the Deputy's signature, but is on the letterhead of the Office of the Solicitor.

<sup>9/</sup> The material forwarded by the Deputy Assistant Secretary does not include this notice of appeal to IBLA. However, we accept the certification of Davis and Lamar that such notice was filed.

with reasons. Subsequently, the Deputy issued his decision of August 27, 1985, denying Walsh's request and giving reasons for his refusal to reconsider. The certificate of service on Walsh's notice of appeal discloses that a copy thereof was personally delivered to the Deputy on September 23, 1985.

Regulations governing the jurisdiction of IBLA require that a notice of appeal be filed in the office of the official from whose decision the appeal is taken within 30 days from receipt of the decision. 43 CFR 4.411. This Board has previously held that a decision issued in response to a petition for reconsideration becomes a final decision where notice of appeal is not filed within 30 days of receipt of the decision on reconsideration. Ilean Landis, 49 IBLA 59, 62-63 (1980). Such is not the case here. Therefore, the motion to dismiss is denied. [ 10/]

On appeal to the Board, appellant Walsh renews his contention that the January 1982 decision to assess royalty on the initial test potential of the well was not a "final" decision subject to appeal prior to receipt of the royalty billing set out in the March 1982 decision which was appealed timely. He also renews his argument that his appeal of the January 1982 decision was timely in any event in view of the error in service which delayed his receipt of the decision until late March 1982. In addition, Walsh argues that the modified royalty assessment of December 1982 should be affirmed by the Board. Although conceding that the filing on an appeal removes the case from the jurisdiction of the initial decisionmaker and places it in the hands of the reviewing authority, Walsh points out that he filed a dismissal of this appeal conditioned upon the terms of the purported settlement. Walsh contends that dismissal, which preceded the revised royalty assessment of December 1982, restored jurisdiction over the matter to the MMS field officials.

As an initial matter, we note it is clear from the record the March 1982 royalty assessment in the amount of \$ 529,694.71, based on the initial test potential of the well, rather than on the amount of gas actually vented, is arbitrary and capricious. An undated copy of an MMS memorandum to the Chief, Onshore Minerals Management Division, from the Minerals Manager, South Central Region, explains:

Since we had no other basis to assess on than the well IP and we felt ignored by the operator, we used the well potential. Realizing we had no legal basis for such an assessment, we arranged a meeting with Mr. Walsh Jr.'s attorney. On May 6, 1982, the Field Operations Supervisor and the District Supervisor met with Mr. Robert A. Watson, attorney for F. Howard Walsh Jr.,

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10/ Appellants Davis and Lamar have filed with their briefs on the merits a petition for reconsideration of the order denying the motion to dismiss. As grounds, they dispute the relevance of Ilean Landis, 49 IBLA 59 (1980), cited by the Board in its order. We find this precedent to be both relevant and a sound statement of the law. Accordingly, the petition for reconsideration of the order of Jan. 15, 1986, is denied.

in the Tulsa District office. The purpose of the meeting was to: (1) determine if the vented gas was "avoidably" or "unavoidably" lost and (2) the amount. [Emphasis added.]

(Exh. 5 to Walsh brief). The arbitrary nature of the assessment figure was reiterated in a memorandum from the Inspector General to the Assistant Secretary for Indian Affairs:

On March 18, 1982, MMS' Royalty Compliance Office in Tulsa, Oklahoma, notified the lessees of the subject Indian leases that they were being assessed \$ 529,684.71 in compensatory royalty for venting gas. This action took place after two prior requests for information from the lease operator went unanswered. The volume basis used in determining this assessment was the initial well potential test. MMS correspondence indicates that there was no factual basis for such an assessment based on the initial well potential test.

MMS knew that the volume of vented gas was significantly less than the test volume. However, after being ignored on two prior notices MMS wanted to be sure that it got the operator's attention. This time, MMS got the full attention of the operator who appealed the assessed amount and who took steps to provide the factual information needed to compute a reasonable assessment.

The operator immediately had the well tested by a contractor to determine the volume of gas being vented and submitted the results to MMS at a meeting that took place on May 6, 1982. MMS thus concluded that the reasonable volume of vented gas was 8 Mcf/day and that the gas contract price of \$ 9.579/Mcf should be used in determining the assessment. MMS billed and collected an assessment of \$ 12,835.89 and has also billed \$ 2,228.78 in late payment charges.

The method used by MMS to get the operators attention is questionable and, in hindsight considering all of the turmoil it caused, a more apt description might be "poor judgment." But, it did get MMS the necessary factual information to determine a reasonable assessment which can be supported. [Emphasis added.]

(Item 5, Administrative Record).

We are unable to sustain Walsh's contention that the Tulsa MMS Office had jurisdiction on December 17, 1982, to issue the decision withdrawing the prior assessment and issuing the revised assessment in the amount of \$ 12,835.89. The filing of a notice of appeal with the office of the official who issued the decision under appeal removes the matter from the jurisdiction of the initial decisionmaker and places it in the hands of the reviewing official (in this case the Deputy Assistant Secretary). Sun Oil Co., 42 IBLA 254, 255-56 (1979). The conditional dismissal of the appeal should have been forwarded to the Deputy Assistant Secretary as MMS had no jurisdiction to grant further relief in the absence of a remand of the case pending before the Deputy on appeal.

Accordingly, the issue before the Board is the propriety of the Deputy's decision of July 25, 1985 (as reaffirmed in his August 27, 1985, decision) upholding the royalty assessment in the amount of \$ 529,694.71. The basis for the decision was the Deputy's finding that the January 1982 letter-decision of MMS advising lessees they would be charged royalty on vented gas based on the initial potential test of the well, 1328 MCFGPD, was not appealed within 30 days of receipt thereof by appellant Walsh and, hence, became a final Departmental decision. Consideration of this issue hinges on two questions: Whether the January 21, 1982, decision is properly found to be a "final" decision thus triggering the jurisdictional 30-day time limit for appeal and whether appellant Walsh was served with a copy of the decision more than 30 days in advance of the April 1, 1982, notice of appeal.

[1] Review of the record fails to disclose the date of service of the January 1982 decision upon appellant Walsh. Service of a decision may generally be effectuated by mailing a document to a party's last address of record regardless of whether it was actually received by him. See 43 CFR 1810.2(b); Joan L. Harris, 37 IBLA 96 (1978) (regarding decisions of BLM officials). However, constructive service by mail may be vitiated where the decision is improperly addressed. See Victor M. Onet, Jr., 81 IBLA 144 (1984) (sent to address other than last address of record); cf., Betty Alexander, 53 IBLA 139 (1981) (use of "restricted delivery" certified mail). In this case, it appears from the record the January 1982 decision was misaddressed to "F. Howard Walsh" rather than "F. Howard Walsh, Jr." <sup>11/</sup> The affidavit of appellant Walsh (Exh. 1 to Walsh's Brief) establishes that "F. Howard Walsh" is his father, that his father is also engaged in the oil and gas business, and the mailing address for both individuals is the same. Appellant Walsh has sworn under oath the decision was not received until the latter part of March 1982 when it was brought to his attention by co-lessee Moncrief, and he subsequently retrieved it from his father's office.

Counsel for Davis and Lamar cites Irving v. Breazeals, 265 F. Supp. 116, 123 n.16 (S.D. Miss. 1967), for the proposition that omission or addition of "Senior" or "Junior" is "harmless error, both in civil and criminal proceedings." Although this may be true as a general proposition it does not dispose of the important question of whether the omission of "Jr." from Walsh's name resulted in an actual delay in his receiving the January 21 decision, and thus prejudiced his right to appeal that decision. We find that under certain circumstances the addition of the suffix "Jr." to a party's name may assume critical importance:

Under appropriate circumstances, however, the suffix "Junior" may be regarded as a constituent part of a person's legal name. Some courts have held, for instance, that though the suffix is ordinarily no part of one's name, the use of the suffix is necessary in legal proceedings where the father and son reside in the same town. Similarly, the use of the suffix is sometimes made desirable because of a rule that where father and son bear the same

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<sup>11/</sup> It appears the author of the letter attached the suffix "Jr." to the name of the wrong lessee as the decision was also misaddressed to lessee R. W. Moncrief as "R. W. Moncrief, Jr."

name, the name in which an instrument is executed is presumed to be that of the father, although this presumption is rebuttable. [Footnotes omitted.]

57 Am. Jur. 2d, Name § 8 (1971). See Tremps v. Ascot Oils, Inc., 561 F.2d 41, 44 (7th Cir. 1977) ("no material prejudice resulted" from incorrect use of "Jr.," where father had "actual notice"); State v. Dingle, 229 A.2d 370, 372 (1967) (significance of variance between "Jr." and "Sr." turns on whether "substantial injury is done".)

Under the circumstances of this case, including the facts regarding receipt of the January 1982 decision related in the affidavit of appellant Walsh, we find that the failure to address the letter-decision properly by omitting the suffix "Jr." on appellant's name vitiated the constructive service of the decision on appellant when the return receipt card was signed. Accordingly, it does not appear the decision was served on appellant Walsh more than 30 days prior to filing the notice of appeal. We are unable to affirm dismissal of the appeal as untimely in these circumstances and the decision of the Deputy Assistant Secretary must be reversed.

[2] Even if we were to consider appellant Walsh to have received the decision when the return receipt card was signed, it would not change the result. Under the circumstances of this case, the January 1982 decision was not a "final" decision subject to appeal. The decision left undetermined certain significant factors in ascertaining lessees' liability, including the price factor for the gas and the length of the period for which the assessment would be charged. Judgment on the issue of liability without determining the amount assessed is generally not final or appealable. See Western Geophysical Co. v. Bolt Associates, Inc., 463 F.2d. 101, 102-103 (2nd Cir.), cert. denied, 409 U.S. 1040 (1972). Indeed, the terms of the January 1982 decision itself stated lessees would be billed in the future for the amount assessed, thus indicating this was not a final decision on the matter. Further, we note the actions of MMS officials in this case indicate they did not perceive the January 1982 letter to be a final decision in the matter. Thus, upon the filing of Walsh's notice of appeal, MMS arranged a meeting to consider the amount of gas actually vented and to arrive at a proper assessment. In Shell Oil Co., 52 IBLA 74 (1981), the Board found this factor to be relevant in resolving the question of the finality of a royalty assessment decision and the resulting timeliness of a challenge to the assessment:

The logic of Shell's position is hard to dispute. While Survey's order of July 6 bears all the indicia of a final order, its willingness to schedule a conference with Shell to discuss its position suggests that it may have been inclined to negotiate a solution to the issue at hand. Such a posture is contradictory to the idea of a final decision. While not entirely helpful, the definition of a final decision, as enunciated by the Supreme Court in construing the present 28 U.S.C. § 1291 (1976), offers some insight: "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). Survey's scheduling of its August 17 conference

with appellant persuades us that a final decision had not yet been rendered.

Shell Oil Co., *supra* at 77.

In light of our reversal of the decision of the Deputy Assistant Secretary holding that the January 1982 decision is the final Departmental determination in the matter for lack of a timely appeal, we would ordinarily remand the case for further proceedings to determine the proper royalty assessment. However, in light of the unusual delay in resolving this case and repeated problems with ex parte proceedings encountered below, we find it more productive to refer this case to the Hearings Division for assignment of an Administrative Law Judge before whom all interested parties may be heard. The decision of the Administrative Law Judge on the proper royalty assessment for the vented gas shall be final for the Department in the absence of appeal by any adversely affected party to this Board.

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 Deputy Assistant Secretary -- Indian Affairs (Operations) is reversed, the royalty assessment it upheld is vacated, and the case is referred to the Hearings Division for a hearing before an Administrative Law Judge.

C. Randall Grant, Jr.  
Administrative Judge

We concur:

Gail M. Frazier  
Administrative Judge

Bruce R. Harris  
Administrative Judge

