

PHILLIPS PETROLEUM CO.
GPM GAS CORP.

IBLA 97-97 Decided March 3, 1999

Appeal from a decision of the Deputy Commissioner of Indian Affairs, Bureau of Indian Affairs, dismissing appeal as untimely filed. MMS-92-0563-IND.

Affirmed in part; vacated and remanded in part.

1. Appeals: Jurisdiction—Rules of Practice: Generally—Rules of Practice: Appeals: Dismissal—Rules of Practice: Appeals: Timely Filing

Appeals to the Director, MMS, must be filed within 30 days from service of the order or decision or within the 10-day grace period defined by 30 C.F.R. § 290.5(b). Untimely appeals are properly dismissed pursuant to 30 C.F.R. § 290.3.

2. Evidence: Presumptions

The date-stamp affixed to a certified mail return receipt card by a U.S. Postal Service employee will be presumed to be the date the item was delivered, absent evidence to the contrary. The party contesting the date-stamp on a certified mail return receipt bears the burden of providing evidence that the Postal Service date-stamp is erroneous.

3. Administrative Authority: Estoppel—Estoppel

A party alleging estoppel against the Government in a matter concerning the public lands must submit an official writing by the Government that shows affirmative misconduct or a critical omission by the Government. The failure of MMS to inform a party that its appeal was not timely filed and therefore subject to dismissal does not constitute affirmative misconduct or a critical omission for which the remedy of estoppel may be invoked.

4. Appeals: Jurisdiction

While the Commissioner of Indian Affairs exercises appropriate jurisdiction in adjudicating appeals to the MMS relating to oil and gas leases on Indian lands held in trust by the Federal Government for Indian tribes or individual Indians, the Commissioner of Indian Affairs lacks jurisdiction over appeals relating to oil and gas leases on Federally-controlled lands that are not Indian lands, and such appeals must be decided by the Director, MMS.

APPEARANCES: M. Julia Hook, Esq., Dorsey & Whitney LLP, Denver, Colorado; Karen F. Brand, Esq., Bartlesville, Oklahoma; and Larry Pain, Esq., Houston, Texas, for Appellants Phillips Petroleum Company and GPM Gas Corporation; Peter J. Schaumberg, Esq., Howard W. Chalker, Esq., Geoffrey Heath, Esq., Sarah Inderbitzen, Esq., and Lisa Hemmer, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Phillips Petroleum Company and GPM Gas Corporation (Appellants or Phillips and GPM) appeal a June 26, 1996, Decision of the Deputy Commissioner of Indian Affairs, dismissing their consolidated appeals from a Minerals Management Service (MMS) Order dated September 29, 1992, and an undated MMS Order.

The September 29, 1992, Order directed Appellants to recalculate and pay additional royalties due on Indian Lease No. 621-000353-0 by utilizing a dual accounting method required under the terms of standard Indian leases. The undated Order informed Appellants that it was auditing processing allowances they had taken "when computing royalties owed Federal and Indian leases for gas processed at gas plants." (Undated Order at 1.)

The undated Order further directed Appellants to "correct the systemic deficiency affecting the computation of royalty on production from Indian and onshore Federal leases" by recalculating and paying royalties due for Appellants' interest in gas produced from Federal and Indian leases "having gas processed through the Lee Plant from the period March 1, 1988, through the present based on 100 percent of the value of the residue gas and natural gas liquid products." (Undated Order at 3.) Additionally, Appellants were directed to recalculate, within 60 days of receipt of the undated Order, the processing allowance "for the Lee Gas Plant based on Phillips/GPM's actual costs in accordance with the requirements set forth in 30 CFR § 206.159(b)(1) through (3) for all reporting periods from March 1, 1988, to the present" and "[w]ithin 60 days of receipt of MMS' approval of the processing allowances, recalculate and pay any resulting underpayment of royalty * * *." (Undated Order at 4.) The MMS also

directed Appellants to examine all other gas plants where they had calculated processing allowances from March 1, 1988, to the present to redetermine their eligibility, under 30 C.F.R. § 206.159(b)(4), for "the exception based on having 50 percent of other gas processed annually at each plant pursuant to arm's-length processing contracts * * *." (Undated Order at 4.)

The Deputy Commissioner of Indian Affairs' June 26, 1996, Decision dismissed Appellants' appeal of the two Orders because their appeal was not transmitted within 30 days of their receipt of the Orders, as is required by the regulation at 30 C.F.R. § 290.3(a).

Appellants make several arguments in their Statement of Reasons (SOR) on appeal. First, they assert that the Deputy Commissioner had no authority to decide an appeal that "relates to federal, as opposed to Indian, leases." (SOR at 4.) Second, Appellants argue that fairness requires that the Government be estopped from dismissing their appeal as untimely filed. In support of their estoppel argument, Appellants assert that MMS treated their appeal as valid and timely filed for 4 years while the case was pending. Further, they argue that MMS did nothing during that time to alert Appellants that a question existed regarding the timely filing of the appeal. Appellants assert:

Indeed, the MMS not only acquiesced in GPM and Phillips' filing of the Notice of Appeal, but over a period of four years took active steps to resolve the appeal on the merits. The MMS accepted the Notice of Appeal and Request for Extension of Time, granted an extension of time for GPM and Phillips to file an Additional Statement of Reasons, assigned an MMS docket number to the consolidated case, responded to GPM and Phillips' pleadings, and researched and produced two detailed field reports addressing the issues that GPM and Phillips had raised in the case.

(SOR at 7.)

Appellants further state that they had reasonably relied on MMS' treatment of their appeal and had "no independent basis for believing that the Notice of Appeal and Request for Extension of Time [were] untimely filed" since, unlike MMS, they did not have in their records "a U.S. Postal Service document showing a receipt date of [Friday] October 2, 1992," for the two MMS Orders. (SOR at 7, 8.) Appellants describe the process of validating receipt of certified mail and delivering it to their mailroom as follows:

Both sets of [Orders] (those addressed to GPM and those addressed to Phillips) arrived in the Bartlesville, Oklahoma Post Office, where they were picked up by couriers, who "signed" them with a rubber (signature facsimile) stamp bearing the name

of a Phillips employee and delivered them to Phillips central mailroom. Phillips maintains a date-stamp system in its mailroom that is intended to accurately note the receipt date of documents mailed or otherwise delivered to its offices. However, somewhere in the process of retrieving the documents from the Post Office and date-stamping them in Phillips' mailroom, the date-stamp system appears to have failed, and the [Orders] were not processed through the mail room and marked "received" until [Monday] October 5, 1992.

(SOR at 8.)

Appellants further assert that in the absence of any notice from MMS over a period of 4 years informing them that their appeal was not timely filed, they proceeded to devote time and resources to prosecuting the appeal: "[Appellants] conducted comprehensive internal investigations into the production and accounting procedures at issue, submitted detailed analyses and comments on the MMS Field Reports, and fully pursued the case." (SOR at 8.)

Appellants argue that they relied upon MMS' silence as to the untimely filing of their appeal to their detriment and will suffer harm if the dismissal of their case is affirmed by this Board. They also claim that they will lose the time and resources they put into prosecuting the case and they will be deprived of their opportunity to contest the merits of MMS' Orders. Moreover, Appellants assert that MMS is seeking to collect from them interest on allegedly underpaid royalty amounts accrued over the 4-year period and they state:

Had the MMS notified GPM and Phillips at any time during the four-year period that it believed their Notice of Appeal was untimely filed, GPM and Phillips could have reassessed their positions, and if appropriate, could promptly have performed the recalculations required by the [Orders] and paid any additional amounts allegedly due, including interest on alleged royalty underpayments. This the MMS did not do, and still has not done. If the Deputy Commissioner's dismissal is upheld, GPM and Phillips will be required to pay the accrued interest on the underlying royalty obligation—even though the interest attributable to the 1992-1996 appeal period is due solely to the MMS's delay in raising the timeliness issue.

(SOR at 8-9.)

Appellants argue that this Board's reversal of the Deputy Commissioner's decision would not result in harm to the Federal Government as lessor or to Indian-lessors of the leases at issue. Appellants state further:

If this Board reverses the Deputy Commissioner's dismissal of Docket No. 92-0563-IND, GPM and Phillips will not gain a

windfall. Rather, the companies will gain only the due process opportunity to receive from the MMS a ruling on the merits of their good-faith appeal. In contrast, if GPM and Phillips are correct in the positions that they raised and briefed in their Notice of Appeal and the responses to the MMS Field Reports, and the Deputy Commissioner's dismissal is upheld, the federal and Indian lessors of the leases involved in the 1992 [Orders] will clearly reap a windfall.

(SOR at 9.)

Counsel for MMS filed an Answer to Appellants' SOR on December 23, 1996, citing a chronology which Phillips and GPM do not dispute. The chronology establishes that return receipts for the MMS Orders were signed and dated by authority of Appellants' employee on October 2, 1992. On October 5, 1992, Appellants' in-house mail system stamped the Orders as received. By letter dated November 3, 1992, Phillips and GPM appealed the two Orders to the Director of MMS, and their Notice of Appeal was received by MMS on November 4, 1992. Thus, the Notice of Appeal was transmitted 32 days after Appellants had received and signed for the Orders, and MMS received the Notice of Appeal 33 days after Appellants received the Orders.

MMS argues that it is well-established by Department practice and Board precedent that the date a return receipt is signed marks the beginning of the 30-day period in which an appeal may be filed pursuant to the regulation at 30 C.F.R. § 290.3(a). MMS cites the regulation at 30 C.F.R. § 290.3(a)(2) to argue that failure to file a Notice of Appeal within the 30 day period, or during the grace period as defined in 30 C.F.R. § 290.5(b), requires that MMS dismiss the appeal and close the case.

MMS concedes, however, that Appellants are correct in challenging the authority of the Deputy Commissioner of Indian Affairs to dismiss as untimely filed the portion of the 1992 appeal which dealt with Federal leases. MMS thus requests that the Board remand the Federal portion of the appeal to MMS so that the agency can issue a dismissal of the Federal lands portion of the appeal, pursuant to 30 C.F.R. § 290.

MMS disputes Appellants' argument that "fairness demands" that the Deputy Commissioner's dismissal should be barred by the doctrine of estoppel because the Deputy Commissioner took 4 years to dismiss the appeal as untimely filed. While acknowledging that the 4-year delay in issuing the decision was "unfortunate," MMS argues that Appellants fail to show how the Government's conduct meets the four elements of estoppel as established in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970). Additionally, MMS asserts that its behavior did not meet a precondition for invoking estoppel: MMS did not mislead Phillips and GPM with a crucial misstatement in an official document. (Answer at 7.)

On January 23, 1997, Appellants filed a brief in reply to the MMS Answer. Phillips and GPM observe that MMS has an ample record before it

to render a decision in the 1992 Appeal since "all the briefing and investigations have been completed and MMS has issued two comprehensive field reports addressing the issues raised." (Reply at 2.) Appellants thus urge that MMS not rely upon a technicality to dismiss the Appeal but, "instead, should simply rule on the merits of that appeal." (Reply at 2.)

Absent such a course of action by MMS, Phillips and GPM argue, MMS should "be barred, by use of equitable estoppel and [the] compelling facts of this case" from dismissing their appeal 4 years after it was first filed. (Reply at 2.) Phillips and GPM assert that MMS never told Phillips that its appeal had not been timely filed, and, instead, engaged in a course of conduct to resolve the appeal on its merits:

The MMS granted an extension of time for GPM and Phillips to [file] an additional Statement of Reasons, assigned an MMS docket number to the consolidated case, responded to GPM and Phillips' pleadings, and researched and produced two detailed field reports addressing the issues that GPM and Phillips had raised in the case.

(Reply at 3.)

Further, Appellants deny MMS' suggestion that because Appellants' Notice of Appeal served as their SOR, their expenditures during the 4-year pendency of the appeal "cannot be said to be due to detrimental reliance on MMS' receipt of its appeal." (Answer at 7.) Rather, Appellants assert that after their Notice of Appeal and Request for Extension of Time were filed,

GPM and Phillips conducted in-depth investigations into the production and accounting procedures at issue, researched whether to file an additional Statement of Reasons, filed additional pleadings and correspondence with the MMS, submitted detailed responses to the two MMS Field Reports, and secured legal counsel to analyze the issues presented in the Appeal. Because the issues involved in the 1992 [appeal] are complex, both from an accounting standpoint and from a legal one, the time and funds GPM and Phillips were obliged to [expend] substantial time and funds to cooperate with the MMS to resolve the appeal.

(Reply at 3.)

Appellants argue that while MMS cites IBLA precedent to assert that the doctrine of equitable estoppel does not pertain to the facts of this case, MMS fails to acknowledge that equitable estoppel and judicial estoppel are distinct doctrines. Appellants cite United States v. Owens, 54 F.3d 271, 275 (6th Cir. 1995), petition for cert. dismissed, John Spirko, Jr. v. United States, 116 S. Ct. 492 (1995), to assert that some courts "may be willing to apply judicial estoppel against the government in cases where they are not willing to apply equitable estoppel." (Reply at 4.)

Finally, Appellants argue that the Deputy Commissioner of Indian Affairs acted outside of her authority in dismissing both the Federal and Indian lease portions of the 1992 appeal. Phillips and GPM therefore urge that this Board reverse the entire decision in the consolidated appeal assigned MMS Docket No. 92-0563-IND, asserting that it would result in no harm to the interests of the Federal Government or the Indian lessors and it would enable "GPM and Phillips [to obtain] a ruling on the substantive issues they raised four years ago in [the] 1992 Appeal." (Reply at 4-5.)

[1] In our consideration of the issues raised by Appellants' SOR, we turn first to a consideration of the timeliness of their Notice of Appeal. Phillips and GPM do not dispute the record showing that the signature stamp of Phillips' employee appeared on the postal service receipt cards indicating that the Orders from MMS were received and date-stamped "October 2, 1992." Appellants also do not dispute the record showing that the Orders were delivered by the courier to Phillips' in-house mailroom and were date-stamped on October 5, 1992. Further, the parties do not dispute and the record shows that GPM and Phillips' Notice of Appeal was filed on November 4, 1992, 33 days after the postal service receipts bearing the signature stamp of Phillips' employee acknowledged receipt of the Orders.

The regulations at 30 C.F.R. § 290.5(b) and 30 C.F.R. § 290.3 make clear that a Notice of Appeal must be filed "in the office of the official issuing the order or decision [appealed from] within 30 days from service of the order or decision" and that "[n]o extension of time will be granted for filing the notice of appeal." The regulation at 30 C.F.R. § 290.5(b) recognizes, however, that "the delay in filing will be waived if the appeal is filed not later than 10 days after it was required to be filed and it is determined that the notice of appeal was transmitted to the proper office before the end of the time required for filing * * *."

In the case before us, Appellants' Notice of Appeal was transmitted on November 3, 1992, 32 days after Phillips' employee's signature stamp acknowledged receipt of the two Orders. The regulation at 30 C.F.R. § 290.3(a)(2) specifically provides that no extension of time will be granted for filing a Notice of Appeal and, if the provisions of the grace period provided in 30 C.F.R. § 290.5(b) do not apply, "the notice of appeal will not be considered and the case will be closed."

It is well settled that untimely appeals to the Director of MMS are properly dismissed pursuant to 30 C.F.R. § 290.3(a). See ANR Production Co., 110 IBLA 127, 128 n.2 (1989), and cases cited therein.

[2] Next, we address Appellants' suggestion that the in-house date-stamp of October 5, 1992, should prevail over the postal service receipt of October 2, 1992, which bears Phillips' employee's signature stamp acknowledging receipt of the two MMS Orders. Appellants acknowledge that their courier service picked up the Orders at the Bartlesville, Oklahoma, Post Office and used a signature stamp provided by Phillips to indicate receipt of the Orders on October 2, 1992. (SOR at 8.) Appellants state that "somewhere in the process of retrieving the documents from the Post

Office and date-stamping them in Phillips' mailroom, the date-stamp process appears to have failed, and the [Orders] were not processed through the mailroom and marked 'received' until October 5, 1992." (SOR at 8.)

We note that Appellants do not dispute the validity of the postal service receipt of October 2, 1992, and they do not challenge the well-established presumption of regularity that attends the acts of public officials, including those of the U.S. Postal Service. Moreover, Appellants do not suggest or present evidence that the date-stamp of October 2, 1992, is erroneous. See, e.g., Enstar Corp., 102 IBLA 207, 208 (1988), and cases cited. Absent evidence to the contrary, we conclude that the date-stamp of October 2, 1992, on the Bartlesville, Oklahoma, postal receipts is correct and that Phillips' Notice of Appeal was untimely filed pursuant to 30 C.F.R. § 290.3(a).

[3] Appellants further argue that MMS should be estopped from dismissing its appeal as untimely filed because MMS treated the appeal as valid and timely for 4 years while the case was pending and took no action to suggest that the appeal was not timely filed. Further Appellants state that they reasonably relied on the MMS' silence regarding the untimely filing of the appeal to their detriment and will suffer further harm if this Board affirms the dismissal of the appeal.

This Board has well-established rules that govern our consideration of estoppel issues. We discussed those rules in Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd sub nom. Bolt v. United States, 944 F.2d 603 (9th Cir. 1991), noting that we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970):

Four elements must be present to establish the defense of estoppel: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)).

In addition, we follow the rule that estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982); State of Alaska, 46 IBLA 12, 21 (1980). Further, we ascribe to the rule that estoppel against the Government in matters concerning the public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978). Moreover, in James A. Becker, 138 IBLA 347 (1997), we stated that to invoke estoppel against the Government in matters concerning the public lands, the affirmative misconduct must be "in the form of a crucial misstatement in an official written decision." Id. at 350. Finally, while estoppel may lie when an individual

relied on a Governmental statement and subsequently was deprived of a right he could have acquired, estoppel will not lie when the effect of such an action would grant an individual a right not authorized by law. See Edward L. Ellis, 42 IBLA 66 (1979).

Under the rules outlined above, we conclude that estoppel does not apply to the facts of this case for two reasons. First, Appellants claim that they had no independent basis for believing that their Notice of Appeal was untimely filed because, unlike MMS, they did not have a record of the U.S. Postal Service receipt showing delivery of the two Orders to Appellants' courier on October 2, 1992. (SOR at 7-8.) We disagree. A courier, evidently in the employ of and acting as the agent of Appellants, signed for the Orders at the Bartlesville, Oklahoma, Post Office on Friday, October 2, 1992, and in so doing used a stamp authorized by Phillips to accept delivery. The courier then delivered the Orders to the Phillips mailroom, where, for some reason, they were not date-stamped until Monday, October 5, 1992.

It is likely that the courier kept records of when it took possession of the legal documents it accepted on behalf of Appellants, and it was surely within GPM and Phillips' authority to inquire. Thus, we find that Appellants were not ignorant of facts that could only have been known by MMS as the recipient of the Post Office receipts showing delivery on October 2, 1992, nor were Appellants required to rely on MMS' conduct in not asserting those facts. Appellants had an independent source of information regarding the time the Orders were received by their courier at the Post Office and thus cannot claim ignorance of the facts in order to invoke estoppel.

In their reply brief, Appellants cite United States v. Owens, *supra*, to speculate that courts "may be willing to apply judicial estoppel against the government in cases where they are not willing to apply equitable estoppel." (Reply at 4.) We have studied the case cited by Appellants and conclude that the application of the doctrine of judicial estoppel does not apply to our decision in this case. Id. at 275.

[4] Finally, Appellants challenge the authority of the Commissioner of Indian Affairs to dismiss the portion of their appeal involving Federal leases. The regulation at 30 C.F.R. § 290.6 reads as follows: "The procedure for appeals under this part shall be followed for permits and leases on Indian land except that with respect to such permits and leases, the Commissioner of Indian Affairs will exercise the functions vested in the Director, Minerals Management Service." Thus, while the Commissioner of Indian Affairs is vested with authority to adjudicate appeals pertaining to leases and permits on Indian lands, the Director, MMS, is responsible for deciding appeals relating to leases and permits on non-Indian Federal lands. We conclude, therefore, that the Deputy Commissioner of Indian Affairs was vested with jurisdiction to decide the Indian lease component of the instant appeal, but lacked jurisdiction to decide the non-Indian Federal lease component of the appeal.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we affirm that part of the Deputy Commissioner's Decision dismissing Appellants' appeal of MMS' Order of September 29, 1992, relating to Navajo Indian Lease No. 621-000353-O. As to that part of the Decision dismissing Appellants' appeal of MMS' undated Order relating to both Indian and Federal leases, we affirm the Decision as it relates to Indian leases; to the extent that it relates to Federal leases, we vacate the Decision and remand the case to the Director, MMS, for action consistent with this opinion.

John H. Kelly
Administrative Judge

I concur.

Gail M. Frazier
Administrative Judge

