



ATCHEE CBM, LLC, *ET AL.*

183 IBLA 389

Decided May 13, 2013



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

ATCHEE CBM, LLC, *ET AL.*

IBLA 2012-192

Decided May 13, 2013

Appeal from a decision of the Utah State Office, Bureau of Land Management, holding competitive combined hydrocarbon lease to have terminated at the end of its 2-year extended term. UTU-74874.

Affirmed; Stay Denied as Moot.

1. Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions--Oil and Gas Leases: Production--Oil and Gas Leases: Termination

A coalbed methane well must be producing or capable of producing “oil or gas” at the end of the primary (or extended) term in order to entitle the lease to an extended term by reason of production pursuant to section 17(e) of the MLA and 43 C.F.R. § 3107.2-1, or to require BLM to issue a 60-day notice to produce pursuant to section 17(i) of the MLA and 43 C.F.R. § 3107.2-3. Where there is no evidence that a lessee was actively engaged in operations at the end of the primary (or extended) term, BLM properly determines the lease to have terminated by operation of law upon cessation of production.

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

In order to be considered capable of production in paying quantities, a well must be physically capable of producing a quantity of oil and/or gas sufficient to yield a profit after the payment of all the day-to-day costs incurred in operating the well and marketing the oil or gas. Actual production is not required if production can be obtained,

but has not occurred because of a lack of pipelines, roads, or markets for the gas. A BLM decision finding wells not capable of production in paying quantities will be affirmed where there is no showing that the wells are capable of producing sufficient oil or gas to yield the requisite profit.

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

An oil and gas lease in its extended term by reason of production on which there is no well capable of producing oil or gas in paying quantities terminates by operation of law and no notice of termination is required.

4. Estoppel--Federal Employees and Officers: Authority to Bind Government

Estoppel is an extraordinary remedy, especially as it relates to the public lands. 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. In matters concerning the public lands, estoppel against the Government must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. Estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law.

5. Oil and Gas Leases: Cancellation--Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions--Oil and Gas Leases: Production--Oil and Gas Leases: Termination

Where an oil and gas lease does not contain a well capable of producing oil or gas in paying quantities, and has expired by operation of law, there is no need to

exercise the cancellation authority under section 31(a) or (b) of the MLA and 43 C.F.R. § 3108.3(a) or (b).

6. Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions--Oil and Gas Leases: Production--Oil and Gas Leases: Termination

An oil and gas lease expires upon the running of its primary term unless eligible for extension as provided by 43 C.F.R. Subpart 3701. While a request for suspension of a lease may be retroactively approved after the lease has expired, no suspension application can be approved where the application itself is not filed until after the expiration date of the lease, unless it can be found that actions of the Department have constituted a *de facto* suspension of the lease during its term. When the lessee can point to no actions of the Department that interfered with or delayed operations on the Lease during its primary or extended term, the criteria for a *de facto* suspension have not been met.

APPEARANCES: Phillip Wm. Lear, Esq., Clifford B. Parkinson, Esq., and Megan B. Parkinson, Esq., Salt Lake City, Utah, for appellants; James E. Karkut, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Atchee CBM, LLC (Atchee), and Medallion Exploration (Medallion) (collectively, appellants) have appealed from and petitioned for a stay of the effect of a March 21, 2012, decision of the Utah State Office, Bureau of Land Management (BLM), holding competitive combined hydrocarbon lease UTU-74874 (Lease) to have expired by operation of law at the end of its 2-year extended term on April 30, 2009, in the absence of either production of oil or gas in paying quantities or a well capable of production of oil or gas in paying quantities.¹

¹ At the time BLM issued the subject decision, Atchee and Retamco Operating, Inc. (Retamco), were co-owners of the Lease. Appellants indicate that at all relevant times, Medallion has been the designated operator of the single well on the leased lands (the Atchee Federal No. 32-4-13-25 Well (Well)). See Affidavit of Jake Y. Harouny, Manager of Atchee and President of Medallion, dated July 31, 2012 (Ex. F (continued...))

For the following reasons, we affirm BLM's decision and deny appellants' request for a stay as moot.

BACKGROUND

The competitive combined hydrocarbon lease in question was originally issued to the Amoco Production Company (Amoco) by BLM, effective December 1, 1995,² for a primary term of 10 years and so long thereafter as oil or gas was produced in paying quantities, pursuant to section 17 of the Mineral Leasing Act (MLA), 30 U.S.C. § 226 (2006), as amended by the Combined Hydrocarbon Leasing Act of 1981 (CHLA), Pub. L. No. 97-78, 95 Stat. 1070, and its implementing regulations, 43 C.F.R. Part 3100 and Subpart 3141.³ All or part of the record title interest in

¹ (...continued)

to Statement of Reasons (SOR) for Appeal) (Harouny Affidavit), ¶ 12, at 3. The decision was issued to Atchee and Retamco. Despite service of the decision on Retamco on Mar. 26, 2012, it did not file an appeal from the decision. In the absence of a timely appeal, the decision has become administratively final for the Department to the extent it adjudicated Retamco's interest in the Lease. See *Robert D. McGoldrick*, 115 IBLA 242, 247-48 (1990); *Daymon D. Gililland*, 108 IBLA 144, 147 (1989); *Turner Brothers, Inc. v. OSM*, 102 IBLA 111, 121 (1988).

² The Lease encompasses 3,865.15 acres of public land situated in secs. 4-9, T. 13 S., R. 25 E., Salt Lake Meridian, Uintah County, Utah, within the Uintah (sometimes Uinta) Basin. All of the leased lands are situated in the 273,950-acre P.R. Spring Designated Tar Sand Area. See 30 U.S.C. § 181 (2006); 45 Fed. Reg. 76800 (Nov. 20, 1980); OG Plat (T. 13 S., R. 25 E., Salt Lake Meridian, Utah), dated Mar. 9, 1995. Appellants report that the Lease is also part of a 10,973.39-acre coal-bed methane (CBM) field. See Harouny Affidavit, dated Nov. 1, 2012 (Ex. 1 to Reply to BLM Answer (Reply)) (Harouny Reply Affidavit), ¶ 10, at 3. The Lease falls under the jurisdiction of BLM's Vernal Field Office.

³ See Combined Hydrocarbon Lease UTU-74874; 30 U.S.C. § 226(b)(2)(A) and (e) (“[C]ompetitive leases issued in special tar sand areas shall . . . be for a primary term of ten years [and] shall continue so long after [their] primary term as oil or gas is produced in paying quantities”) (2006); 43 C.F.R. § 3141.5-2(a) (“Combined hydrocarbon leases . . . shall have a primary term of 10 years and shall remain in effect so long thereafter as oil or gas is produced in paying quantities”); *American Gilsonite Co.*, 111 IBLA 1, 20, 96 I.D. 408, 418 (1989); *Daniel A. Engelhardt (On Reconsideration)*, 62 IBLA 93, 89 I.D. 82 (1982).

Of particular importance to the present case, 43 C.F.R. § 3141.0-8(a) provides, in relevant part, that all of the regulations in 43 C.F.R. Subpart 3107 (except

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the Lease was thereafter assigned as follows: from Amoco to Meany Land & Exploration, Inc. (Meany) effective January 1, 1997 (100%); from Meany to Retamco effective June 1, 1997 (100%); from Retamco to Medallion effective February 1, 1998 (80%); and, finally, from Medallion to Atchee effective March 1, 2010 (80%). Thus, as of March 1, 2010, and thereafter, all of the record title interest in the Lease was held by Atchee (80%) and Retamco (20%).

By decision dated December 22, 2005, BLM approved a suspension of operations and production under the Lease pursuant to section 39 of the MLA, 30 U.S.C. § 209 (2006), and 43 C.F.R. § 3103.4-4, effective October 1, 2005, 2 months before the expiration of the 10-year primary term of the Lease. BLM provided that the suspension would be lifted, in the event a pending application for a permit to drill (APD) was approved, the first day of the month in which actual drilling operations were commenced or, in the absence of actual drilling operations, the first day of the month in which the end of a 90-day period following receipt of the approved APD falls.

BLM approved the APD for the Well, to be situated in sec. 4, T. 13 S., R. 25 E., Salt Lake Meridian, Uintah County, Utah, on November 13, 2006. Medallion commenced drilling the Well on April 25, 2007, reaching a total depth of 3,860 feet on August 2, 2007, and finally completing the Well on October 23, 2007, at which point it was considered ready to produce. *See* Sundry Notices and Reports on Wells (Form 3160-5 (August 2007)) (Sundry Notice), dated Dec. 20, 2007; Well Completion or Recompletion Report (Form 3160-4 (August 2007)) (Well Completion Report), dated Feb. 28, 2008. However, appellants state that the Well was shut-in at or near the time of completion. *See* SOR at 7; Harouny Affidavit, ¶ 13, at 3. Moreover, they admit that the Well initially tested for the production of water, but not oil or gas, and that “Medallion has not produced water from the Well *since the Well was shut-in on October 23, 2007*[.]” SOR at 7 (quoting Harouny Affidavit, ¶ 25, at 5) (emphasis added). Nor has anything else been produced since that time.

By decision dated July 30, 2007, BLM lifted the suspension, effective March 1, 2007. It also noted that, since 2 months remained on the 10-year primary term at the time of the suspension, the term of the Lease would run until April 30, 2007. Section 17(e) of the MLA, 30 U.S.C. § 226(e) (2006), provides that “a lease shall continue so long after its primary term as oil or gas is produced in paying quantities,” or if “actual drilling operations were commenced prior to the end of its primary term

³ (...continued)

§ 3107.7), relating to the continuation, extension, and renewal of competitive oil and gas leases, “apply to the . . . administration of combined hydrocarbon leases” issued under 43 C.F.R. Part 3100.

and are being diligently prosecuted at that time [the lease] shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.” *See also* 43 C.F.R. § 3107.1. BLM determined that since actual drilling operations had commenced prior to, and were being diligently prosecuted at, the end of primary term of the Lease, *i.e.*, April 30, 2007, the Lease had been extended for 2 years, *i.e.*, until April 30, 2009, and so long thereafter as oil or gas was produced in paying quantities.

On December 12, 2007, Medallion initially reported that the Well had been drilled and completed, with the casing being perforated at numerous points in the Mesaverde formation, followed by testing: “Our initial 4 day test averaged 140 bbl [barrels] of H₂O per day with no gas.” Sundry Notice, dated Dec. 20, 2007. A Completion Procedure, which was attached to the Sundry Notice, reported “gas shows” associated with “several” coal seams. Medallion later reported, on March 5, 2008, that a 24-hour test on November 15, 2007, had resulted in the production of 145 bbl. of water, but no oil or gas. Well Completion Report, dated Feb. 28, 2008. On September 12, 2008, Medallion notified BLM concerning the Well: “Completion interval of this well is coals only. Test of 145 [bbl.]/day proved permeable offset core indicates gas content but due to potential lengthy dewatering period, *this well was shut in* until pip[e]lines could be installed and H₂O disposal application could be approved[.]” Sundry Notice, dated Sept. 12, 2008 (emphasis added); *see* SOR at 5 (citing Harouny Affidavit, ¶ 17, at 3). No further Sundry Notices were filed by any party in connection with the Well after September 12, 2008.

Upon inspecting the Well site on April 30, 2009, BLM found contract well testers on the site, who indicated that the Well had been tested for a time before pumping stopped due a problem downhole, producing approximately 86 bbl. of water, but stated that “no gas had been encountered.” Memorandum to the Well File from Branch Chief, Inspection and Enforcement, Vernal Field Office, dated May 5, 2009. The following day, on May 1, 2009, the rig crew reported: “They were swabbing the well, one run per hour getting a couple bbl. of water each run. They said no gas has been produced and there appeared to be very little water in the tubing.” *Id.* Medallion indicated to BLM that “they intended to continue to test the well and w[ere] concerned that with the low water production the well perf[oration]s may be plugged up.” *Id.*⁴

On May 11, 2009, BLM issued a decision notifying the lessees that it deemed actual drilling operations to have been occurring on the Lease at the end of its 2-year extended term on April 30, 2009, and that it considered the Lease to have been

⁴ Subsequent surface inspections of the Well site on Sept. 29, 2009, Sept. 15, 2010, and Jan. 9, 2011, disclosed no activity on the Well, which remained shut-in.

extended a second 2-year period, that would end on April 3, 2011, and so long thereafter as oil or gas was produced in paying quantities.

In the March 21, 2012, decision on appeal, BLM held that the Lease had, in accordance with section 17(e) of the MLA and 43 C.F.R. § 3107.1, expired by operation of law on April 30, 2009, the end of its initial 2-year extended term, in the absence of production of oil or gas in paying quantities or a well capable of production of oil or gas in paying quantities. First, BLM concluded that its May 11, 2009, decision, recognizing a second 2-year extension, had been “issued in error,” since it was “contrary to law.” Decision at unpaginated (unp.) 1. It noted that section 17(e) of the MLA and 43 C.F.R. § 3107.1 provides only for a “one-time” 2-year extension. Decision at unp. 1. Second, BLM concluded that, at the time of the conclusion of the 2-year extended term on April 30, 2009, the Well was neither producing nor capable of producing oil or gas in paying quantities. BLM noted that, although the Well was located on the leased land, it had never produced any oil or gas: “[The Well] tested as a coal bed methane well, [with] well test data indicat[ing] that only water production reached the surface[.]” *Id.* However, BLM further noted that “[t]here are no special considerations in the Mineral Leasing Act . . . for coal bed methane wells,” and thus “[w]ater production does not equate to oil and gas production.” *Id.* BLM therefore held that the Lease expired on April 30, 2009, the end of the first 2-year extended term.

Appellants appealed timely from BLM’s decision, and the case is now ripe for review.

DISCUSSION

A. Dewatering a CBM Well as the Equivalent of Production

In their SOR, appellants argue that BLM lacked authority to declare the Lease expired by operation of law at the end of its 2-year extended term because the regulations upon which it relied, 43 C.F.R. §§ 3107.2-1⁵ and 3107.2-3,⁶

⁵ This regulation provides that “[a] lease shall be extended so long as oil or gas is being *produced in paying quantities*.” (Emphasis added.)

⁶ This regulation provides:

No lease on 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 fails to place the lease in production within a period of not less than 60 days as specified by the authorized officer after receipt of notice by certified mail from the authorized officer to do

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are ambiguous concerning what constitutes paying production and are thus unenforceable. *See* SOR at 8-11, 13-14; Reply at 11-12. Appellants contend that, in declaring the Lease to have expired, BLM acted in an arbitrary and capricious manner by not uniformly and consistently applying 43 C.F.R. §§ 3107.2-1 and 3107.2-3. *See* SOR at 11-13; Reply at 11-13. Appellants ask the Board to vacate the decision and remand the case to BLM for reinstatement of the Lease.⁷

Appellants base their argument that 43 C.F.R. §§ 3107.2-1 and 3107.2-3 are ambiguous and unenforceable upon what they view as conflicting policy pronouncements from two BLM jurisdictions. They note that in Utah, as evidenced in the decision on appeal, BLM does not deem a CBM well to be producing or capable of producing oil or gas in paying production when it produces or is capable of producing only water. By contrast, appellants point to policy pronouncements set forth in a Colorado BLM Notice to Lessees/Operators (NTL) (NTL-CO-88-2), *Paying Well Determinations and Venting and Flaring Applications on Jurisdictional Coal Bed Methane Wells* (Sept. 26, 1988), and Wyoming BLM's Instruction Memorandum (IM) WY-91-174 (Feb. 7, 1991), to the effect that a CBM well on a lease nearing the end of its primary (or extended) term, can be considered to be capable of producing gas in paying quantities where a prudent operator would continue to dewater the well in the expectation of improving the well's performance, provided the operator is diligently dewatering the well, preparatory to gas production, with every indication pointing to continued improved well performance. *See* SOR at 9-10; Reply at 14-17, 19-20; NTL-CO-88-2 at unp. 2; IM No. WY-91-174, Attachment 1, at 1-27, 1-30. Appellants assert that the policy pronouncements of the Colorado NTL and the Wyoming IM both "allow[] dewatering performed by a prudent operator with a view to improving or even establishing [gas] production to constitute [paying] production in satisfaction of 43 C.F.R. § 3107.2-1," and, since that is the situation with their Well, the Board should resolve "the question of whether or not the Well is

⁶ (...continued)

so. Such production shall be continued unless and until suspension of production is granted by the authorized officer.

⁷ In their Reply, appellants argue that BLM's non-uniform, inconsistent application of 43 C.F.R. §§ 3107.2-1 and 3107.2-3 is violative of their right to equal protection under the law, guaranteed by the Fifth Amendment to the U.S. Constitution. *See* Reply at 13-14. The Board, as part of the executive branch of the Federal government, lacks the authority to determine whether Constitutional rights have been violated, or, in any event, to provide an appropriate remedy for such a violation. *See, e.g., Mark Patrick Heath*, 175 IBLA 167, 196 (2008). We do not adjudicate the question of a Constitutional violation.

constructively producing during the dewatering period . . . in favor of Atchee/Medallion.” SOR at 10, 11.⁸

The Board recognizes the principle that an oil and gas leasing regulation should be clear and leave no reasonable basis for a lessee to fail to comply before it is interpreted to deprive a lessee of its statutory right under the MLA. *See, e.g., Exxon Company, U.S.A.*, 113 IBLA 199, 206 (1990); *Charles J. Rydzewski*, 55 IBLA 373, 379, 88 I.D. 625, 627-28 (1981); *Mary I. Arata*, 4 IBLA 201, 203-04, 78 I.D. 397, 398-99 (1971); *A.M. Shaffer*, 73 I.D. 293, 298-300 (1966). The regulations at issue, 43 C.F.R. § 3107.2-1 and § 3107.2-3, clearly state that to avoid expiration by operation of law, the Lease must be producing oil or gas in paying quantities (§ 3107.2-1), or contain a well capable of producing oil or gas in paying quantities (§ 3107.2-3). What is meant by “production in paying quantities,” and similar iterations of the phrase, has been explained by this Board on numerous occasions, as discussed *infra*. In 43 C.F.R. § 3160.0-5, the definitions provision of Subpart 3160 (Onshore Oil and Gas Operations: General), “*Paying well*” is defined as “a well that is capable of producing oil or gas of sufficient value to exceed direct operating costs and the costs of lease rentals or minimum royalty,” and “*Production in paying quantities* means production from a lease of oil and/or gas of sufficient value to exceed direct operating costs and the cost of lease rentals or minimum royalties.”

In defining a “well capable of producing” in paying quantities, the Department has long required evidence of the present capability of the well to produce:

The phrase “well capable of producing” means a “well which is actually in a condition to produce at the particular time in question.” *United Manufacturing Co.*, 65 I.D. 206 (1958). In the absence of perforation of the well casing, a well has been held to be physically incapable of production and, hence, not capable of production in paying quantities. *Arlyne Lansdale*, 16 IBLA

⁸ They argue that Colorado and Wyoming BLM “construe the [necessary] dewatering phase of [CBM] . . . operations to be constructive production,” satisfying the statutory and regulatory requirement for production of oil or gas in paying quantities. Reply at 11. They indicate that dewatering should at least demonstrate a capability of paying production in satisfaction of 43 C.F.R. § 3107.2-3. They assert that, given their longstanding experience in drilling and operating 220 CBM wells in the Powder River Basin of Wyoming, they specifically designed their plan for drilling and operating the well in question based on the expectation that the same policy in Colorado/Wyoming would apply in Utah. *See* SOR at 2, 11; Harouny Affidavit, ¶¶ 11, 18, at 3, 4.

42 (1974); *United Manufacturing Co., supra*. A well has been held not capable of production in paying quantities where substantial pumping of water from the well is required before oil could be produced in paying quantities. *The Polumbus Corp.*, 22 IBLA 270 (1975). Further, a well has been held not capable of production in paying quantities where sandfracing operations were unsuccessful and the record indicated further efforts were needed to restore production, including hot oil treatment and swabbing the well. *Steelco Drilling Corp.*, 64 I.D. 214 (1957).

Amoco Production Co., 101 IBLA 215, 221 (1988) (footnotes omitted). In addition, in order to be considered capable of production in paying quantities, a well must be “physically capable of producing a sufficient quantity of oil and/or gas to yield a reasonable profit after the payment of all the day-to-day costs incurred after the initial drilling and equipping of the well, including the costs of operating the well, rendering the oil or gas marketable, and transporting and marketing that product.” *International Metals & Petroleum Corp.*, 158 IBLA [21,] 22 n.6 [(2002)]; *see Stove Creek Oil Inc.*, 162 IBLA [104,] 105-106 [(2004)]; *Amoco Production Co.*, 101 IBLA at 221-22. Actual production is not required to qualify a well as capable of production in paying quantities as long as production can clearly be obtained but has not been because of a lack of pipelines, roads, or markets for the gas. *John G. Swanson*, 66 IBLA 200, 202 (1982); *American Resources Management Corp.*, 40 IBLA [195,] 201 [(1979)]; *see also C & K Petroleum Inc.*, 70 IBLA 354, 356 (1983); *Burton/Hawks, Inc.*, 47 IBLA 125, 127 (1980).

Coronado Oil Co., 164 IBLA 309, 324 (2005), *aff'd*, No. 05-CO-11J (D. Wyo. Aug. 23, 2006), *appeal dismissed*, No. 06-8083 (10th Cir. Sept. 14, 2007).

Appellants argue that the Colorado/Wyoming BLM policy pronouncements should apply to its operations on the Lease, and that its dewatering operations constitute production within the meaning of *Coronado* and the cited regulations. We disagree with appellants’ analysis for the following reasons.

[1] Colorado’s NTL states that, since sufficient information regarding the costs and revenues necessary for a paying well determination are not likely to be available “at the completion” of a CBM well, Colorado BLM is permitted to make an “initial paying well determination” when “it appears that a prudent operator would continue to operate the coal bed methane well in expectation of improving the well’s performance.” NTL-CO-88-2 at unpag. 2. The NTL notes that such an initial

determination would serve to extend the lease by reason of production (if near the end of its primary (or extended) term), and afford the operator “a period of time up to one year from the completion date of the well *to continuously test the well*,” which could be extended in 6-month increments for no more than a total of 2 years if “a prudent operator would continue to produce the well in anticipation of improving performance.” *Id.* (emphasis added). Such testing allows the operator to gauge the “anticipated gas incline/water decline response,” a correlation that is unique to CBM wells. *Id.* However, BLM is to “closely monitor[.]” any lease extended by an initial paying well determination, in order “*to ensure the continuous production of the well.*” *Id.* (emphasis added).⁹ The NTL instructs BLM to make a final favorable paying well determination whenever testing reveals that gas production would increase, within 6 months, to a point that it amounts to paying production, and an unfavorable determination if that information warrants such a determination. *See id.* The NTL further states that, in making a final paying well determination, BLM will use “*the same methodology used for conventional oil and gas wells* in that we must determine if the well can produce sufficient quantities [of gas] to overcome operating/overhead expenses[.]” *Id.* at unp. 3 (emphasis added).

Wyoming BLM policy is similar. Its IM indicates that it is adopting the Colorado NTL, which

defines paying production in two stages. In the initial stage a well is given a provisional paying status if the [Authorized Officer] determines that a prudent operator would continue operations to dewater the well. Final paying well status is granted under the same conditions as for conventional wells.

IM, Att. 1 at 1-30. Whereas the Colorado NTL limits its initial stage to a 2-year testing period, Wyoming policy is that “a lease in its extended term will not expire if the coalbed methane well is in the dewatering phase and the lessee is diligently ‘producing’ the well, monitoring the well[’]s productive capabilities, and every

⁹ The NTL provided that the testing period might be extended by reason of unavoidable delay, during which time continuous operations were prevented by circumstances beyond the control of the operator. *See* NTL-CO-88-2 at unp. 2. No such unavoidable delay pertains in the present case.

indication points to continued improved well performance.” *Id.* at 1-27; note 10 *supra*.¹⁰

What is clear from the record is that neither the Colorado NTL nor the Wyoming IM would support extending appellants’ Lease beyond April 30, 2009. In both Colorado and Wyoming, BLM was to make an initial paying well determination upon well completion and allow for a testing period that would be closely monitored by BLM to ensure continuous production during that testing period, which would serve to extend the term of an expiring lease until a final paying well determination could be made based on testing results. However, the predicate for any such extension of the primary (extended) lease term is “continuous” testing and production after well completion. Completion of the Well in the present case occurred in October 2007.¹¹ Appellants failed to diligently pursue testing/producing operations thereafter. Therefore, the Wyoming and Colorado policies, even if applicable, would not afford the relief sought by appellants.

There is no evidence that, at any time after completion of the Well in October 2007, Medallion was “diligently ‘producing’” the Well, through dewatering, with “every indication point[ing] to continued improved well performance.” IM WY-91-174, Attach. 1, at 1-27; *see The Polumbus Corp.*, 22 IBLA at 272-73

¹⁰ In a decision dated May 27, 2009, the Deputy State Director, Minerals and Lands, Wyoming State Office, concluded that water production from a CBM well served to extend a lease beyond its extended term since a prudent operator would continue to operate the well in the expectation of improving its performance where it began producing roughly 400 barrels of water per day just 8 days before the extended term expired. SOR, Att. E. In doing so, he stated the IM “incorporates the definitions and concepts provided in the Colorado NTL.” *Id.* at unpag. 3.

¹¹ The fact that completion and initial production from the Well occurred in October 2007, 1-1/2 years before the end of the 2-year extended term in April 2009, distinguishes the present situation from that in the Wyoming BLM May 27, 2009, decision, where the well was completed and initially produced 8 days before the end of the 2-year extended term. Thus, all that was applicable in that decision was an initial paying well determination, where, at the end of the 2-year extended term, all that could be concluded was that a prudent operator would “continue to operate” the well, in anticipation of improving its performance. NTL-CO-88-2 at unpag. 2; Decision, dated May 27, 2009, at unpag. 3. Even were we to conclude that appellants were entitled to an initial paying well determination in October 2007, by April 2009 the question was not whether a prudent operator would initially continue to operate the Well, but whether a prudent operator would, during the extended testing/producing period, “continue to produce” the Well, in anticipation of improving its performance. NTL-CO-88-2 at unpag. 2.

(well not physically capable where substantial pumping of water must occur before potential paying production). After completion of the Well, appellants officially tested the Well on only one other occasion (on November 15, 2007).¹² Medallion did not engage in further testing, and we find no evidence of continuous, substantial, or sustained water production, or gas production of any volume, at any time after completion of the Well in October 2007.¹³ Although limited amounts of water have been produced at times, there is no evidence that it was done continuously or with reasonable diligence during the 18-month period from the October 23, 2007, completion of the Well to April 30, 2009, or, ultimately, that the total quantity removed was even close to being sufficient to allow gas to be produced. SOR at 11. Nor was there any reasonable assurance that, once production was achieved, it would likely amount to paying production.

BLM determined that, upon the April 30, 2009, expiration of the 2-year extension, the Lease could only be further extended in the event of production of oil or gas in paying quantities or a well capable of production of oil or gas in paying quantities. BLM held that the Well was not producing or capable of production in paying quantities, having only produced limited quantities of water since it was drilled and completed in April/October 2007. The record supports BLM's determination. On these facts, we conclude that even if BLM had applied the policy

¹² We note that BLM found testing activity occurring at the Well site on Apr. 30, and May 1, 2009, but no Sundry Notice was filed reporting that activity or its results, and, indeed, the minimal amount of water being or capable of being produced indicates that the activity achieved little worth reporting.

¹³ See Briefing Paper (attached to NTL-CO-88-2) at unp. 2 (“An initial paying well determination can be granted *as long as testing/producing operations remain continuous* and the authorized officer has determined that . . . the operator can reasonably expect production to incline significantly.” (Emphasis added)); Briefing Paper to Deputy State Director, Lands and Minerals, Utah State Office, from Allen McKee, dated Apr. 20, 2012, at 3 (“The Colorado NTL requires that the CBM well in question be . . . actively producing at the end of the [2-year extended] term and . . . that the initial dewatering stage be continued for at least one continuous year with . . . evidence of increasing methane production[.] . . . [I]f the Utah BLM were to apply [the Colorado BLM NTL] in this instance, *the well on lease UTU-74874 would not meet the required criteria to earn an extension.*” (Emphasis added)); cf. *D.L. Cook*, 144 IBLA 63 (1998) (CBM well not being diligently drilled in accordance with unit obligation, where water was not continuously produced from the well to the point that its capability to produce gas in paying quantities could be determined).

pronouncements of Colorado and Wyoming, the outcome would not change.¹⁴ BLM properly held that the Lease was not extended by reason of production in paying quantities pursuant to section 17(e) of the MLA and 43 C.F.R. § 3107.2-1.

B. The Well Was Not Capable of Production in Paying Quantities

[2] The Lease was not producing or capable of producing oil or gas in paying quantities at the end of its extended period, *i.e.*, on April 30, 2009. Appellants assert that, following completion, the Well encountered Nelson coal seams in the Mesaverde formation that “showed very promising,” from the standpoint of gas production. SOR at 5 (citing Harouny Affidavit, ¶ 15, at 3). They add that, although no gas production was reported in the Well Completion Report or any of the subsequent sundry notices, it could not be “recorded,” due to the “unavailability of gas measuring

¹⁴ Given our holding that appellants in this case would not meet the standard for production under either the Utah or the Colorado/Wyoming policy pronouncements, we need not attempt to read uniformity into what appear to be the inconsistent policy pronouncements identified by the appellants regarding what the phrase “production in paying quantities” means in the CBM context. Ordinarily, it would remain for the Board, in the absence of binding judicial precedent, to interpret the policy pronouncements uniformly, since what is paying production in Colorado/Wyoming cannot be considered non-paying production in Utah, and vice versa. As the Board stated in *Pacificorp*, 95 IBLA 16, 19 (1986):

Congress intended that the statutes and regulations under which these leases are administered grant the same rights and impose the same obligations in Montana as they do in Wyoming or any other state in which the leased deposits are situated. If the agency were to interpret a statutory [or regulatory] requirement in one way for a Montana lease and in an opposite way for a Wyoming lease, the agency’s action would be arbitrary and capricious by definition. [Emphasis added.]

See Westar Energy, Inc. v. Fed. Energy Regulatory Comm’n, 473 F.3d 1239, 1241 (D.C. Cir. 2007) (“A fundamental norm of administrative procedure requires an agency to treat like cases alike. If the agency makes an exception in one case, then it must either make an exception in a similar case or point to a relevant distinction between the two cases.”); *Kerr-McGee Coal Corp.*, 96 IBLA 280, 284 (1987) (“It is the Board’s practice to apply its own decisional precedent until binding contrary precedent is established”). We express no opinion regarding whether the Colorado NTL or the Wyoming IM comports with the MLA and Board precedent or whether such policy pronouncements may require additional authority, a change in the lease instrument, or an exercise of Departmental authority to suspend leases affected by such pronouncements.

equipment,” and was, instead, simply “verbally communicated” to BLM.¹⁵ Harouny Affidavit, ¶ 16, at 3.

Appellants state that the Well is the second of two CBM discovery wells in the Nelson coal seams of the Uinta Basin, with the first being the Davis Canyon No. 1-12-13-25 (Davis Canyon) well, which is situated in sec. 12, T. 13 S., R. 25 E., Salt Lake Meridian, Uintah County, Utah, approximately 1-1/2 miles from the Well.¹⁶ See SOR at 6; Reply at 15. Appellants note that the Davis Canyon well has already produced close to 0.5 billion cubic feet of gas (BCFG), and is estimated to recover a total of 1.5 BCFG. See SOR at 6. They point out that the well logs for the well at issue reveal “thicker coals,” and thus “the potential for greater production” than the Davis Canyon well.¹⁷ *Id.* (citing Harouny Affidavit, ¶ 22, at 5). They conclude that, at present, although the Well has been idle for some time, they are “ready . . . to pursue any and all options to develop the Well and confirm the discovery of a new CBM play in the eastern Uinta Basin.” Reply at 4 (citing Harouny Reply Affidavit, ¶ 32, at 7).

In general, appellants do not dispute the record evidence regarding drilling, completion, and operation of the Well, and make no effort, in their SOR or Reply, to establish that the Well was, as of April 30, 2009, capable of production in paying quantities, or that there was any other well on the leased lands capable of such production. At best, they assert that, although not reported in any contemporaneous record, the initial tests disclosed the presence of “minute amounts of gas,” which were present at the wellhead only after the production of sufficient quantities of water. SOR at 5; see Harouny Affidavit, ¶ 18, at 4 (“Initial tests had gas”). They particularly note that the sustained presence of gas at the wellhead was illustrated by the fact that, whenever the choke was opened for a period of 4 to 5 minutes, there was a distinctive squeal of escaping gas. See Harouny Affidavit, ¶ 24, at 5. However, nowhere do appellants offer any evidence that the quantity of gas present at the wellhead meant that the Well was physically capable, as of April 30, 2009, of producing oil and/or gas in sufficient quantities to yield a reasonable profit after the

¹⁵ We find no evidence in the record that anyone ever orally advised BLM that any gas had been produced at the time of completion and initial testing of the Well.

¹⁶ We note that BLM reports, at page 2 of the Apr. 20, 2012, Briefing Paper to the Deputy State Director, Lands and Minerals, from McKee, that the Davis Canyon well produced “from the Mancos ‘B’ shale formation,” not the Mesaverde formation.

¹⁷ Appellants have not provided the well logs for the Well, or any evidence supporting their assertion that the Well is likely to produce more gas than the Davis Canyon well.

payment of all day-to-day costs incurred to drill, complete, and operate the Well and to transport and market the oil and/or gas.

In their SOR, appellants state that the Well initially tested for the production of water, but not oil or gas, and that “Medallion has not produced water from the Well since the Well was shut-in on October 23, 2007.” SOR at 7 (quoting Harouny Affidavit, ¶ 25, at 5). Nonetheless, appellants surmise that gas could be produced after the Well had been dewatered. *See* SOR at 6, 7. They further note that the shut-in status of the Well was only pending approval of a plan for disposing of the water, along with the installation of pipelines that would allow the gas that would be produced after dewatering to be carried to market. *See* SOR at 5; Harouny Affidavit, ¶ 13, at 3. Appellants add that, once they had communicated the production characteristics of the Well to BLM through the Sundry Notices and Well Completion Report, they believed that BLM agreed that the Well was “held by production pending pipeline hook-up.”¹⁸ SOR at 5 (citing Harouny Affidavit, ¶ 19, at 4).

As a matter of law, the capability of paying production hinges on the physical capability of the well at issue to produce oil or gas in paying quantities, and does not depend upon the existence of actual production. The absence of a pipeline connection, or even a plan for disposing of the water therefore does not detract from the productive capability of the Well. *See, e.g., Coronado Oil Co.*, 164 IBLA at 324; *John G. Swanson*, 66 IBLA 200, 202 (1982)). What is missing, however, is any showing that the Well was likely, after dewatering, to be productive of paying quantities of gas sufficient to cover the day-to-day drilling, completing, operating, transporting, and marketing costs, and generate a reasonable profit. We find no evidence in the record of any gas production from the Well following its completion in October 2007. Appellants’ representations only suggest the ability to produce very small quantities of gas, which do not satisfy the criteria for establishing paying production.

BLM also concluded that the Davis Canyon well does not establish the productive capability of the well at issue:

The offset well that Mr. H[a]rouny claims to prove up the productive capability of the Atchee Federal well was drilled in 2006, treated with a . . . frac[,] and tested at the time of completion

¹⁸ Appellants assert not only that they were “under the impression” that the Lease was considered by BLM to be held by production (HBP), but also that a BLM employee “acknowledge[d] . . . [the] HBP status . . . during a phone conversation.” Harouny Affidavit, ¶ 19, at 4. No record of this conversation with BLM appears in the record. Nor have appellants provided any evidence of this conversation.

300 mcf [thousand cubic feet per day] [of gas] plus 400 bwpd [barrels of water per day] from 36 feet of coal beds. The Atchee Federal well perforated 25 feet of coal beds but was not treated with a frac and *has not produced the same level of water and gas.*¹⁹ The offset well has been online and producing 200 to 300 mcf since it was completed in 2006.

E-mail to McKee from Robin L. Hansen, Petroleum Engineer, Vernal Field Office, dated Feb. 22, 2012 (emphasis added).

Appellants attest to the importance of the initial 24-hour test: “The only determining factor in dewatering the coal is the capability of the well to produce water in large enough quantities to allow for and facilitate the desorption process [for producing gas]. *Therefore, it is important to report initial water production for a 24 h[ou]r[] period.*” Harouny Affidavit, ¶ 18, at 4 (emphasis added). However, the 24-hour test of the Davis Canyon well disclosed substantial gas, along with 400 bbl. of water per day, but in the case of the well at issue, the test disclosed no gas, or, at best, only very small quantities of gas, and 145 bbl. of water per day. Further, while water continued to be produced from the Davis Canyon well after completion, water production from the well at issue essentially ceased after the October 2007 completion. Since then, no effort has been made to bring the Well closer to being capable of producing gas in any sizeable quantity, assuming that gas production is even possible.

Appellants infer that the Well is likely to be productive of gas in paying quantities because it is comparable to the Davis Canyon well. However, a mere inference will not suffice to establish the productive capability of the Well. The Board has held that facts recited in an affidavit attesting to the productive capability of a well “give support only to possible inferences that there *may be* commercial quantities of oil or gas because of the proximity of a well to producing wells and favorable geological conditions, but do not establish that there is oil or gas in paying quantities

¹⁹ Assuming the underlying coal seams need to be fractured before they can produce gas in paying quantities only further establishes that the Well is not yet physically capable of paying production. *See, e.g., Amoco Production Co.*, 101 IBLA at 217-18, 222 (well not physically capable where it requires reworking and/or stimulation); *Arlyne Lansdale*, 16 IBLA 42, 46-47, 49 (1974) (well not physically capable where casing must be perforated and formation sand-fractured); *Carl Losey*, A-30153 (Dec. 4, 1964), at 4 (well not physically capable where casing must be set, cemented, and perforated); *Steelco Drilling Corp.*, 64 I.D. 214, 218, 220 (1957) (well not physically capable where it must be treated with hot oil and swabbed).

or that there is a well capable of producing such.” *Am. Res. Mgmt.*, 40 IBLA at 201; *see also Am. Res. Mgmt. Corp. (On Judicial Remand)*, 88 IBLA 172 (1985).

We, therefore, conclude that the Lease was not capable of producing oil or gas in paying quantities as of April 30, 2009, at the end of its 2-year extended term.

C. There Was No Requirement for a 60-Day Notice

In the absence of a well capable of producing oil or gas in paying quantities, we reject appellants’ argument that they were entitled to a 60-day notice before BLM could properly declare the Lease to have expired by operation of law at the end of its 2-year extended term on April 30, 2009.²⁰ They assert that, instead, they were first notified that the Lease “was in jeopardy of termination for lack of production” at the time of issuance of BLM’s March 2012 decision, which declared that the Lease had already expired. SOR at 6 (citing Harouny Affidavit, ¶ 20, at 4).

[3] A lease in its extended term is subject to termination when there is a cessation of production of oil and gas in paying quantities in accordance with the standards discussed in *Coronado Oil Co.*:

Both the statute and the case law differentiate between a lease without a well capable of production in paying quantities and one containing a well capable of production in paying quantities. 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 has 60 days to commence reworking or drilling operations and must continue the reworking or drilling operations with reasonable diligence to avoid lease termination; if such operations are not timely initiated and diligently pursued, the lease terminates automatically upon cessation of production. *Coronado Oil Co.*, 164 IBLA 107, 115 (2004)[, *rev’d on other grounds, Coronado Oil Co. v. U.S. Dep’t of the Interior*, 415 F. Supp. 2d 1339 (D. Wyo.

²⁰ In their SOR, appellants state that they were entitled to the 60-day notice provided by 43 C.F.R. § 3107.2-2. They also indicate that they were actually entitled to the 60-day notice provided by 43 C.F.R. § 3107.2-3, because the Well was properly deemed to be capable of paying production. *See* SOR at 14 (“Assuming that the Well is deemed to be constructively productive . . . , the Utah State Office was obligated to issue the 60-day notice”). In their Reply, they later state only that, “[b]ecause the Well is capable of [paying] production, the BLM[] was required to give Appellants 60-day-notice as described in 43 C.F.R. § 3107.2-3.” Reply at 20. In any event, we address the applicability of both § 3107.2-2 and § 3107.2-3.

2006)]. Notice is not required in this situation. *Id.*; see *Stove Creek Oil Inc.*, 162 IBLA 97, 104-105 (2004) (citing *Merit Productions*, 144 IBLA 156, 160-61 (1998) (Burski, A.J., concurring)); *International Metals & Petroleum Corp.*, 158 IBLA 15, 20-21, n.6 (2002). When the term of an oil and gas lease has been extended by production and the lease *does* contain a well capable of production in paying quantities, however, BLM must notify the lessee and allow a reasonable time of at least 60 days from receipt of the notice to place the well into production to avoid having BLM declare the lease expired by operation of law for lack of production. *International Metals & Petroleum Corp.*, 158 IBLA at 21; *Merit Productions*, 144 IBLA at 161, 163-64; *Great Western Petroleum & Refining Co.*, 124 IBLA [16, 24 (1992)]. The different treatment afforded leases with wells capable of production in paying quantities reflects Congress' concern both that a lease in its secondary term not be automatically terminated for lack of production where a lessee has in good faith expended money to develop a well capable of production, but where production has been deferred because of lack of pipelines, roads, or markets for the gas, and that such lessees are afforded a reasonable period in which to place the well in producing status. See *American Resources Management Corp.*, 40 IBLA 195, 200-201 (1979), citing H.R. Rep. No. 2238, 83d Cong., 2nd Sess. (1954), reprinted in 1954 U.S.C.C.A.N. 2695, at 2700. This is the notice provided in the regulations at 43 CFR 3107.2-3. The Department has recognized that this notice provision is applicable to a well capable of production in paying quantities that was shut in for reasons such as lack of a pipeline or market for the oil or gas. *Robert W. Willingham*, 164 IBLA 64, 68 (2004); *Merit Productions*, 144 IBLA at 161 n.5; *Steelco Drilling Corp.*, 64 I.D. 214, 219 n.3 (1957).

164 IBLA at 324 (footnotes omitted); see *Ridgeway Arizona Oil Corp.*, 181 IBLA at 244.²¹

²¹ The statutory/regulatory provision that no lease on which there is a well capable of paying production shall expire in the absence of a 60-day notice to produce is generally considered to be applicable where, as in *Coronado*, the lease at issue is in its extended term by reason of paying production. However, it is equally applicable where the lease at issue has reached the end of a fixed 2-year extended term. See *Jim's Water Service, Inc.*, 114 IBLA 1, 5-7 (1990); *Amoco Prod. Co.*, 101 IBLA at 220-21, 222; *Hancock Enterprises*, 74 IBLA 292, 293 (1983); *Edward H. Coltharp*, 58 IBLA 234, 237-38 (1981), and cases cited (end of 10-year primary term). In both cases, the lease can continue so long as oil or gas is produced in paying quantities. In
(continued...)

For the reasons discussed *supra*, we conclude there was no well capable of production on the subject Lease. The Lease was in its extended term not by reason of production, but rather by reason of the 2-year extension afforded upon the conclusion of the 10-year primary term on April 30, 2007, because of actual drilling operations, which extension ended on April 30, 2009. *See OroNegro, Inc.*, 156 IBLA 170, 175 (2002). Those drilling operations did not result in a showing that the Well was capable of production. Thus, BLM properly declared the Lease to have expired by operation of law at the end of the first 2-year extension period, and since there was no well capable of production, BLM was not required to provide notice affording appellants 60 days in which to return the well to producing status, in accordance with § 3107.2-3.²²

D. The Grounds for Estoppel Are Not Present

[4] Next, in their Reply, appellants argue that BLM is estopped from declaring the Lease to have expired at the end of its 2-year extended term on April 30, 2009, because they reasonably relied upon the notification in BLM's May 2009 decision that the Lease had received a second 2-year extension pursuant to section 17(e) of the MLA and 43 C.F.R. § 3107.1. They state that they were ignorant of the true facts and

²¹ (...continued)

either situation, the lease will not expire “unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice . . . , within which to place [the] well in producing status.” *Id.*

We note that 43 C.F.R. § 3107.2-2, but not section 17(i) of the MLA, provides that the 60-day period commences upon the receipt of notice that the lease is not capable of production in paying quantities. We have held, however, that, to the extent the regulation requires 60-day notice to rework or drill in the case of a lease on which there is no well capable of paying production, it is contrary to section 17(i) of the MLA. *See Coronado Oil Co.*, 164 IBLA at 322; *Merit Prods.*, 144 IBLA at 163-64 (Burski, A.J., concurring).

²² We note that the Colorado BLM NTL and Wyoming BLM IM both provide that, once BLM makes a final unfavorable paying well determination, it must give the lessee 60 days notice to commence reworking or drilling operations and thereafter conduct them with reasonable diligence, so as to restore paying production, prior to declaring the lease to have terminated by operation of law. *See NTL-CO-88-2* at unp. 2; *IM WY-91-174* at 1-27. However, the NTL and IM are referring to the situation where a lease is in its extended term *by reason of production in paying quantities*, which, under the NTL and IM, would include the production of gas or water (preparatory to gas production). That is not the situation here, since we find no evidence of either gas or water production occurring at the end of the 2-year extended term.

that they relied on BLM's decision to their detriment by expending money to acquire the Lease. They argue that BLM should have known that the Lease had expired at the end of the first 2-year extended term on April 30, 2009. *See* Reply at 5-9. They further assert that BLM engaged in affirmative misconduct by misrepresenting the expiration date of the Lease as April 30, 2011, not April 30, 2009, in an official written decision, and that the public interest weighs in favor of estoppel since the public will not be "unduly damaged" by a finding of estoppel, whereas they will be "greatly injured" should the Board not find estoppel. *Id.* at 9. Appellants recognize that estoppel is not generally applied against the United States, but that it has been—and should be—applied where doing so accords with "basic notions of fairness," as it does here. Reply at 9 (quoting *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970)).

Estoppel is an extraordinary remedy when applied against the United States, especially when what is at issue is the proper use and management of the public lands. *See, e.g., Jack C. Scales*, 182 IBLA 174, 180 (2012). The party seeking estoppel must establish that the four basic elements of estoppel have been met:

(1) the party to be estopped must know the facts; (2) the party to be estopped must intend that his/her conduct shall be acted on or must so act that the party asserting estoppel has a right to believe it is so intended; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must detrimentally rely on the conduct of the party to be estopped.

Terra Res., Inc., 107 IBLA 10, 13 (1989) (citing *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970)). Even then, however, estoppel must be based upon affirmative misconduct, such as an affirmative misrepresentation or concealment of material facts by a Federal agency, upon which the party asserting estoppel detrimentally relied. *See United States v. Ruby Co.*, 588 F.2d 697, 703-04 (9th Cir. 1978); *Terra Res., Inc.*, 107 IBLA at 13.

In the decision on appeal, BLM concluded that its earlier May 2009 decision had been issued in error because it was "contrary to law[.]" Decision at unp. 1. However, it is well established that estoppel is not appropriate where it would afford the party claiming estoppel a right not authorized by law. *See* 43 C.F.R. § 1810.3(b) and (c);²³ *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60-63

²³ This regulation provides, in subsection (b), that "[t]he United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do . . . what the law does not sanction or permit," and, in

(continued...)

(1984); *Brandt v. Hickel*, 427 F.2d at 57; *Jack C. Scales*, 182 IBLA at 180; *Terra Res., Inc.*, 107 IBLA at 13; *Harriet C. Shaftel*, 79 IBLA 228, 232 (1984). That is the situation here.

As we have noted, April 30, 2009, was the end of the 2-year extended term, not the end of the 10-year primary term of the Lease. Clearly, appellants were not entitled, as a matter of law, to a second 2-year extension under section 17(e) of the MLA and 43 C.F.R. § 3107.1. Were actual drilling operations commenced prior the end of the 2-year extended term, and being diligently prosecuted at the end of that extended term, the lease would have been extended so long as oil or gas was being produced in paying quantities pursuant to 43 C.F.R. § 3107.2-1. See *Enfield v. Kleppe*, 566 F.2d 1139, 1140-41 (“There is a provision [in section 17(e) of the MLA] . . . for one two-year extension”), 1142 (“Nor can there be any doubt that Congress when it amended the statute in 1960 intended to limit [competitive] leases to a primary term, with a single two-year extension provided actual drilling is diligently being prosecuted at the end of the primary term, and further extensions only if oil or gas is being produced in paying quantities”) (10th Cir. 1977); *Hiko Bell Mining & Oil Co. (On Reconsideration)*, 100 IBLA 371, 391-92, 95 I.D. 1, 12 (1988); *Yates Petroleum Corp.*, 34 IBLA 7, 11 (1978). The second extension granted by BLM was *ultra vires*, a fact that appellants knew or should have known, since all members of the public are deemed to have knowledge of relevant statutes and duly promulgated regulations. See, e.g., *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947); *Enfield v. Kleppe*, 566 F.2d at 1142; *Francis X. Furlong II*, 73 IBLA 67, 71 (1973); *Yates Petroleum Corp.*, 34 IBLA at 12.

Were we to apply estoppel and afford the lessees a second 2-year extension pursuant to section 17(e) of the MLA and 43 C.F.R. § 3107.1, we would clearly grant them a right not authorized by law. We will not do so, even though appellants may have been misled by the error reflected in BLM’s May 2009 decision, *i.e.*, that the Lease was entitled to a second 2-year extension when it was not so entitled. We conclude that BLM is not estopped from declaring the Lease to have expired at the end of its single 2-year extended term on April 30, 2009.

E. Notice of Cancellation Was Not Required

[5] In their Reply, appellants argue that BLM was not entitled to simply declare that it had erroneously extended the Lease for a second 2-year extended

²³ (...continued)

subsection (c), that “[r]eliance upon information or opinion of any officer, agent or employee . . . cannot operate to *vest any right not authorized by law.*” (Emphasis added.)

term, but rather was required to follow the procedure in section 31(a) or (b) of the MLA, 30 U.S.C. § 188(a) or (b) (2006), and 43 C.F.R. § 3108.3(a) or (b), for administratively or judicially canceling the Lease. *See* Reply at 9-11 (citing *John J. Farrelly*, 62 I.D. 1 (1955), and *Hjalmer A. Jacobson*, 61 I.D. 116 (1953)).²⁴ We reject appellants' argument.

Cancellation, either by the Secretary of the Interior (where the leasehold does not contain a well capable of paying production) or a Federal district court (where the leasehold contains a well capable of paying production), is the appropriate remedy under section 31(a) or (b) of the MLA, when a lessee has failed to comply with any of the provisions of his lease or with applicable statutory or regulatory requirements. *See, e.g., Boesche v. Udall*, 373 U.S. 472, 478-79 (1963); *Great Western Petroleum & Ref. Co.*, 124 IBLA 16, 23 (1992). Under 43 C.F.R. § 3108.2(a), which applies if there is no well capable of production, the Secretary may cancel a lease “only after notice to the lessee in accordance with section 31(b) of the [MLA] and only if default continues for the period prescribed in that section after service of 30 days notice of failure to comply.” And under § 3108.2(b), which applies if there is a well is capable of production, “the lease may be canceled only by judicial proceedings in the manner provided by section 31(a) of the [MLA].”

In its March 21, 2012, decision, BLM held that the May 11, 2009, decision, extending the Lease for a second 2-year period “was contrary to law and issued in error.” BLM reasoned that at the end of the first 2-year extended term, the Lease “never went into its extended term due to production,” because “no well existed on the lease that was capable of oil or gas production,” and accordingly BLM held that the Lease “expired of its own terms on April 30, 2009.” BLM did not determine that the lessees had “fail[ed] to comply with any of the provisions of the law, the regulations issued thereunder, or the lease,” the standard for cancellation under section 31 of the MLA and 43 C.F.R. § 3108.3.²⁵

The Lease expired and did not require even the notice specified in 43 C.F.R. § 3107.2-3, because there was no well capable of production on the Lease. *See Jim's Water Serv., Inc.*, 114 IBLA at 6-7; Memorandum to Deputy State Director, Mineral

²⁴ A lawsuit was brought in Federal district court, *Farrelly v. McKay*, No. 3037-55, challenging the Department's ruling in *Farrelly*. We note that judgment for Farrelly was rendered on Oct. 11, 1955, but find no evidence that it has disrupted the legal principles, applicable here, which were first enunciated in *Jacobson*.

²⁵ Only in the most technical sense might it be argued that Medallion violated its lease by not conducting diligent drilling or other operations on the Lease during the first 2-year extended period. Appellants avoid this obvious trap—nowhere do they suggest that Medallion's failure to produce constitutes a violation of the Lease.

Resources, Utah State Office, from Jerry Kenczka, Assistant Field Manager, Land and Mineral Resources, Vernal Field Office, dated Mar. 7, 2012 (“Our records indicate there are no producing wells on this lease and the requirements as specified in 43 CFR 3107.2-1 have not been met. Therefore, this office recommends Lease No. UTU-74874 be terminated.”); E-mail to Harouny from Hansen, dated Feb. 21, 2012 (“After May 1st 2009, we have no record of any activity or diligence being performed on the lease. . . . To date the Atchee Federal 32-4-13-25 has not demonstrated that it has passed the test that would hold the lease.” (Emphasis added)).²⁶

BLM acknowledged in its March 2012 decision that it acted “contrary to law” and was “in error” when it granted the second 2-year extension.²⁷ Decision at unp. 1. In *Jacobson* and *Farrelly*, BLM had granted an extension of an oil and gas lease in violation of law. The Department held that the continued existence of an improperly extended lease must be recognized and thereafter canceled. See *John J. Farrelly*, 62 I.D. at 4, 5-6; *Hjalmer A. Jacobson*, 61 I.D. at 118-19. Indeed, the Department stated, in *Jacobson*, that “[t]here appears to be no substantial distinction between an improper extension of an oil and gas lease and the improper issuance of one.” 61 I.D. at 119. However, nowhere in either decision does the Department state that cancellation must be undertaken pursuant to the procedural dictates of section 31(a) or (b) of the MLA and 43 C.F.R. § 3108.3(a) or (b).

There was no reason for BLM to exercise its cancellation authority under section 31(a) or (b) of the MLA and 43 C.F.R. § 3108.3(a) or (b). We thus conclude that BLM was entitled to declare the Lease to have expired by its own terms on April 30, 2009, without being required to adhere to the procedural requirements for

²⁶ Appellants cannot point to diligent drilling or operations on the Lease at any time during the improperly granted second 2-year extended period that would change our conclusion. The status of the Well did not change between Apr. 30, 2009, and Apr. 30, 2011. Thus, we do not address how BLM would properly have responded had the Well begun producing oil or gas in paying quantities during the improperly granted extension.

²⁷ There is no question that BLM has the authority to hold a lease to have been improvidently issued when it has acted contrary to law, and to administratively cancel such a lease. See 43 C.F.R. § 3108.3(d); e.g., *Boesche v. Udall*, 373 U.S. at 479 (“[Section 31 of the MLA] leaves unaffected the Secretary’s traditional administrative authority to cancel [an oil and gas lease] on the basis of pre-lease factors”), 485 (“[T]he Secretary has the power to correct administrative errors [in issuing leases] . . . by cancellation of leases”); *Celeste C. Grynberg*, 169 IBLA 178, 183 (2006), *aff’d*, *Grynberg v. Kempthorne*, No. 1:06-cv-01878-WYD-MJW (D. Colo. July 2, 2008). This is, in effect, what BLM accomplished in the present case.

cancellation imposed by section 31(a) or (b) of the MLA and 43 C.F.R. § 3108.3(a) or (b).

F. Inactivity Does Not Constitute a De Facto Suspension

[6] In their Reply, appellants argue that the Lease should be considered to have been subject to two *de facto* suspensions of operations and production under the Lease. The first suspension, according to appellants, resulted when Atchee's parent company (Formidable, LLC) filed for bankruptcy on August 27, 2009, and ownership of the Lease was acquired by Formidable's creditor (NGP Capital Resources Co.) on September 28, 2009; the second suspension resulted from uncertainty regarding the status of the Lease that arose in mid-2011, after the end of the second 2-year extended term on April 30, 2011, when Medallion, which believed the Lease to be held by production, learned that it had been officially listed as terminated on BLM's LR2000 Website. Appellants assert that these events independently served to extend the term of the Lease for the periods of the suspensions, well beyond the April 30, 2011, expiration date of the second 2-year extended term. *See* Reply at 2-4 (citing Harouny Reply Affidavit, ¶¶ 16-30, at 3-7), 17-19.

Under section 39 of the MLA, 30 U.S.C. § 209 (2006), where operations and production under an oil and gas lease have been precluded by the Department, a lessee may be entitled to Departmental recognition of a *de facto* suspension of the lease term during the period it was precluded from operating or producing. *See, e.g., Hoyle v. Babbitt*, 129 F.3d 1377, 1380, 1383-84 (10th Cir. 1997) (citing *Copper Valley Mach. Works, Inc. v. Andrus*, 653 F.2d 595, 602-05 (D.C. Cir. 1981)); *Harvey E. Yates Co.*, 156 IBLA 100, 104, 105 (2001). The burden of demonstrating entitlement to a suspension rests with the lessee. *See, e.g., Harvey E. Yates Co.*, 156 IBLA at 105.

A *de facto* suspension will be recognized where BLM unjustifiably delays action on an APD or Sundry Notice, or otherwise acts or fails to act in an appropriate manner, preventing the lessee from undertaking operations and production on his lease. *See, e.g., Harvey E. Yates Co.*, 156 IBLA at 105; E-mail to Harouny from Hansen, dated Feb. 21, 2012 ("Unless Medallion can show that it was prevented from performing its diligence at proving the well is capable of producing in paying quantities, the Lease UTU-74874 will have expired on April 30th 2011"). In these circumstances, the Department does not formally grant a suspension, but rather recognizes that a suspension has already occurred during the period it effectively barred operations and production.

This case involves no suspension directed by the Secretary or BLM. It is undisputed that at no time did the lessees ever apply for, nor did BLM consent to or direct, a suspension of operations and/or production (other than the suspension that

lasted from October 1, 2005, to March 1, 2007), pursuant to section 17(i) of the MLA or section 39 of the MLA, and their implementing regulations, 43 C.F.R. § 3103.4-4, which are applicable to combined hydrocarbon leases. *See* 43 C.F.R. § 3141.0-8(a); *UOS Energy, LLC*, 177 IBLA 341, 349 (2009); E-mail to Harouny from Hansen, dated Feb. 21, 2012 (“If there was a bankruptcy affecting Atchee CBM LLC (Lessee) that prohibited Medallion from performing due diligence on the well, we needed to have received from Medallion a request for suspension of the lease with a copy of the court order requiring a cessation of activity on the lease”).

Appellants state that a *de facto* suspension should be recognized “in the case of Formidable’s bankruptcy.” Reply at 17. They argue that “[e]ven though [BLM] . . . did not give any direct orders preventing Medallion from accessing the lease,” we should hold that Medallion was precluded by BLM from accessing the lease, because BLM had “tacitly endorsed the orders of the bankruptcy court which prevented Medallion from pursuing operations [and production] on the lease from August 2009 to December 2010.” *Id.* at 17, 18. We find no tacit endorsement by BLM. Appellants state that “it hardly seems that [BLM] . . . would expect an operator to act in violation of the orders of a [F]ederal [bankruptcy] judge.”²⁸

The first *de facto* suspension asserted by appellants occurred after the end of the first 2-year extended term on April 30, 2009, when BLM deemed the Lease to have expired. The filing for bankruptcy by Atchee’s parent company (Formidable, LLC) took place on August 27, 2009; acquisition of ownership of the Lease by Formidable’s creditor (NGP Capital Resources Co.) occurred on September 28, 2009; and the bankruptcy proceeding concluded on December 2, 2010—all of which occurred after the Lease expired by operation of law on April 30, 2009.

Second, appellants state that, although Medallion was informed by BLM several times prior to issuance of the March 2012 decision that the Lease was in existence, “[f]rom mid-2011 to the present, the Lease status was uncertain” because “the BLM LR2000 website . . . listed [the status of the lease] as ‘terminated,’” which negatively affected operations and production under the Lease. Reply at 18. However, at the point in time (mid-2011) when appellants claim the status of the Lease became uncertain, it was no longer in existence, having expired by operation of

²⁸ We note that appellants have not identified any order of the bankruptcy court that prevented operations and production during the period of time from Aug. 27, 2009, to Dec. 2, 2010, when the Lease, as an asset of Atchee’s subsidiary, was under the cloud of Formidable’s bankruptcy proceeding and its aftermath. Nor did the bankruptcy laws or orders of the bankruptcy court affect the running of the second 2-year extended term of the Lease from Apr. 30, 2009, to Apr. 30, 2011. *See Great Western Petroleum & Ref. Co.*, 124 IBLA at 24-27.

law on April 30, 2009. Moreover, even the improperly granted second 2-year extension had expired by that point, with no showing of production or a well capable of production in paying quantities. A lease that is no longer in existence cannot be the subject of any suspension, whether one granted by BLM or one recognized by BLM as having occurred of its own accord.

Thus, at the time the *de facto* suspensions allegedly occurred, the Lease was, in BLM's view, no longer in existence, and thus could not be affected by a suspension. See *Harvey E. Yates Co.*, 156 IBLA at 105, 106; *Jones-O'Brien, Inc.*, 85 I.D. 89, 95 (1978) ("If a suspension application is not filed prior to the lease expiration, the lease ends totally and there is nothing in existence for the Department to suspend [or to recognize as having been suspended]"). Appellants would have us conclude that the bankruptcy proceeding, which did not involve BLM, gives rise to a *de facto* suspension so as to excuse them from applying for an extension. There is no suggestion in the record that BLM has compromised Medallion's ability to develop the Well.²⁹ Not only had the Lease already expired when the bankruptcy proceeding was commenced, as best we can determine, appellants raise the issue of retroactive suspension for the first time in their Reply herein.

We conclude that, absent any action or inaction by BLM precluding operations and production, the Lease was not entitled to a *de facto* suspension for either of the periods identified by appellants.

CONCLUSION

We, therefore, hold that BLM properly declared the Lease expired by operation of law at the end of its first 2-year extended term on April 30, 2009, and that the second 2-year extension was improperly granted. Appellants have not demonstrated error in BLM's determination that the Lease was not producing oil or gas in paying quantities at the end of its first 2-year extended term, and did not contain a well capable of producing oil or gas in paying quantities at that time entitling them to a 60-day notice under 43 C.F.R. § 3107.2-3. We affirm BLM's decision.

²⁹ In *Harvey E. Yates Co.*, the appellant argued that it was entitled to a *de facto* suspension of its lease on the basis that BLM had delayed final approval of an APD. Meanwhile, the lease expired for lack of production. The Board held that "[i]n the case of a BLM-ordered well shutdown or lease suspension, BLM is statutorily required to extend the term of the lease," but "[w]here, on the other hand, a lessee requests suspension based on alleged BLM delay, such a request will only be considered to justify a retroactive suspension on timely application for one." 156 IBLA at 108-09.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed and the petition for a stay is denied as moot.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge