

ROBERT W. WILLINGHAM

IBLA 2001-90

Decided November 23, 2004

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, holding oil and gas lease in its extended term by reason of production to have terminated because of cessation of production. WYW 54919.

Set aside and remanded.

1. Oil and Gas Leases: Termination--Oil and Gas Leases: Well Capable of Production

On appeal from a determination by BLM that an oil and gas lease in its extended term by reason of production has terminated because a shut-in gas well is no longer capable of production in paying quantities, the lessee is entitled to notice and an opportunity for a hearing when a material issue of fact regarding the status of the well is raised by the record. Prior to any hearing, the case is properly remanded to BLM to allow a current supervised flow test of the well on the lease.

APPEARANCES: Richard H. Bate, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal has been brought by Robert W. Willingham, individually and doing business as Integrity Oil and Gas (Integrity) and Warren Enterprises (Warren), from a November 22, 2000, decision of the Wyoming State Office, Bureau of Land Management (BLM). The decision held that oil and gas lease WYW 54919 terminated by reason of cessation of production effective May 4, 1999.

Oil and gas lease WYW 54919 was issued through competitive bidding for a term of 5 years effective June 1, 1976. Subsequently, fractional interests in the lease

were assigned to Willingham, Integrity, and Warren. An application for permit to drill the Federal No. 1-29 well on the leasehold was filed August 24, 1979, and approved September 19, 1979. After testing, the well was determined to be capable of producing oil or gas in paying quantities. (Memorandum of July 9, 1980, from District Engineer to Oil and Gas Supervisor.) Although the extent of production from the well is not clear from the record before the Board, appellant indicates that it produced gas for several years. The gas was sold to Natural Gas Pipeline Company of America “until litigation over a take or pay contract resulted in a settlement pursuant to which the gas purchaser ceased taking gas.” (Statement of Reasons (SOR) for Appeal at 2.) A letter dated February 20, 1996, from the Area Manager, Great Divide Resource Area, to Integrity states: “Our records indicate that well No. 1-29 on lease WYW 54919 has been in a nonproducing status since May[] 1986 and may not be capable of production in paying quantities.” In this letter, BLM informed Integrity that if “the well is capable of economic production, you must submit written justification to this office demonstrating the same” within 60 days. The case file contains no record of any response from the lessee regarding the status of the well.

Subsequently, the Field Manager, Rawlins Field Office, BLM, issued to Integrity a decision letter dated May 4, 1999, indicating that according to his records well No. 1-29 had been in a nonproducing status since October 1983. This fact was taken by BLM as an indication that the well “may not be capable of production in paying quantities.” (May 4, 1999, Decision Letter at 1.) Noting that the oil and gas lease was in its extended term by reason of production, the decision letter gave Integrity 60 days notice that reworking or drilling operations must be commenced on the lease to establish production or “justification that the well is capable of production in paying quantities” must be submitted, in the absence of which the lease will automatically terminate. *Id.* The BLM decision cited the regulation at 43 CFR 3107.2-2 for support. This decision letter addressed to Integrity was returned to BLM by the Postal Service on May 17, 1999, marked “Addressee Unknown.”

Thereafter, on November 22, 2000, the BLM State Office issued the decision from which this appeal is brought. Therein, BLM held that Integrity had been notified by the letter of May 4, 1999, that it was allowed 60 days in which to commence reworking or drilling operations. Finding that the date of last production on the lease was October 1983, and that no reworking or drilling operations had commenced, BLM held the lease terminated by cessation of production effective May 4, 1999. (Decision of Nov. 22, 2000, at 1.) It appears that 4 days after the notice of appeal was filed appellant submitted a sundry notice to BLM seeking authority to conduct a production test on the shut-in gas well. This sundry notice was returned “unapproved” by BLM letter of January 2, 2001, because of the pending appeal regarding the lease status.

In his SOR, appellant contends the termination of the lease because of cessation of production is ineffective because the No. 1-29 well is capable of producing gas in paying quantities and the lease does not terminate unless the lessee has received a notice to place the well in production. Appellant asserts that the notice in this case allowed the lessee 60 days to commence reworking or drilling operations and the notice was returned undelivered. Even if the notice had been received, appellant argues that the relevant regulation is 43 CFR 3107.2-3 and under this regulation the lease does not terminate unless the lessee is given a reasonable period of time (not less than 60 days) within which to produce the well on the lease and the lessee fails to do so. Appellant requests a remand of this case to BLM to allow a production test on the well so that BLM can reverse its decision if the well is found to be productive or afford appellant a hearing before an administrative law judge if BLM is not convinced. Asserting that it now has a prospective buyer of gas from the well, appellant submits the results of flow tests conducted on the well in 1981 in support of its assertion that the well is capable of production in paying quantities.

As a preliminary matter, we note that the relevant regulation regarding service of decisions provides in pertinent part:

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 this chapter, 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.

43 CFR 1810.2(b). It is well established in Departmental adjudication that the transmission of a decision to a party's last address of record by certified mail, return receipt requested, constitutes constructive service even though the delivery was not successful. Fidelity Trust Building, Inc., 129 IBLA 57, 61 (1994); Victor M. Onet, Jr., 81 IBLA 144, 146 n.2 (1984); Red Rock Golf and Recreational Association, Inc., 77 IBLA 87, 88 (1983). Thus, the fact that the 60-day notice to Integrity was returned to BLM by the Postal Service marked "Addressee Unknown" does not negate constructive service upon appellant. This does not, however, resolve the appeal before us.

A more difficult question under the relevant provision of the Mineral Leasing Act, 30 U.S.C. § 226(i) (2000), is presented by BLM reliance upon the terms of the May 4, 1999, notice in this case as the predicate for finding that the lease terminated by cessation of production. As a general rule, oil and gas leases in their extended term by reason of production terminate by operation of law when paying production

ceases on the lease. 30 U.S.C. § 226(e) (2000); 43 CFR 3107.2-1; Stove Creek Oil, Inc., 162 IBLA 97, 104-105 (2004); Great Western Petroleum and Refining Co., 124 IBLA 16, 24 (1992); Universal Resources Corporation, 31 IBLA 61, 65 (1977). The Mineral Leasing Act, however, provides certain exceptions to this automatic termination:

No lease issued under this section which is subject to termination because of cessation of production shall be terminated for this cause so long as reworking or drilling operations which were commenced on the land prior to or within sixty days after cessation of production are conducted thereon with reasonable diligence, or so long as oil or gas is produced in paying quantities as a result of such operations. No lease issued under this section shall expire because operations or production is suspended under any order, or with the consent, of the Secretary. No lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall not be less than sixty days after notice by registered or certified mail, within which to place such well in producing status or unless, after such status is established, production is discontinued on the lease premises without permission granted by the Secretary under the provisions of this chapter.

30 U.S.C. § 226(i) (2000). The alternatives defined by the statute were set forth in Steelco Drilling Corp., 64 I.D. 214 (1957), and have been restated in numerous decisions of the Board:

Under the Mineral Leasing Act, as amended by the act of July 29, 1954, if production ceases on a lease which is in an extended term by reason of production, the lease terminated by operation of law unless:

- (1) within 60 days after cessation of production, reworking or drilling operations are begun on the lease and thereafter conducted with reasonable diligence during the period of nonproduction; or,
- (2) an order or consent of the Secretary suspending operations or production on the lease has been issued; or (3) the lease contains a well capable of producing oil or gas in paying quantities and the lessee places the well on a producing status within a reasonable time, not less than 60 days after notice to do so, and thereafter continues production unless and until the Secretary allows suspension.

Max Barash, 6 IBLA 179, 181-82 (1972); accord Great Plains Petroleum, Inc., 117 IBLA 130, 132 (1990); C & K Petroleum, Inc., 70 IBLA 354, 356 (1983);

Michael P. Grace, 50 IBLA 150, 151-52 (1980); John S. Pehar, 41 IBLA 191, 192 (1979); Vern H. Bolinder, 40 IBLA 164, 167 (1979).

When the term of an oil and gas lease has been extended by production and there is no well capable of production in paying quantities when production ceases, the lessee must initiate reworking or drilling operations within 60 days and continue the reworking or drilling operations with reasonable diligence to avoid termination. In such cases termination is automatic if BLM has not approved the suspension of operations and/or production. International Metals & Petroleum Corp., 158 IBLA 15, 20 (2002); Merit Productions, 144 IBLA 156, 158-59, 161-62 (1998) (Burski, A. J., concurring); Daymon D. Gililand, 108 IBLA 144, 147 (1989); Universal Resources Corp., 31 IBLA at 66. We find no tangible evidence in the record before us regarding the question of BLM consent to the shut-in status of the well upon the loss of the market for lease gas.

It has been noted, however, that the notice provision under the third sentence of 30 U.S.C. § 226(i) would be applicable to a well capable of production in paying quantities which was shut in for reasons such as lack of a pipeline or market for the oil or gas. Merit Productions, 144 IBLA at 161 n.5; Steelco Drilling Corp., 64 I.D. at 219 n.3. This invokes the 60-day notice to place the well in production provided by the regulation at 43 CFR 3107.2-3, as appellant points out. Unlike those cases in which production has ceased because the well is no longer physically capable of producing oil or gas in paying quantities, *see, e.g., Max Barash*, 6 IBLA at 180-83, the well in this case was apparently shut in when the purchaser refused to buy production from the well rather than because of any inability to produce. In this case, appellant contends the well is capable of production in paying quantities and tenders a well test report in support of its assertion. While BLM disallowed the effort by appellant to retest the well because of the pending appeal, it acknowledged the existence of an issue of fact regarding whether the well is capable of production in paying quantities, noting in both its letter of February 20, 1996, and its letter of May 4, 1999, that the well “may not be capable of production in paying quantities.”^{1/}

^{1/} Considering appellant’s constructive notice of the BLM letter of May 4, 1999, we would ordinarily be reluctant to allow a further opportunity to provide evidence of the productive capacity of the well. In this case, however, the statute mandates that no oil and gas lease on which there is a well capable of production in paying quantities shall expire because the lessee fails to produce the well unless allowed a reasonable time of not less than 60 days in which to place the well in production. 30 U.S.C. § 226(i) (2000); 43 CFR 3107.2-3. In view of the issue of material fact in the record before us, it is necessary to obtain more information regarding the well status.

[1] Upon a determination by BLM that a well on an oil and gas lease in its extended term by reason of production is no longer a well capable of production in paying quantities, the lessee is entitled to notice and an opportunity for a hearing when the record presents an issue of material fact regarding the status of the well. Daymon D. Gililland, 108 IBLA at 148; C & K Petroleum, Inc., 70 IBLA at 356; John Swanson, 51 IBLA 239, 241 (1980); Universal Resources Corp., 31 IBLA at 67; see Merit Productions, 144 IBLA at 167. In this case we find a hearing would be premature in the absence of current data from a recent flow test of the well, such as requested by appellant, which would provide evidence of the productive capacity of the well. Thus, the case is properly remanded to BLM to allow a flow test witnessed by BLM to determine the productive capacity of the well prior to referring the case to an administrative law judge for an evidentiary hearing. Daymon D. Gililland, 108 IBLA at 148; John Swanson, 51 IBLA at 241-42; Universal Resources Corp., 31 IBLA at 67. After reviewing the test results and any additional evidence submitted by appellant, BLM should make a determination whether there is a well capable of production in paying quantities on the lease.^{2/} To the extent appellant is adversely affected by the BLM finding on remand, it will be subject to appeal to this Board.

Therefore, 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 set aside and the case is remanded to BLM for further proceedings consistent herewith.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Lisa Hemmer
Administrative Judge

^{2/} If such a well is found to exist, BLM may in its discretion consent to a continuation of shut-in status if deemed appropriate. Under the terms of the Mineral Leasing Act, 30 U.S.C. § 226(i) (2000), and 43 CFR 3107.2-3, however, the lease could not be found to have expired without provision by BLM of at least 60 days in which to place the well in a producing status.