

R. GERALD JONES

IBLA 86-1224

Decided January 27, 1988

Appeal from a decision of the Wyoming State Officer Bureau of Land management, holding oil and gas lease W-96182 to have terminated, denying petition for class I reinstatement, and finding no petition had been filed for class II reinstatement.

Affirmed.

1. Oil and Gas Leases: Applications: Reinstatement--Oil and Gas Leases: Reinstatement

The back rental due when filing a petition for class II reinstatement is determined at the increased rates accruing from the date of termination. The increased rates are the rates which will apply if class II reinstatement is granted-- a minimum of \$5 per acre for non-producing leases and \$10 per acre for producing leases.

2. Oil and Gas Leases: Applications: Reinstatement--Oil and Gas Leases: Reinstatement

Neither 30 U.S.C. § 188(d)-(e) (1982) nor 43 CFR 3108.2-3 expressly require that fees for administrative costs and costs of publication in the Federal Register be submitted when a petition for class I reinstatement is filed or within the time limitation for filing a petition.

APPEARANCES: Bill Pedersen, Jr., Esq., Nacogdoches, Texas, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

R. Gerald Jones has appealed a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated April 23, 1986, denying his petition for reinstatement of oil and gas lease W-96182. BLM rejected appellant's petition as to class I reinstatement on the grounds that mailing the annual rental payment due August 1 on August 7 (as shown by the postmark on the envelope) did not constitute reasonable diligence in making the payment, and appellant's absence from the country the month prior to the anniversary date of the lease, as stated in his petition for reinstatement, did not justify the failure to submit the lease payment in a timely manner.

The lease in question is for a 78.54 acre parcel described as lot 2 and the NE 1/4 NW 1/4, sec. 30, T. 41 N., R. 78 W., sixth principal meridian, Wyoming. The lease was created upon approval of a partial assignment of noncompetitive oil and gas lease W-079785, which had been issued to Lyle A. Hale on July 8, 1982, with an effective date of August 1, 1982. The assignment to appellant was executed on August 15, 1984, by Robin Clark, President of the Federal Petroleum Group, Inc., and was approved by BLM on July 15, 1985, effective December 1, 1984. 1/

By notice dated January 9, 1986, BLM informed appellant that his lease had terminated for failure to pay the annual rental on or before the anniversary date of the lease. The Mineral Leasing Act provides that "upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law * * * ." 30 U.S.C. § 188(b) (1982). Under the statute a lease is terminated by the failure of the lessee to timely pay rental, not by Departmental action. Oil Resources, Inc., 28 IBLA 394, 405, 84 I.D. 91, 97 (1977).

BLM's notice of termination also informed appellant of his right to petition for reinstatement as provided by 30 U.S.C. § 188(c)-(e) (1982) and 43 CFR 3108.2-2, 3108.2-3. Appellant petitioned for reinstatement by letter dated January 27, 1986. A petitioner for class I reinstatement bears the burden of showing that failure to make timely payment of the annual rental was either justified or not due to a lack of reasonable diligence. 43 CFR 3108.2-2(b). In his petition appellant stated: "The reason my lease check was late [was that] I was out of the country during the month of July and I remitted as soon as I got back and got my notice of rental due." A \$25 filing fee and a copy of appellant's cancelled check for \$79 showing payment of the lease rental were enclosed with appellant's petition for reinstatement.

By the decision on appeal BLM denied appellant's petition as to class I reinstatement because, based on decisions of this Board cited by BLM, 2/ the agency found the reason stated by appellant to show neither reasonable diligence in submitting the lease rental nor a justifiable reason for the delay. See 30 U.S.C. § 188(c) (1982). BLM's decision also stated that appellant had not submitted a petition for class II reinstatement within the 60 days provided by 30 U.S.C. § 188(d) (1982).

1/ The case file for appellant's assigned lease does not contain documentation showing the transfer of title to the lease from Lyle A. Hale to the Federal Petroleum Group, Inc. Presumably the documentation is in the file for oil and gas lease W-79785.

2/ The decisions cited by BLM are Ronald C. & Mary A. Hill, 38 IBIA 315 (1978); Lloyd M. & Adelheid A. Patterson, 34 IBLA 68 (1978); Hildred W. Bernthal, 30 IBIA 18 (1977); Sara Turcsan, 23 IBLA 370 (1976); and Charles C. Sturdevant, 20 IBLA 280 (1975).

Appellant does not challenge BLM's decision as to denial of class I reinstatement. Instead, he argues in his statement of reasons that his petition for reinstatement met the requirements for consideration for class II reinstatement, that the requirements for a petition for class II reinstatement set forth in BLM's notice of termination incorrectly state the law, that BLM erred in failing to consider class II reinstatement, and that, because his failure to timely pay was inadvertent, he qualifies for class II reinstatement.

Class II reinstatement of oil and gas leases which have terminated by operation of law for failure to timely pay annual rental by the anniversary date of the lease is authorized by 30 U.S.C. § 188(d) and (e) (1982). These subsections were added to the statute by Title IV of the Federal Oil and Gas Royalty Management Act of 1982 (FOGRMA), P.L. 97-451, 96 Stat. 2447, 2462-64 (1983). The statute permits class II reinstatement in two circumstances. A lease may be reinstated when the lessee has failed to make payment within 20 days of the anniversary date of the lease and shows that the failure to make make timely payment "was justifiable or not due to lack of reasonable diligence." 30 U.S.C. S 188(d)(1) (1982). A lease also may be reinstated under class II when "no matter when the rental is paid after termination, it is shown to the satisfaction of the Secretary of the Interior that such failure was inadvertent * * * ."

Subsection 188(d) provides that a lease which terminates after January 12, 1983, the date of approval of FOGRMA, may not be reinstated under class II unless

a petition for reinstatement together with the required back rental and royalty accruing from the date of termination is filed on or before the earlier of --

(i) sixty days after the lessee receives from the Secretary notice of termination, whether by return of check or by any other form of actual notice, or

(ii) fifteen months after termination of the lease. (Emphasis added.)

Id. § 188(d)(2)(B).

[1] In his statement of reasons appellant asserts that he met the requirements for filing a petition for class II reinstatement when he filed a petition for reinstatement and paid his back rental within the time prescribed by the statute. Appellant is correct that his petition was filed within the time period defined by the statute. However, the amount of rental due when filing a petition for class II reinstatement is rent at the rates which will apply if class II reinstatement is granted--a minimum of \$5 per acre for nonproducing leases and \$10 per acre for producing leases. 30 U.S.C. § 188(e) (1982); 43 CFR 3108.2-3(b)(1); Monica V. Rowland, 90 IBLA 349, 352 (1986); Robert P. Creson, 83 IBLA 362 (1984); Kurt W. Mikat, 82 IBIA 71 (1984). Appellant's check to BLM in the amount of \$79 was based upon the initial rental rate of \$1 per acre. In his statement of reasons appellant

states that according to BLM's decision he paid the back rental. We find no such statement in BLM's decision, only an acknowledgment that \$79 was submitted "as rental payment." In any event, we can find nothing in the record indicating that appellant paid the \$5-per-acre back rental necessary for consideration for class II reinstatement. Because appellant failed to submit the back rental due at the required rate of \$5 per acre within the time period established by 30 U.S.C. S 188(d) (1982), BLM properly concluded that appellant did not submit a petition for class II reinstatement.

Appellant, however, maintains that BLM reached its conclusion because he did not submit, as stated in BLM's notice of termination, a \$500 reinstatement fee and a deposit for publishing notice in the Federal Register.

The portion of BLM's notice of termination questioned by appellant states:

A terminated lease may be reinstated if either of the following sets of conditions are [sic] met.

PUBLIC LAW 97-451 (Class II Reinstatement) Pursuant to the provisions of Title IV of the Federal Oil and Gas Royalty Management Act of 1982, Public Law 97-451, 96 Stat. 2462-2466, and Title 43 Code of Federal Regulations Section 3108.2-3(a)(b)(1), you have the right to petition for reinstatement of the lease. Under these provisions the right of reinstatement is subject to the following conditions and procedures:

(5) That a petition for reinstatement is filed in this office within sixty (60) days after receipt of this Notice, and it is submitted with:

- a reinstatement fee of \$500.00 per lease;
- all required rental including back rental and/or royalty which has accrued from the date of termination of the lease at the rate identified in item (3) above; and
- a \$106.25 deposit to insure payment of the cost of publication in the Federal Register.

Appellant's arguments that BLM improperly rejected his petition for class II reinstatement are based on a distinction he finds in the controlling statute and regulation between requirements for filing a petition for class II reinstatement and criteria which must be met in order for BLM to grant class II reinstatement. In particular, appellant contends that the applicable statute

and regulation require a petition to be filed within 60 days of receipt of a notice of termination, and back rentals and royalties to be paid within the same period, but do not require that a petition be accompanied by a \$500 reinstatement fee and the cost of publishing notice in the Federal Register.

Two portions of 30 U.S.C. § 188 (1982) are relevant. In addition to subsection (d)(2)(B) quoted previously, subsection (e) provides that a reinstatement under subsection (d) shall be granted only if four conditions are met. No valid lease affecting the lands may have been issued prior to the date the petition for reinstatement is filed. Id. § 188(e)(1). Back rentals and royalties must have been paid, and a noncompetitive lease must include provisions for payment of future rentals at a minimum of \$5 per acre per year and a royalty rate of not less than 16-2/3 percent. Id. § 188(e)(2), 188(e)(3). Notice of the proposed reinstatement must be published in the Federal Register. Id. § 188(e)(4).

Subsection 188(e) concludes with two sentences requiring the reimbursement of two specified costs of reinstating a lease:

The lessee of a reinstated lease shall reimburse the Secretary for the administrative costs of reinstating the lease#, but not to exceed \$500. In addition the lessee shall reimburse the Secretary for the cost of publication in the Federal Register of the notice of proposed reinstatement.

Id. § 188(e).

The structure of the relevant regulation promulgated by the Department, 43 CFR 3108.2-3, reflects the divisions of subsections 188(d) and (e) of the statute. Subsection 3108.2-3(a) of the regulation reiterates the circumstances set forth in subsection 188(d)(1) of the statute in which class II reinstatement is available. Subsection (b)(1) of the regulation states that:

For leases that terminate on or after January 12, 1983, consideration may be given to reinstatement if the required back rental and royalty at the increased rates accruing from the date of termination, together with a petition for reinstatement, are filed on or before the earlier of:

- (i) Sixty days after the receipt of the Notice of Termination sent to the lessee of record;
- or
- (ii) Fifteen months after termination of the lease.

43 CFR 3108.2-3(b)(1); see 30 U.S.C. S 188(d)(2)(B) (1982).

Similar to section 188(e) of the statute, subsection (b)(2) of the regulation provides that "[a]fter determining that the requirements for filing

of the petition for reinstatement have been timely met, the authorized officer may reinstate the lease" if six conditions listed in the regulation are met. Id. 3108.2-3(b)(2). The third condition is that the petitioner must have made "[p]ayment of all back rentals and royalties at the rates established for the reinstated lease." Id. 3108.2-3(b)(2)(iii). The fifth condition is that notice of the proposed reinstatement must have been published in the Federal Register, "for which the lessee shall reimburse the Bureau for the full costs incurred in the publishing of said notice." Id. 3108.2-3(b)(2)(v). The sixth condition is that "[t]he lessee has paid the Bureau a nonrefundable administrative fee of \$500." Id. 3108.2-3(b)(2)(vi).

[2] It is clear that neither the statute nor the regulation expressly requires that fees for administrative costs and costs of publication in the Federal Register be submitted when a petition for class II reinstatement is filed or within the time limitation for filing a petition. The statute requires only that a petition and back rentals and royalties be submitted within the time prescribed. The regulation states that "[a]fter determining that the requirements for filing of the petition for reinstatement have been timely met" a lease may be reinstated if six conditions are met and includes the fees for administrative and publication costs among the conditions. Id. 3108.2-3(b)(2). Thus, as set forth in the regulation, a determination as to the sufficiency of a petition precedes a determination as to whether the lease may be reinstated under class II. Paralleling the statute, the regulation lists the fees as conditions for reinstatement, not as requirements for filing a petition.

The portion of BLM's Notice of Termination appellant questions appears to have been adopted from the model oil and gas lease termination notice included in BLM's "Oil & Gas Adjudication Handbook" (BLM Manual Handbook 3108-1). As with BLM's notice to appellant, the model letter lists five "conditions and procedures" for reinstating a lease under class II. Using language similar to that previously quoted, the fifth item of the model letter states that a petition for reinstatement be submitted with back rentals and royalties, an administrative fee of \$500, and a fee for publication of notice in the Federal Register. The items in the model letter reflect the "Qualifications for Class II Reinstatement" listed in the handbook. Among the qualifications listed are:

5. An administrative reinstatement fee of \$500 per lease is received.
6. A \$130 (subject to change) deposit is received to ensure payment of the cost of publication in the Federal Register.
7. No additional filing fee is required.
8. All required rental including all back rental and/or royalty which has accrued from the date of termination of the lease at the reinstatement rate is received.

Note: Required rental must be submitted with the petition. However, 60 days is allowed in which to submit the \$500 administrative fee and Federal Register publication deposit.

("Oil & Gas Adjudication Handbook," H-3108.1.III.E.) Criteria for class II reinstatement also appear in the BLM manual. One criterion is that:

A petition for reinstatement is submitted in the proper BLM office within 60 days of receipt of a Notice of Termination (or within 15 months after termination of the lease in any case where a Notice of Termination of lease was not sent) with a nonrefundable administrative fee of \$500 and the required rental and royalty at the increased rates.

BLM Manual, 3108.23.A.2.

The Board is aware that in the past the procedures adopted by BLM state offices in reviewing class II reinstatement petitions were not uniform. Compare *Luca Robert*, 90 IBLA 182 n.1 (1986) (Alaska); *Melvin P. Clarke*, 90 IBLA 95, 96 n.1 (1985) (Alaska); *Donald D. Dunn*, 87 IBLA 316 (1985) (Alaska); and *Jerry D. Powers*, 85 IBLA 116 (1985) (New Mexico), with each other and the instruction in the present case quoted above (Wyoming). While the current instructions contained in the handbook and BLM Manual should help to standardize procedures among state offices, we note several respects in which they do not reflect the provisions of the controlling statute and regulation. First, the note to item eight in the handbook stating that the back rental and royalty payment must be submitted with the petition is more restrictive than the statute and regulation which simply require that both the petition and rental and royalty payment be received within the earlier of 60 days of receipt of the notice of termination or 15 months from termination of the lease. See *Monica V. Rowland*, *supra*, and the other cases cited. Second, by listing only qualifications and criteria for reinstatement of a lease, neither the handbook nor the Manual fully reflects the provisions of 43 CFR 3108.2-3. Neither notes that subsection (b)(1) of the regulation provides that "consideration may be given to reinstatement when the required back rentals and royalties and a petition for reinstatement are both received within the 60-day period, even though the payment may not have been submitted with the petition. Cf. *Northwest Exploration Co.*, 73 IBLA 123 (1983). Additionally, as discussed above, neither the handbook nor the Manual reflects the distinction established by the statute between those requirements which must be met within the 60-day time period and those which must be met to obtain a reinstated lease.

Currently, if BLM finds the petition for class II reinstatement in order in all other respects, it must send a petitioner for class II reinstatement a copy of the lease amendment specifying the new lease terms as to rents and royalties so that it can be executed by the lessee. It would seem that the same letter could also serve to provide the petitioner with notice and an opportunity to pay the required class II administrative and publication fees

if they have not been submitted previously. Such notification of course would be necessary only if BLM has decided to act favorably upon the class II reinstatement petition. Reimbursement of administrative costs is not required of unsuccessful petitioners; nor would there be any publication of notice in the Federal Register. See 30 U.S.C. § 188(e) (1982); "Oil & Gas Adjudication Handbook," H-3108-1.III.G.3.

Accordingly, 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.

R. W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING SPECIALLY:

While I agree with so much of the majority discussion as upholds the Bureau of Land Management's (BLM's) decision that appellant has not properly petitioned for a class II reinstatement of his lease under 30 U.S.C. § 188(d) (1982), I write separately to explain my understanding of the draft's concluding discussion, by way of dicta, concerning the interplay between the statute, the regulations, and BLM's procedures.

To the extent that the majority has concluded that nothing in the statute or regulations requires that an applicant submit the nonrefundable reinstatement fee and the costs of publication at the same time that an application for a class II reinstatement is made, I agree. This does not mean, however, that BLM is therefore precluded from requiring the submission of these monies at the time that a petition is filed, provided that BLM expressly notifies a prospective applicant (as it did in the instant case) that he or she must submit these amounts with its petition for reinstatement. I think it goes without saying that, should BLM ultimately decide that class II reinstatement should not be granted, these sums, together with the advance rentals, must be refunded since, under the statutory scheme, it is clear that these monies are not earned until such time as BLM has decided to grant the requested reinstatement. But, nothing in the majority decision purports to prohibit the procedures utilized herein (though I think it obvious that the majority might prefer an alternative approach).

While I personally have no problems with the procedures that BLM used in the instant case, I agree that, should the majority approach commend itself to BLM, BLM is free to adopt it. Consistent with this understanding of the majority discussion, I concur in the decision.

James L. Burski
Administrative Judge

