

**Editor's note: Appealed -- James Miner v. Lujan, Civ.No. 89-579 REC (C.D. Calif. Aug. 14, 1989) and Texploration, Inc. v. Lujan, Civ.No. 89-4836 (C.D. Calif., Aug. 14, 1989)**

JAMES P. MINER  
TEXPLORATION, INC.

IBLA 87-220

Decided June 15, 1989

Appeal from decisions of the California State Office, Bureau of Land Management, denying petitions for reinstatement of geothermal leases. CA 13568 and CA 13569.

Affirmed.

1. Geothermal Leases: Reinstatement--Geothermal Leases:  
Termination

Neither reasonable diligence nor justification is demonstrated by the holder of a geothermal lease who stops payment on his rental checks because they were drawn on the wrong account and thereafter submits replacement checks which are received by the Minerals Management Service after the anniversary date of the lease, and reinstatement is properly denied.

APPEARANCES: James P. Miner, pro se; Francis C. Pizzulli, Esq., Santa Monica, California, for Texploration, Inc.; John F. Shepherd, Esq., Denver, Colorado, for Intervenor, Grant S. Lyddon; David E. Lindgren, Esq., Lynn M. Cox, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

James P. Miner (Miner) and Texploration Inc. (Texploration) have appealed from separate decisions of the California State Office, Bureau of Land Management (BLM), dated November 25, 1986, denying their petitions for reinstatement of geothermal resource leases CA 13568 and CA 13569, which terminated because annual rental was not paid on or before the anniversary date.

The leases, embracing secs. 14, 15, 21, 22, 27, and 28 in T. 21 S., R. 38 E., Mount Diablo Meridian, were originally awarded to Crownite

Corporation (Crownite) on May 6, 1983, effective June 1, 1983. 1/ By assignment approved effective September 1, 1984, Texploration became the owner of 100 percent of record title of the leases. Intervenor Grant S. Lyddon holds three-fourths of 1 percent overriding royalty in the leases.

By notice dated August 1, 1986, BLM informed Texploration that the leases had terminated for failure to pay rental on or before the anniversary date. BLM's notice also advised Texploration of its right to seek reinstatement and of the conditions required to be met for reinstatement. See 43 CFR 3244.2-2(b).

Texploration's original lease rental checks were received by the Minerals Management Service (MMS) on Monday, June 2, 1986. See 43 CFR 3205.3-2(d). The checks did not clear the bank, however, because payment on them had been stopped. 2/ On June 23, 1986, MMS received replacement checks from Texploration. In the meantime, on June 20, 1986, appellant Miner submitted his own payments to cover the lease rentals.

BLM found that the failure to pay the full amount of the rental due on or before the anniversary date was neither justifiable nor not due to a lack of reasonable diligence on the part of the lessee. 43 CFR 3244.2-2(b)(1). Timely submission of a rental check that is later dishonored is not timely payment, the BLM decision issued to Texploration states, and sending payment after the due date is not reasonable diligence. A justifiable delay occurs when factors beyond the lessee's control are the direct cause of the late payment. "When a late payment is caused by the action of an employee, 'who was unaware of the June 1 deadline,' it cannot be found that the late payment was justifiable," the decision concluded. 3/

We first deal with some preliminary matters. Appellants argue on appeal, as Miner did in his petition for reinstatement, that the leases embrace lands affected by the injunction issued in National Wildlife Federation (NWF) v. Robert F. Burford, 676 F. Supp. 271 (D.D.C. 1985). Appellants contend that, because the leases cover land that was withdrawn,

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1/ On May 25, 1982, H. Cabot Jones, President of Crownite, and Miner filed a joint declaration, as required by 43 CFR 3202.2-5, indicating that Miner held "a 25 per cent undivided interest in any and all \* \* \* geothermal resources owned or to be acquired by Crownite Corporation, exclusive of any overriding royalties."

2/ In an Aug. 8, 1986, letter to BLM, Texploration's President, A.L. Vassallo, Jr., explained:

"Unfortunately, these checks were inadvertently drawn on my Oil and Gas Partnership account and not my Geothermal Account. In my absence my auditors noted the mistake and stopped payment on these checks, replacing them with checks from the Geothermal Account. The auditor who transacted this stop payment was unaware of the June 1 deadline. Thus, the stop payment of the timely checks was an unfortunate mistake; it was not due to a lack of reasonable diligence."

3/ Additional arguments rejected in the decision issued to Miner are dealt with below.

lease rental was suspended as a result of the injunction and the leases could not have terminated.

The injunction in NWF prohibited the Secretary from taking any action, including the issuance of leases, inconsistent with the specific restrictions of a withdrawal or classification in effect on January 1, 1981. The injunction was subsequently vacated and the action dismissed for lack of standing in NWF v. Burford, Civ. No. 85-2238 (D.D.C. Nov. 4, 1988).

As pointed out in BLM's decision to appellant Miner, only some of the lands in CA 13568 were affected by Exec. Order No. (EO) 6206 (July 16, 1933), which withdrew public lands from "settlement, location, sale, or entry" in aid of legislation for protection of the water supply of the City of Los Angeles. <sup>4/</sup> This EO did not, however, withdraw the lands from geothermal leasing. See 46 FR 28856 (May 29, 1981). <sup>5/</sup> Leases issued under the Mineral Leasing Act of 1920, as amended 30 U.S.C. || 181-287 (1982), are generally not considered to constitute a location, entry, or appropriation of the public lands embraced therein. Douglas H. Willson, 86 IBLA 135, 92 I.D. 153 (1985). Generally, unless a withdrawal or reservation specifically provides otherwise, lands withdrawn or reserved for a specific purpose are available for leasing under the mineral leasing laws. TXO Production Corp., 79 IBLA 81 (1984); cf. Sulphur River Exploration, Inc., 36 IBLA 307 (1978). In Udall v. Tallman, 380 U.S. 1, 19 (1965), the court held that a withdrawal from settlement, location, sale, or entry under any of the public land laws did not withdraw the lands from oil and gas leasing, observing that "[a]n oil and gas lease does not vest title to the lands in the lessee." Likewise, a geothermal lease does not vest title to the lands in the lessee. The Geothermal Steam Act of 1970 itself gives the Secretary the authority to issue geothermal leases on withdrawn lands, subject to applicable terms and conditions as circumstances may require. 30 U.S.C. || 1002, 1014 (1982). Appellants' contentions that EO 6206 was intended to withdraw the land from geothermal leasing and that the leases are subject to the NWF injunction are in error.

Miner asserts that because BLM issued the leases without reflecting his interest therein he was deprived of an opportunity to monitor the leases and protect his interest. Miner explains that, due to a "falling out" between himself and Crownite, the latter refused to execute documents reflecting his interest in the leases. In December 1984 Miner requested BLM to amend the leases to reflect his interest and to indicate this interest on the Serial Register pages. Miner contends that, because BLM refused to act on his behalf, the failure to pay rental on time is justifiable and BLM should

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<sup>4/</sup> EO 6203 withdrew secs. 21, 27, and 28, T. 21 S., R. 38 E., Mount Diablo Meridian, embraced by lease CA 13568.

<sup>5/</sup> As BLM noted in its decision, Miner apparently confused the leases involved here with other leases which BLM ordered suspended as a result of the NWF injunction. Exhibit F to Miner's petition for reinstatement is a BLM decision to Geothermal Properties, Incorporated, suspending operations on seven leases as a result of the injunction.

reinstate his interest "as a matter of equity." He also argues that BLM should be estopped from opposing reinstatement.

Although Miner was an other party in interest, he did not sign the bid or the lease, so he was not a co-lessee. Cf. Clayton H. Read, 49 IBLA 200, 203-04 (1980) (concurring opinion). To gain rights as a co-lessee, Miner would have had to avail himself of the assignment and transfer procedures at 43 CFR Subpart 3241. The initiative for perfecting an assignment lies with the parties contemplating it, and when an assignment is filed, BLM's role is to review and approve or disapprove it. <sup>6/</sup> No request for an assignment of 25 percent record title interest to Miner was filed, so BLM properly looked to Crownite's successor, Texploration, for payment of the rental. Miner has demonstrated no affirmative misconduct that would call for estoppel. See Terra Resources, Inc., 107 IBLA 10, 13 (1989). <sup>7/</sup>

[1] The Secretary's authority to reinstate a lease that has been terminated for late payment is set forth at 30 U.S.C. | 1004(c) (1982). That section states in part:

Geothermal leases shall provide for--

\* \* \* \* \*

\* \* \* payment in advance of an annual rental of not less than \$1 per acre of fraction thereof for each year of the lease. If there is no well on the leased lands capable of producing geothermal resources in commercial quantities, the failure to pay rental on or before the anniversary date shall terminate the lease by operation of law: \* \* \* Provided further, [t]hat, where any lease has been terminated automatically by operation of law under this section for failure to pay rental timely and it is shown to the satisfaction of the Secretary of the Interior that the failure to pay timely the lease rental was justifiable or not due to a

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<sup>6/</sup> BLM does not enter disputes between parties to an assignment. BLM suspends action on an assignment when there is a dispute between the parties. See J.R. Holcomb Oil, 96 IBLA 35 (1987). Thus, even if an assignment had been pending and if BLM had become aware of a dispute between the parties, BLM would properly have suspended action on the assignment to allow the parties to resolve their dispute.

<sup>7/</sup> Indeed, since the Board has consistently held that failure of the lessee of record to receive the courtesy notice that rental is due does not justify late payment (see, e.g., Melbourne Concept Profit Sharing Trust, 46 IBLA 87, 91 (1980); Louis J. Patla, 10 IBLA 127 (1973)), it is difficult to see any causal connection between the asserted failure of BLM to recognize Miner's interests and the failure of either Texploration or Miner to submit the annual rental in a timely fashion. As BLM points out on appeal, there is no requirement that the rentals be submitted by the lessee of record (see Nola Grace Ptasynski, 82 IBLA (1984), and a properly identified submission from Miner would have been credited to the subject leases.

lack of reasonable diligence, he in his judgment may reinstate the lease if-

(1) a petition for reinstatement, together with the required rental, is filed with the Secretary of the Interior; and

(2) no valid lease has been issued affecting any of the lands in the terminated lease prior to the filing of the petition for reinstatement; \* \* \*. [Emphasis supplied.]

Under 43 CFR 3244.2-2(b)(2), the burden of showing that failure to pay on or before the anniversary date was justifiable or not due to lack of reasonable diligence is on the lessee.

Appellants argue that the reasons for submitting late payment were justifiable. Intervenor contends that the Board's interpretation of the reinstatement standards in geothermal cases is too narrow and contrary to congressional intent. Intervenor notes that the legislative history of the Geothermal Steam Act does not address the purpose of the reinstatement provision. He states, however, that the considerations of equity and fairness appearing in the legislative history of the oil and gas reinstatement provisions should be applied in geothermal cases to allow reinstatement in cases of simple inadvertence. Intervenor contends that there is no logical reason to distinguish between the reinstatement of oil and gas leases and geothermal leases.

A failure to exercise reasonable diligence may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficient extenuating circumstances outside the lessee's control which affected its actions in paying the rental fee. Proximity in time and causality of the unfavorable occurrence are essential elements. U.S. Geothermal Corp., 61 IBLA 265, 267 (1982). In Hydra-Co Enterprises Inc., 102 IBLA 46 (1988), the Board held that a computer malfunction and office move were insufficient to demonstrate diligence in or a justification for making tardy rental payment. The circumstances of this case are similar to these cases, and no extenuating circumstances, outside the lessee's control, are shown. 8/ As

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8/ In Melbourne Concept Profit Sharing Trust, 46 IBLA 87 (1980), the Board stated that a computer malfunction, which caused a check to issue in an insufficient amount, did not justify late payment. The basis for this conclusion was the notion that a lessee is ultimately in control of and is responsible for the performance of the business machines it uses. See also Joseph F. Broda, 71 IBLA 390 (1983); Tenneco Oil Co., 71 IBLA 339 (1983); Trend Resources Ltd., 64 IBLA 383 (1982).

The decision in Mono Power Co., 28 IBLA 289 (1976), involved a tardy payment allegedly caused by the remodeling of company offices. The Board held that a lessee may not rely upon the bulk or complexity of its business organization so as to make justifiable an action which would not be held to be justifiable for an individual lessee. "Likewise, the negligent or inadvertent failure of the lessee's agent or employee to submit the rental properly and timely has consistently been held not justify the lessee's

we held in Hydra-Co Enterprises Inc., *supra*, mere inadvertence, which may permit the Secretary to reinstate an oil and gas lease under the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. | 188(d)(1) (1982), is not available to the holder of a geothermal lease.

Intervenor's contention that the standard heretofore applied by the Board with respect to reinstatement of terminated oil and gas leases under 30 U.S.C. § 188(c) (1982) and reinstatement of terminated geothermal leases under 30 U.S.C. § 1004(c) (1982) has been unduly restrictive and not in accord with legislative intent ignores the fact that both the U.S. Court of Appeals for the Ninth Circuit in Ram Petroleum Inc. v. Andrus, 658 F.2d 1349 (1981), and the U.S. Court of Appeals for the Tenth Circuit in Ramoco, Inc. v. Andrus, 649 F.2d 814 (1981), affirmed the Board's approach against similar challenges.

Moreover, the subsequent action of Congress in enacting section 401 of the Act of January 12, 1983, far from evincing Congressional rejection of the Department's approach, is correctly seen as a reaffirmation of the Department's original analysis of the scope of the Act of May 12, 1970, 84 Stat. 296, 30 U.S.C. § 188(c) (1982). Thus, Congress specifically added a new reinstatement section, 30 U.S.C. § 188(d) (1982), which permitted reinstatement of leases which had terminated through the inadvertence of the lessees. In contradistinction to section 188(c), reinstatement of leases under section 188(d) would result in an increased rental or royalty rate and required reimbursement of the Secretary of the administrative costs incurred, including publication of the proposed reinstatement in the Federal Register. Far from being a repudiation of the Department's interpretation that reinstatement under section 188(c) was not available when the failure to timely pay the advance rental was the result of simple inadvertence, this Congressional enactment must be seen as a recognition that this interpretation of section 188(c) was correct.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

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Will A. Irwin  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

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fn. 8 (continued)  
failure to meet this requirement." 28 IBLA at 291. See also David E. Cooley, Jr., 62 IBLA 87 (1982).