

LYMAN J. IPSEN ET AL.

IBLA 86-123

Decided April 14, 1987

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, giving notice of termination of lease W-65485.

Dismissed as to two appeals; affirmed as to the remaining appeals.

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

Under 43 CFR 4.411(a), a notice of appeal must be filed within 30 days after the person taking the appeal is served with the decision from which the appeal is taken. The filing of a notice of appeal in a timely manner is jurisdictional, and failure to file an appeal within the time allowed will result in dismissal of the appeal. 43 CFR 4.401(a) provides a delay in filing may be waived if the document is filed no later than 10 days after the deadline, and the document was transmitted on or before the deadline date. When a notice of appeal was due on or before Nov. 27, 1985, and the postmark on the envelope shows that it was transmitted Nov. 29, 1985, the delay in filing may not be waived.

2. Oil and Gas Leases: Assignments or Transfers -- Oil and Gas Leases: Termination

A decision disallowing a pending partial assignment of an oil and gas lease will be affirmed where, prior to approval of the partial assignment, the lease had terminated automatically by operation of law for failure to pay the annual rental on or before the lease anniversary date and the assignee had not tendered the rental for the lands described in the partial assignment prior to the anniversary date.

3. Oil and Gas Leases: Assignments or Transfers -- Oil and Gas Leases: Rentals

While a potential assignee of an oil and gas lease may pay the annual rental, BLM is under no obligation to give the potential assignee a courtesy notice of rental due prior to the lease anniversary date.

APPEARANCES: David W. Preston, Esq., Kansas City, Missouri, for Albert G. Lang, Estate of Earl W. Jackson, Sr., Thomas H. Eubanks, Richard J. Middendorf, Tashi T. Georgoff, Joseph B. Thompson, William D. Enright, Ben Swartzentruber, Jr.; Philip A. Shaver, Esq., Princeton, New Jersey, for Suzanne Reid; Lyndall G. James, Esq., Cleveland, Ohio, for E. Sue Gatti; Thomas L. Hunt, Michael Marra, Leonard H. McCain, Lyman J. Ipsen, pro sese.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Lyman J. Ipsen et al. 1/ appeal from decisions of the Wyoming State Office, Bureau of Land Management (BLM), dated October 23, 1985, providing notice of automatic termination of oil and gas lease W-65485 for failure to make timely payment of rentals and declaring assignments unapproved.

BLM issued lease W-65485 to Robert W. David, effective February 1, 1979, for 2,318 acres of land in Sublette County, Wyoming. The lease was subsequently assigned to three successive assignees with the last assignment being to WLM Corporation (WLM) effective April 1, 1984. On September 21, 1984, BLM received a record-title assignment conveying 100-percent interest in lease W-65485 from WLM to Spearman Energy, Inc. (Spearman), executed January 19, 1984. On September 26, 1984, BLM received 29 record-title assignments for the same lease with Spearman as assignor conveying 100-percent interest in various parcels of land within the leased lands to various individuals, including appellants. These assignments were executed either February 28, or March 6, 1984. The WLM to Spearman assignment and the 29 assignments to various individuals were all filed more than 90 days after the date of execution. Pursuant to the requirements set forth in 43 CFR 3106.1(a), BLM requested signed statements from all assignors and assignees that the assignments remained valid and in effect. 2/ Spearman did not comply with this request. Neither the assignment from WLM to Spearman nor the assignments from Spearman to the 29 other assignees have been approved by BLM.

By notice dated June 18, 1985, BLM informed WLM, the lessee of record, that lease W-65485 terminated, effective February 1, 1985, for failure to pay rental. BLM allowed WLM 60 days in which to file a petition for reinstatement of the lease. This notice was sent to WLM's address of record but was

1/ Notices of appeal were also filed by Albert G. Lang, Thomas Hunt, Earl W. Jackson, Sr., Thomas H. Eubanks, Suzanne Reid, Richard J. Middendorf, Tashi T. Georgoff, Joseph B. Thompson, William D. Enright, Ben Swartzentruber, Jr., Michael Marra, Leonard H. McCain, E. Sue Gatti.

2/ 43 CFR 3106.1(a) reads in pertinent part as follows:

"An application for approval of any instrument of transfer of a lease or interest in a lease shall be filed within 90 days from the date of execution. The 90-day filing period shall begin on the date the assignor signs and dates the assignment. Assignments filed after the 90th day may be approved provided the assignor and assignee state to the proper BLM office that the assignment is still in force and provided that no intervening assignment(s) involving all or part of the interest(s) being assigned has been filed for approval."

returned to BLM because WLM was no longer at the address of record and the postal service had no forwarding address. No petition for reinstatement was filed.

On October 23, 1985, BLM issued its decision to the 29 assignees providing notice of lease termination and declaring assignments unapproved.

Numerous briefs have been filed on appeal, and the essential arguments in these briefs will be considered. Appellants contend the termination of their interests in the tracts purchased from Spearman is improper and constitutes a taking of appellants' property without due process of law. Appellants assert that BLM never notified them of the obligation to pay the 1985 rentals; that they never knew that their assignments from Spearman would not be approved; that BLM knew, but did not inform appellants, that the assignment from WLM to Spearman had not been approved; and, that knowledge of this fact would have alerted appellants to irregularities in Spearman's dealings and allowed them an opportunity to make inquiries regarding their leases.

Appellants request the right to pay the rentals due on February 1, 1985, to allow their interests in the lease to be reinstated and their assignments to be approved. Alternatively, appellants seek appointment of a Trustee in Bankruptcy to represent the interests of the 29 persons who have paid their money to Spearman and who are now faced with losing their investments. WLM and Spearman are defunct organizations which have been forced to surrender their corporate charters. Appellants assert that it would be inequitable to deny them an interest in the lease because of fraud of others.

[1] At the outset we note that Leonard H. McCain's notice of appeal was not timely. The BLM decision had been sent to McCain at the address given on the face of the assignment and received by McCain at that address on October 28, 1985. McCain's notice of appeal was filed with BLM on December 2, 1985.

Departmental regulation 43 CFR 4.411(a) provides that "[a] person served with the decision being appealed must transmit the notice of appeal in time for it to be filed in the office where it is required to be filed within 30 days after the date of service." Subsection (c) of the regulation provides that no extension of time will be granted for filing the notice of appeal. However, a grace period is provided by 43 CFR 4.401(a). 43 CFR 4.401(a) states a delay in filing will be waived if the document is filed no later than 10 days after it was required to be filed and the document was transmitted before the filing deadline. Timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal. Oscar Mineral Group #3, 87 IBLA 48 (1985); George Schultz, 81 IBLA 29 (1984).

The decision was received at the mailing address given by McCain on October 28, 1985. Therefore, in order for an appeal to have been timely, McCain was required to file its notice of appeal on or before November 27, 1985. The notice of appeal was filed by McCain on December 2, 1985.

Although the notice of appeal was filed within 10 days after the deadline, the grace period provided by 43 CFR 4.401(a) is of no help to McCain, as the postmark shows that it was mailed on November 29, 1985, 2 days after the filing deadline. When the notice of appeal is not transmitted on or before the deadline date, the appeal must be dismissed. See State of Alaska, 70 IBLA 369, 371 (1983).

The notice of appeal filed by Michael Marra was also untimely. Marra received BLM's decision on October 31, 1985. In order for his appeal to have been timely, he was required to file his notice of appeal on or before December 2, 1985, since November 30 was a Saturday. See 43 CFR 4.22(e). The notice of appeal was not filed until December 23, 1985, and was therefore untimely. The grace period is not applicable, as the document was not filed within 10 days of the deadline date and the postmark shows that it was mailed December 16, 1985, 14 days after the filing deadline. Because Marra's appeal was not timely filed under 43 CFR 4.411(a) and the grace period provided by 43 CFR 4.401(a) is not applicable, Marra's appeal must also be dismissed. Indeed, since the notice of appeal was not filed within the grace period, BLM should not have considered Marra's notice of appeal and returned it. 43 CFR 4.411(c); B. L. & Norma Jean Newman, 92 IBLA 314, 315 n.2 (1986).

[2] Section 31(b) of the Mineral Leasing Act, as amended, 30 U.S.C. @ 188(b) (1982), provides that an oil and gas lease will "automatically terminate by operation of law" where the lessee fails to pay the annual rental on or before the lease anniversary date and there is no well capable of producing oil or gas in paying quantities. Accordingly, in the absence of evidence that the rental was tendered by the anniversary date, oil and gas lease W-65485 terminated on February 1, 1985. See Dena F. Collins, 86 IBLA 32 (1985).

An assignment of 100-percent of the record-title to a portion of the leased lands segregates the assigned portion and the retained portion into separate leases. 43 CFR 3106.7-5. This Board has held that a partial assignment of record-title to a portion of the acreage in a Federal oil and gas lease filed by a qualified assignee prior to the lease anniversary date may be approved after the anniversary date if the annual rental for the segregated acreage was tendered by the potential assignee prior to the anniversary date. Ladd Petroleum Corp., 70 IBLA 313 (1983). However, in light of appellants' failure to tender the annual rental for the lands embraced in their assignments prior to the lease anniversary date, appellants cannot avail themselves of this holding. See Ruth L. Schwoerer, 92 IBLA 98 (1986).

On January 30, 1985, E. Sue Gatti made a timely rental payment of \$ 40 for her portion of the lease. However, after considering the facts of this case, we must affirm the BLM holding that the lease had terminated and that her assignment was unapproved. On October 23, 1985, BLM issued a decision to Spearman Energy, Inc., notifying Spearman that lease W-65485 had terminated for failure to pay rentals due and that the untimely assignment from WLM to Spearman was unapproved. Spearman did not appeal from this decision. Because the assignment from WLM to Spearman had not been approved, Spearman has no

interest to assign to Gatti. Therefore, an assignment from Spearman to Gatti cannot be approved and Ladd Petroleum, supra, is not applicable.

Appellants request reinstatement of their interests in the lease and approval of their assignments. When an oil and gas lease has terminated for failure to pay rental prior to approval of a pending assignment, only the record titleholder of the lease may file a petition to reinstate the lease. Grace Petroleum Corp., 62 IBLA 180 (1982). In Victory Land & Exploration Co., 65 IBLA 373, 374 (1982), the Board set forth the statutory bases for denying a petition for reinstatement of a terminated oil and gas lease filed by a holder of an unapproved assignment:

There are two statutory bases for this holding. Under 30 U.S.C. @ 188 (c) (1976), as noted above, a terminated lease may be reinstated only if the failure to make timely payment "was either justifiable or not due to a lack of reasonable diligence on the part of the lessee." (Emphasis added.) Furthermore, the statutory provision governing assignments, 30 U.S.C. @ 187a (1976), states that until approval of an assignment, "the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed." ^{3/}

See also J. Edward Hollington, 86 IBLA 345, 349 (1985).

Thus, where the record titleholder of a lease fails to file a timely petition for reinstatement, the lease may not be reinstated. Howard H. Vinson, 90 IBLA 280 (1986); Victory Land & Exploration Co., supra. Consequently, where the record titleholder fails to request reinstatement within the time allowed, reinstatement is not authorized under governing statutory and regulatory provisions, and the termination of the lease becomes final. In these circumstances, BLM must refuse to approve any pending assignments, as there is no lease interest left to be assigned. James Darby, 92 IBLA 231 (1986).

[3] Appellants state that they were not notified of their obligation to pay the rental. As noted above, the potential assignee may pay the annual rental. However, BLM is under no obligation to provide either the assignor or the assignee a courtesy notice of the rental due prior to the lease anniversary date. Otto C. Svancara, 87 IBLA 319, 321-22 (1985). See also, Ruth L. Schwoerer, supra at 99 n.1. Failure to provide such a notice does not justify a late payment or avert the statutory consequences of the failure to pay timely. Harry C. Peterson, 75 IBLA 195 (1983).

Finally, this Board has no authority to appoint a Trustee in Bankruptcy.

^{3/} This rationale is equally applicable to class II reinstatement under 30 U.S.C. @ 188(d) (1982).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals of Leonard McCain and Michael Marra are dismissed, and the decisions of BLM are affirmed with regard to the other appeals.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Will A. Irwin
Administrative Judge.

