

PETROLEX 84-1 LIMITED

IBLA 88-557

Decided mARCH 14, 1991

Appeal from a decision of the Colorado State Office, Bureau of Land Management, cancelling oil and gas lease C-44379 and declaring oil and gas lease C-37244 to be in full force and effect.

Affirmed.

1. Oil and Gas Leases: Rentals--Oil and Gas Leases: Termination

30 U.S.C. § 188(b) (1988) and 43 CFR 3108.2-1(b) require that a notice of deficiency be sent by the Secretary to an oil and gas lessee whose rental payment is paid on or before the anniversary date of the lease but in an amount nominally deficient. Where the regulation requires that this notice be served by certified mail, return receipt requested, it is not unreasonable to look to the party asserting delivery to produce positive proof of such event, e.g., by producing a signed return receipt card.

2. Oil and Gas Leases: Bona Fide Purchaser

A bona fide purchaser who is the assignee of a lease describing lands unavailable for lease is not entitled to the protection offered by 30 U.S.C. § 184(h)(2) (1988) and 43 CFR 3108.4.

APPEARANCES: Thomas H. McCarthy, Jr., Esq., Denver, Colorado, for appellant; Charles E. Weller, Esq., Reno, Nevada, for Syncline Basin Partnership.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Petrolex 84-1 Limited has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated June 13, 1988, cancelling oil and gas lease C-44379 and declaring oil and gas lease C-37244 to be in full force and effect. Each lease describes the identical 1,072.61 acres in Mesa County, Colorado. Lease C-44379 was issued by BLM after the agency concluded that lease C-37244 had terminated by operation of law. BLM's decision of June 13, 1988, reversed this conclusion, and the instant appeal followed.

Lease C-37244 was issued by BLM to Syncline Partnership with an effective date of October 1, 1983. Annual rent was \$1 per acre or fraction thereof, i.e., \$1,073 at all relevant times. For the lease year beginning October 1, 1985, Syncline Basin Partnership (Syncline) paid \$1,072.61, a deficiency of 39 cents. Accompanying this payment, Syncline states, was written notice of a change of address reflecting the fact that Syncline had moved from a Pacific Coast Highway (PCH) address in Malibu, California, to a second Malibu address at 28196 Rey De Copas. 1/

BLM responded to Syncline at its new Rey De Copas address by letter of October 2, 1985, and informed Syncline that its rental payment should have been directed to the Minerals Management Service (MMS) and that BLM had forwarded the payment to MMS. The letter said nothing about the 39-cent deficiency.

The record reveals that sometime on or after March 17, 1986, MMS prepared a computer generated deficiency notice addressed to Syncline Partnership at its old PCH address. Syncline states that it did not receive this notice and points in support to an unsigned and undated return receipt card in the case file. 2/ Syncline additionally argues that MMS never mailed the deficiency notice, as evidenced by a receipt for certified mail bearing Syncline's old PCH address but otherwise unmarked. 3/

The deficiency notice is critical because it stated that lease C-37244 would terminate if the 39 cents owing were "not PD-15 days." The notice also had an entry under the words "DUE DATE" of "04/17/86." No payment was made by Syncline on or before the "DUE DATE," so BLM instructed MMS by memorandum of May 22, 1986, to prepare a refund of the \$1,072.61 submitted previously by Syncline. BLM's instruction letter noted that Syncline's nominal deficiency had not been paid and, therefore, lease C-37244 had terminated effective October 1, 1985. No refund was, in fact, forthcoming from MMS until June 1987, so Syncline again paid its lease rental in 1986. 4/

1/ Syncline further states that it informed the Colorado and New Mexico State Offices of its change of address by telephone. Syncline asserts that it retained no copy of its written change of address, and the file does not contain such. The check used by Syncline in paying its October 1985 rental bears Syncline's new Rey De Copas address.

2/ This card (PS Form 3811 Domestic Return Receipt) bears Syncline's old PCH address and the serial number P-171-905-506. BLM retrieved this card from MMS. The parties are in agreement that this card was prepared to accompany MMS' notice of deficiency.

3/ This receipt (PS Form 3800) bears Syncline's old PCH address and the serial number P-171-905-506. As above, BLM retrieved this receipt from MMS, and no question is raised by the parties that this receipt was intended to accompany MMS' notice of deficiency.

4/ This time Syncline paid the correct amount. By memorandum of Oct. 23, 1986, BLM again instructed MMS to prepare a refund. The reason for this instruction is set forth on the memorandum: "Lease terminated 10-1-85."

No refund was in fact received until June 1987.

The basis for BLM's conclusion that lease C-37244 had terminated is set forth at 30 U.S.C. § 188(b) (1988) and 43 CFR 3108.2-1. The statute provides that a lease on which there is no well capable of production in paying quantities shall automatically terminate by operation of law if the lessee fails to pay rental on or before the anniversary date of the lease. An exception to this result occurs if rental is timely paid, although in an amount nominally deficient, and the lessee thereafter pays the deficiency "within the period prescribed in a notice of deficiency sent to him by the Secretary." 5/

Regulation 43 CFR 3108.2-1(b) (1985) adds the following detail:

The authorized officer or the designated Service office, as appropriate, shall send a Notice of Deficiency to the lessee.

The Notice shall be sent by certified mail, return receipt requested, and shall allow the lessee 15 days from the date of receipt or until the due date, whichever is later, to submit

the full balance due to the proper BLM office or the Service, as appropriate. If the payment required by the Notice is not paid within the time allowed, the lease shall have terminated by operation of law as of its anniversary date. [Emphasis added.]

Having concluded that lease C-37244 had terminated on October 1, 1985, BLM offered these identical lands in the August 1986 filing period for simultaneous oil and gas lease applications. Petrolex received first priority in the drawing for these lands and was issued lease C-44379 by BLM effective May 1, 1987.

In June 1987, Syncline received a letter from MMS informing it that its request for a refund on lease C-37244 had been approved and that a check in the amount of \$2,145.61 would be forthcoming. 6/ Syncline states that it had never sought a refund and that this letter was its first indication that there was any problem with lease C-37244.

On July 27, 1987, Petrolex and Campbell Oil Company sought BLM's approval of an assignment of the record title interest in lease C-44379. BLM approved this assignment to Campbell effective August 1, 1987.

Syncline states that it obtained the case file for lease C-37244 on August 17, 1987, and at that time first learned that the lease was considered to have terminated for failure to pay a 39-cent deficiency. On September 14, 1987, Syncline filed a notice of appeal with BLM. As no

5/ A legislative history of the statute is set forth in Rijan Oil Co., 4 IBLA 153, 78 I.D. 359 (1971), William C. Morgan, 13 IBLA 60 (1973), and Joseph E. Steger, 20 IBLA 206 (1975).

6/ Syncline states that the check was, in fact, enclosed with this June 1987 letter.

decision or notice had issued terminating lease C-37244, BLM treated Syncline's appeal as a protest. During the pendency of this protest, Syncline tendered to MMS on October 8, 1987, a total of \$3,219 to cover the rent due for 1985, 1986, and 1987. ^{7/}

Syncline's protest occasioned BLM's decision of June 13, 1988, from which Petrolex appeals. The decision addresses the notice of deficiency required by 30 U.S.C. § 188(b) (1988) and 43 CFR 3108.2-1 in these words:

In March 1986, the Minerals Management Service (MMS) directed a Notice of Deficiency to Syncline Partnership by Certified Mail No. P-171-905-506. The return receipt card is postmarked March 28, 1986, in Denver, Colorado, but bears no indication of any attempted delivery on Syncline Partnership at its address of record. So far as we have been able to determine, the envelope bearing the Notice of Deficiency was not returned to the MMS. Absent such evidence, we cannot conclude that the Post Office delivered or attempted to deliver a certified mail envelope with the notice to Syncline Partnership. We thus conclude that the return receipt card was somehow detached from the envelope carrying [the] Notice of Deficiency in Denver and there is insufficient basis to conclude that Syncline Partnership was properly notified of the deficiency, either actually or constructively, in Malibu, California.

Having found an insufficient basis to conclude that Syncline had been properly notified, BLM held that lease C-37244 was an active oil and gas lease at the time lease C-44379 was posted for the August 1986 filing period. There being an active lease outstanding, the lands were not eligible for re-leasing, BLM concluded. Cancellation of lease C-44379 was, therefore, appropriate pursuant to 43 CFR 3108.3(b) (1985) (Decision, June 13, 1988, at 2).

In its statement of reasons on appeal, Petrolex presents a variety of arguments. It begins by stating that under 43 CFR 3108.2-2(b), Syncline bears the burden of proving that its failure to pay rental in a timely manner was justified. This regulation assigns the burden of proof to a party seeking reinstatement of an oil and gas lease that has terminated for failure to pay rent in a timely manner.

Addressing MMS' deficiency notice, appellant points to the return receipt card in the file as evidence that this notice was, in fact, mailed by MMS. BLM found that this card had been addressed to Syncline's last

^{7/} The record contains a petition for reinstatement of lease C-37244 filed with BLM on Feb. 25, 1988. The petition recites that Syncline paid its annual rent on Oct. 7, 1987, rather than on Oct. 1, 1987, when the rental was due. MMS received this rental on Oct. 8, 1987, the petition reveals.

address of record, Petrolex states, and therefore the mailing requirements of 43 CFR 1810.2(a) had been met. 8/ Petrolex further argues that the Syncline case file indicates that Syncline received the deficiency notice. If the deficiency notice had not been delivered to Syncline, appellant argues, then the envelope containing the notice would have been returned to MMS by the post office. This envelope is not in the case file, appellant notes. Actual delivery of the deficiency notice occurred, Petrolex states, and therefore cases construing 43 CFR 1810.2(b), a regulation describing constructive delivery, are inapplicable. 9/

Petrolex also argues that even if Syncline did not receive MMS' deficiency notice, it received notice of its deficient payment upon examining case file C-37244 in mid-August 1987. Syncline should also be deemed to have notice of the deficiency by June 1987, appellant contends, when it received the refund of its 1985 and 1986 rent. Because Syncline did not pay this deficiency until October 8, 1987, well beyond 15 days after learning of the deficiency, 43 CFR 3108.2-1(b) provides that lease C-37244 terminated as of its anniversary date, appellant contends.

Appellant further maintains that regardless of whether Syncline received the deficiency notice, Syncline failed to timely appeal the refund of its lease rentals or the issuance of lease C-44379 until September 14, 1987. This date was more than 30 days after issuance to Petrolex of lease C-44379, effective May 1, 1987, or Syncline's receipt of its refund in June 1987. Applicable regulations, 43 CFR 4.411 and 30 CFR 290.3, require that a notice of appeal be filed within 30 days of service of an adverse decision, Petrolex states. Moreover, BLM's conclusion that Syncline's notice of appeal should be treated as a protest was error, Petrolex maintains, because 43 CFR 4.450-2 limits a protest to actions "proposed to be taken," and does not comprehend, as here, past events.

8/ This regulation states that where the regulations in 43 CFR Chapter II provide for communication by mail by the authorized officer, the requirement for mailing is met when the communication, addressed to the addressee at his last address of record in the appropriate BLM office, is deposited in the mail.

9/ Regulation 43 CFR 1810.2(b) provides:

"(b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of [43 CFR Chapter II], that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by post office authorities."

Appellant's final argument on appeal is the contention that even if the Petrolex lease is subject to cancellation because lease C-37244 had not been properly terminated, Campbell Oil Company, the assignee from Petrolex of 100 percent of the record title interest in lease C-44379, is a bona fide purchaser, and its interest in this lease cannot be cancelled. In support, appellant relies upon 43 CFR 3108.4, which states that a lease shall not be cancelled to the extent that such action adversely affects the title of a bona fide purchaser, even though such lease, when held by a predecessor-in-title, may have been subject to cancellation.

We begin our resolution of this appeal with appellant's argument that under 43 CFR 3108.2-2(b) Syncline bears the burden of proving that its failure to pay the deficient rental was justified. This argument misses the mark. Though it is true that Syncline has filed a petition for reinstatement of lease C-37244 based upon its tardy payment of rent on October 8, 1987, this petition for reinstatement has not yet been acted upon, and its grant or denial cannot affect whatever rights Petrolex may have in the lands at issue. Our focus is properly on events occurring prior to April 20, 1987, when lease C-44379 was issued. Petrolex, not Syncline, is clearly the appellant in the case before us, and Petrolex as appellant bears the burden of showing error in BLM's decision. United States v. Connor, 72 IBLA 254 (1983).

We are inclined to agree with appellant that MMS mailed a notice of deficiency to Syncline Partnership in March 1986. How else could the return receipt card bear a postage cancellation mark indicating cancellation on March 28, 1986, in Denver? We do not agree with appellant, however, that Syncline received this notice. Though the absence of a returned envelope bearing the MMS notice is evidence of appellant's position, other evidence preponderates.

Actual delivery upon Syncline is unlikely because the address appearing on the return receipt card (and presumably on the envelope containing the deficiency notice) was no longer in use by Syncline. Actual delivery is further unlikely because the return receipt card lacks both the signature of a recipient and a date of receipt. Had actual receipt occurred, the Post Office representative is presumed to have collected such information. Finally, actual delivery is unlikely because a deficiency notice, had it been received, would likely have caused Syncline to attempt to pay the deficiency or neglect the lease altogether. It did neither, but instead paid its October 1986 rent as if nothing were amiss.

[1] We are reminded that 43 CFR 3108.2-1(b) requires MMS to send a deficiency notice by certified mail, return receipt requested. Where, as here, service by certified mail is required by regulation, it is not unreasonable to look to the party asserting delivery to produce positive proof of such event as, e.g., by producing a signed return receipt card. To place the burden of showing nondelivery upon the intended recipient is to require that party to prove a negative, i.e., that no delivery in fact occurred. This we decline to do. See Bernard S. Storper, 60 IBLA 67, 71 (1981),

aff'd, Storper v. Watt, Civ. No. 82-0449 (D.D.C. Jan. 20, 1983). See also Mobil Oil Exploration and Producing Southeast, Inc., 90 IBLA 173 (1986).

Appellant's alternate argument that Syncline's 15-day cure period commenced upon its examining case file C-37244 in mid-August 1987 or upon receipt in June 1987 of its 1985 and 1986 rent payments must also be rejected. Examination of the lease file in August 1987 would have informed Syncline that not only had its 1985 rent been deficient, but that even though it had received no notice or decision to that effect, its lease had in fact terminated almost 2 years prior. ^{10/} BLM's conclusion that lease C-37244 had terminated would not reasonably trigger payment of the deficiency.

Refund of Syncline's 1985 and 1986 rental payments was accompanied by a brief letter from MMS informing Syncline that its "request for a refund" had been approved. Nothing in this letter indicated that a deficient payment had occurred or that such deficiency could be cured. The deficiency notice contemplated by 30 U.S.C. § 188(b) (1988) and 43 CFR 3108.2-1(b) must reasonably inform the lessee that a deficiency has occurred. MMS' letter failed in this regard and cannot be regarded as the notice contemplated by the statute and regulation. See McClellan Oil Corp., 76 IBLA 322, 326 (1983).

In a similar vein, we reject appellant's argument that Syncline filed a tardy notice of appeal. Regulations 43 CFR 4.411 and 30 CFR 290.3 make clear that a notice of appeal must be filed within 30 days after an adverse decision or order has been served upon a party. Syncline was not served with a decision or order by BLM or MMS until it received the June 13, 1988, decision presently on appeal. Syncline's "notice of appeal," filed on September 14, 1987, was a proper vehicle to call BLM's attention to an apparent error. Whether this notice is properly characterized as a protest does not alter the fact that Syncline had not as yet been served with a decision by BLM or MMS. Estate of Glenn F. Coy, 52 IBLA 182, 193, 88 I.D. 236, 242 (1981), aff'd sub nom. Weedon v. Watt, Nos. 81-749, 81-984 (D.D.C. Oct. 9, 1981), rev'd on other grounds, No. 81-2286 (D.C. Cir. Nov. 22, 1982). As noted above, MMS' brief letter accompanying the refund of Syncline's 1985 and 1986 rent set forth neither findings nor conclusions, but merely announced that Syncline's request for a refund had been approved. No request had, in fact, been made, and no appeals paragraph appeared in the letter.

[2] Appellant's final argument, based on the regulatory provisions protecting bona fide purchasers, is also unavailing. A similar argument was addressed by the Board in Fortune Oil Co., 69 IBLA 13 (1982), a case involving, as here, the issuance of two leases for the same land. In that case, the Board declined to apply 30 U.S.C. § 184(h)(2) (1988), the statutory counterpart to 43 CFR 3108.4. That statute provides that the Secretary's right to cancel a lease for certain statutory violations shall not apply so as to adversely affect the title or interest of a bona fide

^{10/} See BLM's instructions to MMS, dated May 22, 1986, and Oct. 23, 1986.

purchaser. The Board held that the assignee of a lease which is void ab initio because it describes lands unavailable for leasing can be in no better position than his assignor. The assignor has nothing because lands under lease are unavailable for additional leasing. 69 IBLA at 15.

The Board's application of 30 U.S.C. § 184(h)(2) (1988) and 43 CFR 3108.4 is explained in Oil Resources Inc., 14 IBLA 333, 337 (1974):

Appellant's contention that it is entitled to the protection afforded to bona fide purchasers by the amendatory acts of September 21, 1959, 73 Stat. 571, and of September 2, 1960, 74 Stat. 781, likewise cannot be accepted. The statutory protection to a bona fide purchaser may be granted where an oil and gas lease is subject to cancellation for violation of some law or regulation by the original applicant, but we do not recognize any protection to a purchaser in good faith and for value of a lease which was a nullity from its inception. All reported cases concerning bona fide purchasers relate to leases for land which could have been leased properly to someone, but for various reasons, the original lessee was not presently qualified or was not the first qualified applicant for the lease. Nowhere have we found any indication that a bona fide purchaser is entitled to any protection where the lease in question was issued for land not subject to noncompetitive oil and gas leasing under the Mineral Leasing Act. 1/

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1/ The legislative history of the 1959 act, the basic amendment which provided protection for bona fide purchasers, indicates that the intent of Congress was to protect good faith purchasers whose predecessors in interest were in violation of some provision of the act, such as the acreage limitation provisions, and not for the protection of purchasers of leases erroneously issued for lands not subject to noncompetitive leasing. See 1959 U.S. CODE CONG. & ADM. NEWS, p. 2620 et seq.

See also Lee Oil Properties, Inc., 85 IBLA 287, 293 (1985), and Lucinda E. Boggs, 45 IBLA 60 (1980).

We agree with BLM that there is an insufficient basis to conclude that Syncline was properly notified of its 39-cent deficiency. As such, lease C-37244 did not terminate in 1985 or at any time prior to issuance of lease C-44377. Lease C-44377, having issued for lands then unavailable for lease, was a nullity at the time of issuance, and its cancellation by BLM was, accordingly, proper. Campbell took nothing by its assignment and is not entitled to bona fide purchaser protection. BLM may proceed to adjudicate Syncline's petition for reinstatement.

Therefore, 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 Colorado State Office is affirmed.

Wm. Philip Horton
Chief Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

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