



TEKXON ONSHORE OIL & GAS, LLC

184 IBLA 134

Decided August 27, 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

TEKXON ONSHORE OIL & GAS, LLC

IBLA 2012-245

Decided August 27, 2013

Appeal from and petition for a stay of the effect of a decision of the New Mexico State Office, Bureau of Land Management (BLM), denying its petition for Class II reinstatement of six Federal noncompetitive oil and gas leases.

Decision affirmed as modified. Petition for stay denied as moot.

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

Section 31(d)(2) of the Mineral Leasing Act, 30 U.S.C. § 188(d)(2) (2006), requires an applicant for a Class II reinstatement of a Federal oil and gas lease to submit, along with its petition for reinstatement, the required back rental accruing after the date of termination on or before the earlier of (i) 60 days after receipt of the notice of termination sent by the Secretary of the Interior by certified mail to all lessees of record or (ii) 24 months after the termination of the lease.

2. Oil and Gas Leases: Reinstatement--Oil and Gas Leases:
Termination

The statutory authority of 43 U.S.C. §§ 1161-1164 (2006), which underlies 43 C.F.R. §§ 1871.0-3 and 1871.1-1 and provides authority for equitable relief in certain circumstances, expressly applies to “suspended entries” and “locations.” These terms contemplate conveyance of title and are not usually construed to include oil and gas leases issued under the Mineral Leasing Act or other less-than-fee interests. Further, late filings do not constitute “substantial compliance” as required by 43 C.F.R. § 1871.1-1(a). The statutory provisions at 43 U.S.C. §§ 1161-1164 (2006) and

implementing regulations therefore afford no equitable relief from the automatic termination provision of 30 U.S.C. § 188(b) (2006), where Federal oil and gas leases have terminated for failure to timely pay annual rental.

APPEARANCES: Ernest L. Padilla, Esq., Santa Fe, New Mexico, for appellant; Michael C. Williams, Esq., U.S. Department of the Interior, Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Tekxon Onshore Oil & Gas, LLC (Tekxon) has appealed from and petitioned for a stay of the effect of a June 22, 2012, decision of the New Mexico State Office, Bureau of Land Management (BLM), denying its petition for Class II reinstatement of six Federal noncompetitive oil and gas leases (Leases), situated in eastern Texas, which terminated, by operation of law, for nonpayment of annual rent on or before the lease anniversary date, effective September 1, 2011.¹

As discussed below, we have determined that Tekxon failed to establish any error of fact or law in the State Office's June 2012 decision, which we affirm. Since we resolve the appeal on its merits, we deny Tekxon's petition for a stay as moot.

Background

BLM issued the Leases, effective September 1, 2003, for a primary term of 10 years and so long thereafter as oil or gas was produced in paying quantities, pursuant to section 3 of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (2006).^{2,3} The record title interests in the Leases passed by various mesne

¹ BLM serialized the Leases as TXNM-60896, TXNM-61092 through TXNM-61095, and TXNM-61115.

² The Leases encompass 24,092.43 acres of acquired lands, and are situated in several tracts within the Davey Crockett National Forest, located in Trinity County, Texas.

³ The acquired lands at issue were leased in accordance with the Mineral Leasing Act (MLA), 30 U.S.C. §§ 181-287 (2006), and its implementing regulations, regarding, *inter alia*, the requirement to pay annual rent and the consequences for failing to pay annual rent. See 30 U.S.C. §§ 352 (“[Deposits of oil and gas in acquired lands] may be leased by the Secretary [of the Interior] under the same conditions as contained in the leasing provisions of the mineral leasing laws, subject to the provisions hereof”)

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conveyances until they were transferred, in their entirety, to Tekxon, effective December 1, 2009.⁴

The Leases were all subject to the requirement to pay, in advance of each lease year, an annual rental at the rate of \$1.00 per acre or fraction thereof, or \$2.00 per acre or fraction thereof should all or part of the leased land be later determined to be within a known geological structure, pursuant to section 17(d) of the MLA, 30 U.S.C. § 226(d) (1982). In accordance with section 31(b) of that Act, 30 U.S.C. § 188(b) (2006), the “[f]ailure to pay annual rental, if due, on or before the anniversary date of this lease . . . shall automatically terminate this lease by operation of law.”

Annual rental for the ninth lease year beginning September 1, 2011, was due on or before that lease anniversary date. It is undisputed that Tekxon submitted to Minerals Management Service (MMS), the agency then responsible for collecting annual rentals on behalf of BLM, rental payment for the Leases, in the form of a September 28, 2011, cashier’s check, on September 30, 2011—29 days after the lease anniversary date.

By letter dated March 2, 2012, and attached notices of termination, the State Office notified Tekxon that the Leases, which were neither producing nor bearing a well capable of production in paying quantities, had terminated by operation of law, effective September 1, 2011, because Tekxon had failed to timely submit the annual rental, which was due on or before the lease anniversary date. BLM also informed Tekxon of its right to petition for Class II reinstatement of the Leases, pursuant to section 31(d) and (e) of the MLA, 30 U.S.C. § 188(d) and (e) (2006), and its

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and 359 (“The Secretary of the Interior is authorized to prescribe such rules and regulations as are necessary and appropriate . . . [for leasing oil and gas in acquired lands], which rules and regulations shall be the same as those prescribed under the mineral leasing laws to the extent that they are applicable”); e.g., *Larremore Petroleum P’ship*, 94 IBLA 30, 31 (1986).

⁴ The assignments to Tekxon were later corrected, effective Apr. 1, 2010, because of a slight error in the name of the assignee.

implementing regulation at 43 C.F.R. § 3108.2-3,^{5,6} and outlined the conditions Tekxon must satisfy to qualify for reinstatement.

[1] Section 31(d)(2) of the MLA, 30 U.S.C. § 188(d)(2) (2006), required Tekxon to submit, along with its Class II petition for reinstatement of its six Federal oil and gas leases, “the required back rental . . . accruing after the date of termination[] . . . on or before *the earlier of*—(i) 60 days after receipt of the notice of termination sent by the Secretary [of the Interior] by certified mail to all lessees of record; or (ii) 24 months after the termination of the lease.” (Emphasis added.)⁷ See 43 C.F.R. § 3108.2-3(b)(2); see generally *Petro Ventures, Inc.*, 172 IBLA 186, 187 n.1 (2007). The back rental was to be computed at the new rate of \$5 per acre or fraction thereof. See 30 U.S.C. § 188(e) (2006); 43 C.F.R. § 3108.2-3(b)(2).⁸

The State Office transmitted the March 2, 2012, letter by certified mail, return receipt requested, and Tekxon received it on March 5, 2012.⁹ The 60th day following

⁵ The Mar. 2, 2012, letter, also informed Tekxon that, within 15 days of receipt of the letter, it could submit proof of its payment of the annual rental on or before the lease anniversary date. On Mar. 21, 2012, Tekxon submitted proof of its untimely Sept. 30, 2011, payment.

⁶ In the attached notices, the State Office also informed Tekxon of its right to petition for Class I reinstatement of the Leases, pursuant to section 31(c) of the MLA, 30 U.S.C. § 188(c) (2006), and its implementing regulation, 43 C.F.R. § 3108.2-2. Both the statute and regulations required, *inter alia*, payment of the annual rental to be made or tendered within 20 days after the lease anniversary date. It is clear from the record that Tekxon did not make or tender the required payment within 20 days after Sept. 1, 2011. Thus, it is undisputed that Tekxon does not qualify for Class I reinstatement. See, e.g., *PRM Exploration Co.*, 90 IBLA 63, 68, 92 I.D. 617, 620 (1985).

⁷ The Class II reinstatement provisions of 30 U.S.C. § 188(d) (2000) were amended by section 371(b) of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 734, principally by changing the time for submission of a reinstatement petition, along with the required back rental, *from* the earlier of 60 days after receipt of a notice of termination or 15 months after termination *to* the earlier of 60 days after receipt of a notice of termination or 24 months after termination, in the case of leases which terminate after Aug. 8, 2005, for failure to pay annual rental timely.

⁸ Tekxon was also required to pay administrative fees totaling \$666. See 30 U.S.C. § 188(e) (2006); 43 C.F.R. § 3108.2-3(b)(2).

⁹ Where a document is sent by certified mail, return receipt requested, the date of receipt will be the date the U.S. Postal Service delivered the document to the

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receipt was May 4, 2012. As the “earlier” of 60 days after receipt of the notice of termination or 24 months after lease termination, May 4, 2012, was the deadline for payment of the required back rental, in accordance with section 31(d)(2) of the MLA and 43 C.F.R. § 3108.2-3(b)(2).

On May 4, 2012, Tekxon filed a petition for Class II reinstatement of the Leases, pursuant to section 31(d) and (e) of the MLA and 43 C.F.R. § 3108.2-3. It sought reinstatement on the basis that its late payment of the annual rental was inadvertent, arising from “excusable neglect” on the part of the party charged “with making sure the rentals were fully and timely paid.” Class II Reinstatement Request, dated Apr. 30, 2012. Tekxon did not submit the payment required along with the petition for reinstatement. Instead, on May 18, 2012, BLM received a check, in the amount of \$93,845, in payment of the required back rental and other fees necessary for reinstatement of the Leases.¹⁰ On May 21, 2012, BLM deposited the check in an account at the Bank of America, N.A., which, by letter dated May 24, 2012, returned the check, and notified BLM that there were insufficient funds in Tekxon’s account to cover the check.

In its June 22, 2012, Decision, the State Office denied Tekxon’s petition for reinstatement of the Leases, concluding that BLM was “unable to reinstate due to the check being returned for insufficient funds.” The State Office declared the Leases terminated effective September 1, 2011.

Tekxon filed a timely appeal of the Decision, requesting a stay of the effect of the decision, during the pendency of the appeal. It has, to date, filed with the Board only its notice of appeal/request for stay (NA/Request), and thus has never filed with

⁹ (...continued)

addressee’s last record address, as generally established by the date on the return receipt card. See 43 C.F.R. § 1810.2(b); *J-O’B Operating Co.*, 97 IBLA 89, 91 (1987); *Lloyd M. Baldwin*, 75 IBLA 251, 252, 253 (1983). Here, a representative of Tekxon signed the return receipt card for the March 2 letter, but the date of delivery was not identified on the card. BLM received the return receipt card on Mar. 9, 2012. Using the U.S. Postal Service’s “Track & Confirm” system, we have determined that the date of delivery was Mar. 5, 2012, which, for the purposes of this decision, is the date of Tekxon’s receipt of the March 2 letter. See <https://tools.usps.com/go/TrackConfirmAction.action> (last visited Aug. 2, 2013).

¹⁰ On behalf of Tekxon, the law firm now representing Tekxon before the Board submitted the check, which was drawn on the law firm’s account.

the Board a separate statement of reasons (SOR) for its appeal. Nonetheless, we have obtained a copy of the SOR filed with the Solicitor.¹¹

BLM filed an answer to the SOR with the Board, arguing that the State Office properly denied Tekxon's petition for reinstatement of the Leases. It did not oppose the stay request.

Tekxon initially admits that "it is true that Appellant[] did not timely reinstate the affected oil and gas leases," but then argues that BLM should not have denied its petition for reinstatement because "*BLM's deadline* [for payment of the required back rental] was nonetheless discretionary, and *could have been extended* to the time that Appellant was able to tender certified funds," noting that the failure to pay timely was attributable to "temporary liquidity problems caused by failure of timely corporate action in Australia[.]" NA/Request at 2 (emphasis added).

In its SOR, Tekxon asserts that, having learned for the first time upon receipt of BLM's March 2, 2012, letter, and attached notices of termination, that its September 30, 2011, annual rental payment was untimely, and that the Leases terminated by operation of law, it inquired of BLM regarding reinstatement of the Leases. *See* SOR at 2. It states that it filed the petition for reinstatement on May 4, 2012, and later attempted to pay the required back rental on May 18, 2012, even though it was after the 60-day deadline, after receiving assurance from "BLM[']s affirmative[] represent[ation] to Appellant in writing [on May 18] that the leases could still be reinstated[.]" *Id.* Tekxon states that, although the May 18 payment failed because of "Appellant[']s problems with transfer of funds from Australia, causing temporary liquidity difficulties," in view of BLM's determination to effectively extend the 60-day deadline, it asks the Board to fashion "an equitable, and indeed, a legal resolution . . . for Class II reinstatement," accept payment of the required back rental, and reinstate the Leases. *Id.* at 2, 3.

Tekxon asserts that, by allowing Tekxon to pay the required back rental by May 18, 2012, BLM effectively extended the 60-day deadline, which it could do, so long as it did not go beyond 24 months after lease termination: "[T]he BLM's

¹¹ An appellant is required by 43 C.F.R. § 4.412(a) to file an SOR with the Board "no later than 30 days after the notice of appeal was filed," where the notice did not contain an SOR. Further, failure to file an SOR timely subjects the appeal to summary dismissal. *See* 43 C.F.R. §§ 4.402 and 4.412(c). We will not, however, exercise our discretionary authority to dismiss the present appeal since we think that the NA/Request served as an adequate SOR, and, in any event, BLM filed an answer to the SOR, eliminating any concern that BLM has been prejudiced by a late filing of the SOR with the Board. *See, e.g., Red Thunder, Inc.*, 117 IBLA 167, 172-73, 97 I.D. 263, 266 (1990) (citing *Tagala v. Gorsuch*, 411 F.2d 589 (9th Cir. 1969)).

conduct allows Appellant to reinstate under the 24-month period provided by [30 U.S.C. § 188](d)(2)(B)(ii) [(2006)].” SOR at 4. According to this argument, reinstatement of appellant’s leases would not violate subsection (d)(2)(B)(ii), because an alternate time period under (d)(2)(B)(ii) would govern the reinstatement.

Tekxon also claims that it is entitled to reinstatement on two equitable bases. Tekxon argues that, even where “full compliance with law [is] not effected within the period authorized by law,” the Board has authority under 43 C.F.R. § 1871.1-1 to “shape an equitable outcome for all parties involved.” SOR at 5. Second, Tekxon asserts that BLM is estopped from denying its petition to reinstate the Leases since Tekxon detrimentally relied on BLM’s affirmative representation that it would accept payment of the required back rental after the 60-day deadline, and now that Tekxon has obtained the funds necessary to resubmit the payment, it should be allowed to do so. *See id.* at 4-5.

Discussion

The Petition for Class II Reinstatement is Properly Denied

As indicated, the Leases terminated, by operation of law, on September 1, 2011, upon the failure to pay the annual rental due on or before that lease anniversary date, pursuant to section 31(d) of the MLA, 30 U.S.C. § 188(d) (2006), which requires submission, along with a Class II petition for reinstatement, of the required back rental “on or before the earlier of– (i) 60 days after the receipt of the notice of termination sent by the Secretary [of the Interior] by certified mail to all lessees of record; or (ii) 24 months after the termination of the lease.” *See* 30 U.S.C. § 188(e) (2006); 43 C.F.R. § 3108.2-3(b)(2). Tekxon admits that it failed to pay the back rental and other fees on May 4, 2012, which was the earlier of 60 days after receipt of the notices of lease termination on March 5, 2012, or 24 months after lease termination on September 1, 2011. NA/Request at 2. It contends that the May 4, 2012, deadline was “discretionary,” and that BLM should have exercised its authority to “extend[.]” the deadline not only to May 18, 2012, but “to the time that Appellant was able to tender certified funds[.]” *Id.*

Despite Tekxon’s wishes, nothing in section 31(d)(2) of the MLA or 43 C.F.R. § 3108.2-3(b)(2) authorizes BLM to exercise discretionary authority to extend the deadline for payment of the required back rental. To the contrary, the statute explicitly provides that “[n]o lease shall be reinstated . . . unless” the lessee files the petition for reinstatement together with the required back rental on or before the earlier of 60 days after receipt of a notice of lease termination or 24 months after the lease termination. (Emphasis added.) 30 U.S.C. § 188(d)(2) (2006); *see* 43 C.F.R. § 3108.2-3(b)(2). While the payment need not actually accompany the petition, it

clearly must be made by the statutory/regulatory deadline before BLM can decide whether to grant the petition, and reinstate the applicable lease. *See, e.g., William F. Corkran*, 114 IBLA 76, 80 (“Although appellant sought to cure the deficiency [in the payment of required back rental,] . . . he did not do so within the statutory period allowed for the submission of ‘a petition for reinstatement together with the required back rental[.]’”), 81 (1990).

BLM’s June 2012 Decision did not err in denying Tekxon’s petition for Class II reinstatement of the Leases. However, denial is appropriate not because the check, received on May 18, 2012, was returned as uncollectible, but because Tekxon failed to remit proper payment *on or before May 4, 2012, the 60-day deadline established by statute and regulation for reinstatement of the Leases*. We hereby modify the Decision rationale accordingly.¹²

We turn next to Tekxon’s argument that the Board should exercise equitable authority provided by 43 C.F.R. § 1871.1-1 to reinstate the Leases.

The Board has no Equitable Authority under 43 C.F.R. § 1871.1-1 to Reinstate the Leases

The regulations at 43 C.F.R. Part 1870, entitled “Adjudication Principles and Procedures,” comprise two rules. The first, 43 C.F.R. § 1871.0-3, points to the statute at 43 U.S.C. §§ 1161-1163 (2006), which authorizes the Secretary to decide, upon principles of equity and justice, and in accordance with regulations to be promulgated by the Secretary, whether to issue “patents” in “all cases of suspended entries of public lands and of suspended preemption land claims” (43 U.S.C. § 1161); provides that every such adjudication shall be approved by the Secretary and operate only to divest the United States of title to the affected land, without prejudicing the rights of conflicting claimants (43 U.S.C. § 1162); and provides that, where the affected land has already been patented, the Secretary may cancel the patent, and issue a new one to the entryman or his heirs or assigns (43 U.S.C. § 1163).

43 U.S.C. § 1164 (2006) defines the extent of the three previous statutory provisions, stating that

[s]ections 1161 to 1163 . . . shall be applicable to *all [subsequent] cases of suspended entries and locations*, . . . embracing as well locations under bounty-land warrants as ordinary entries or sales, including homestead

¹² We note that, even if Tekxon had submitted a check for the required payment by the May 4 deadline, if it were dishonored for insufficient funds, it would not constitute payment required under the statute, and its reinstatement petition would have properly failed. *See, e.g., John F. Clifton*, 82 IBLA 126, 128 (1984).

entries and preemption locations or cases; where the law has been substantially complied with, and the error or informality arose, from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or preemptor are prejudiced, or where there is no adverse claim. [Emphasis added.]

The second regulation in Part 1870, 43 C.F.R. § 1871.1-1, implements 43 U.S.C. § 1164 (2006). It specifically identifies “[t]he cases subject to equitable adjudication,” investing such adjudication authority in “the Director, Bureau of Land Management[.]” 43 C.F.R. § 1871.1-1. Such cases are said to encompass “[a]ll classes of entries in connection with which the law has been substantially complied with and legal notice given,” but where the entryman is not entitled to a patent of the entry because of some deficiency in compliance with the law. *Id.* (emphasis added). This includes cases where “full compliance with [the] law [has] not [been] effected within the period authorized by law[.]” *Id.* The regulation also states that such cases must have “no lawful adverse claim.” *Id.*

[2] The statutory authority of 43 U.S.C. §§ 1161-1164 (2006), which underlies 43 C.F.R. §§ 1871.0-3 and 1871.1-1, and provides authority for equitable relief in certain circumstances, expressly applies to “suspended entries” and “locations.” These terms contemplate conveyance of title and are not usually construed to include leases issued under the MLA. *See Udall v. Tallman*, 380 U.S. 1, 19 (1965); *Hawley v. Diller*, 178 U.S. 476, 493 (1900) (“The purpose of th[e] legislation is, where the law has been substantially complied with, to authorize the confirmation of entries which otherwise the land officers would be compelled to reject.”); *James C. Forsling*, 56 I.D. 281, 285 (1938) (“[P]etitioner’s case, involving as it does neither an entry, *ready except for a curable irregularity to pass to patent*, nor a preemption claim . . . does not fall within the purview of the controlling act,” emphasis added). It does not concern oil and gas leases or other less-than-fee interests. *See Geothermal Res. Int’l, Inc.*, 17 IBLA 231, 233 (1974) (“Appellant seeks to have this Board apply equitable adjudication under 43 CFR 1871.1-1. That regulation, however, is limited in its ambit to ‘entries[.]’”); Sol. Op., “Oil Prospecting Permits in Power Site Reserves,” 48 L.D. 459, 462-63 (1921).

Further, we have held that late filings do not constitute “substantial compliance” as required by 43 C.F.R. § 1871.1-1(a). *Goldie James*, 143 IBLA 289, 293-94 (1998); *Basic Rock & Sand, Inc. (On Reconsideration)*, 110 IBLA 1, 8 (1989) (Burski, A.J., concurring), citing *United States v. Locke*, 471 U.S. 84 (1985)—“A filing deadline cannot be complied with, substantially or otherwise, by filing late—even by one day.” The statutory provisions at 43 U.S.C. §§ 1161-1164 (2006) and implementing regulations therefore afford no equitable relief from the automatic termination provision of 30 U.S.C. § 188(b) (2006), nor expand the reinstatement

authority, where Federal oil and gas leases have terminated for failure to timely pay annual rental.

We therefore must decline appellant's invitation to exercise equitable adjudication authority under 43 C.F.R. §§ 1871.0-3 and 1871.1-1. There is no lawful, equitable basis for us to hold that, although Tekxon failed to submit payment of the required back rental on or before the deadline established by 30 U.S.C. § 188(d)(2) (2006) and 43 C.F.R. § 3108.2-3(b)(2), and indeed has never submitted payment, it nevertheless substantially complied with the law, and is entitled to reinstatement of the Leases.

BLM is not Estopped from Denying the Petition

Finally, we turn to the question of whether BLM should be estopped from denying the petition for reinstatement of the Leases. Tekxon asserts that it detrimentally relied on an "affirmative[] represent[ation] . . . in writing" by BLM "on May 18, 2012," that it could submit the required back rental after the 60-day deadline. SOR at 2.

Estoppel is generally considered an extraordinary remedy when applied against the United States, especially when what is at issue is the proper use and management of Federal lands and resources. *See, e.g., Jack C. Scales*, 182 IBLA 174, 180 (2012). However, this is not to say that estoppel may never be applied, simply that the hurdles to doing so are considerable. The party seeking estoppel must first 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)). However even then, 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. Further, estoppel will not lie where the crucial misstatement by the Federal agency, relied upon by the party seeking estoppel, no matter how definite and assured, was *not in writing*. *David E. Best*, 140 IBLA 234, 236 (1997) (citing *Heckler v. Comty. Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 65 (1984)).

Here it important to note that, while the Board has observed that U.S. Supreme Court decisions have declined to hold that estoppel may not in any circumstances run against the Government (*Pennzoil Co.*, 99 IBLA 245, 253 (1987) *aff'd*, *Pennzoil Co. v. Hodel*, No. 88-0026-B (D. Wyo. Jan. 13, 1989), citing *Heckler v. Comty. Health Serv. of Crawford County, Inc.*, 467 U.S. at 60-61; *Schweiker v. Hansen*, 450 U.S. 785, 788, *reh'g denied*, 451 U.S. 1032 (1981)), these same cases have refused to find that the traditional elements of estoppel have been met by the party asserting its protection, thus refuting any impression of hospitality toward claims of estoppel against the Government. Although a majority of the Court's members may have stated that the Government may be estopped only upon a showing of "affirmative misconduct," among other things, the Court has not actually found affirmative misconduct, even where the circumstances for making such a finding were more compelling than those presented in this case. In *Office of Personnel Management v. Richmond*, 496 U.S. 414, 419-24 (1990), the Court reviewed its previous decisions involving claims of estoppel against the government dating back to 1813, noting that "dicta in our more recent cases have suggested the possibility that there might be some situation in which estoppel against the Government could be appropriate," *id.* at 421, and that such "language in our decisions has spawned numerous claims for equitable estoppel in the lower courts." *Id.* at 422. "Courts of Appeals have taken our statements as an invitation to search for an appropriate case in which to apply estoppel against the Government, yet we have reversed every finding of estoppel that we have reviewed." *Id.* (emphasis added.)

Finally, it is firmly established that, while estoppel may lie where failing to do so deprives the party of a right he would have legally acquired had he not relied on the Federal agency, *it will not lie where to do so would grant the party a right not authorized by law*. See 43 C.F.R. § 1810.3(b) and (c);¹³ *Heckler v. Comty. Health Serv. of Crawford County, Inc.*, 467 U.S. at 60-63; *Brandt v. Hickel*, 427 F.2d 53, 57 (9th Cir. 1970); *Terra Res., Inc.*, 107 IBLA at 13.

Here, Tekxon is not able to establish the prerequisites for asserting an estoppel,¹⁴ but even if it had, estoppel would not lie because it would afford Tekxon a

¹³ The regulation at 43 C.F.R. § 1810.3 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 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.)

¹⁴ The SOR at 2 claims that

(continued...)

right to which it is not entitled under section 31(d) and (e) of the MLA and 43 C.F.R. § 3108.2-3, *i.e.*, reinstatement of leases where it has plainly failed to submit payment of the required back rental by the May 4, 2012, deadline, and thus failed to comply with the applicable statute and regulation. *See Martin Faley*, 116 IBLA at 402. Moreover, the argument is illogical on its face. No reasonable argument can be constructed to support the theory that Tekxon was induced to defer timely payment on or before May 4, 2012, until a later, untimely date by relying on purported assurance received from BLM on May 11, 2012, a week *after* the statutory deadline for making payment had passed.

We, therefore, hold that the State Office, in its June 2012 decision, properly denied Tekxon's petition for Class II reinstatement of Federal noncompetitive oil and gas leases TXNM-60896, TXNM-61092 through TXNM-61095, and TXNM-61115, because Tekxon failed to pay the required back rental on or before the statutory/regulatory deadline, as required by 30 U.S.C. § 188(d)(2) (2006), and

¹⁴ (...continued)

on May 18, 2012, . . . BLM affirmatively represented to Appellant in writing that the leases could still be reinstated under the Class II process if the necessary payment for past-due rental was received. In a hurried attempt to reinstate the leases and comply with the BLM's offer, Appellant then hand-delivered a check in the amount of \$93,845.00 to pay the rentals and accrued fees.

The record includes no evidence of affirmative misrepresentation, *in writing*, regarding the applicable deadline for submission of payment of the required back rental. It includes only a BLM constructed Time Line reporting a May 11, 2012, phone conversation, indicating that BLM orally informed Tekxon, by phone, that the payment for reinstatement could be submitted by May 18, 2012. Time Line (Tekxon "called again [on May 11, 2012,] and I gave them until Friday May 18, 2012[,] to have funds here for reinstatement"). This representation of an oral statement does not support a claim of estoppel. *See Martin Faley*, 116 IBLA 398, 402 (1990).

In addition, Tekxon cannot be deemed to be and does not claim to be ignorant of the law applicable to these facts, *i.e.*, the correct deadline for submission of payment of the required back rental, since it was established by section 31(d)(2) of the MLA and 43 C.F.R. § 3108.2-3(b)(2), knowledge of which is imputed to all members of the public. *See* SOR at 3 ("Appellant is fully informed as to the statutory requirements governing reinstatement of Federal oil and gas leases"); *Western Energy Res. Inc.*, 172 IBLA 395, 402 (2007), *aff'd*, *Western Energy Res. Inc. v. Kempthorne*, No. 1:07-cv-02684-RPM (D. Colo. Jan. 16, 2009) (citing *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947)).

43 C.F.R. § 3108.2-3(b)(2).¹⁵ See *Western Energy Resources, Inc.*, 172 IBLA at 405; *Forcenergy Inc.*, 151 IBLA 3, 7-8 (1999); *William F. Corkran*, 114 IBLA at 80 (“Failure to submit the back rentals at the increased rate properly results in denial of a petition for a class II reinstatement”), and cases cited.

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 as modified, and the petition for a stay is denied as moot.

_____/s/_____
Christina S. Kalavritinos
Administrative Judge

I concur:

_____/s/_____
T. Britt Price
Administrative Judge

¹⁵ Tekxon’s failure to timely pay, along with its petition, the required back rental, at the increased rate, on the earlier of 60 days following receipt of the lease termination notices obviates the need to address the question of whether the original failure to pay the annual rental on or before the Sept. 1, 2011, lease anniversary date was inadvertent, under the Class II reinstatement requirements of 30 U.S.C. § 188(d) and (e) (2006), and 43 C.F.R. § 3108.2-3. Nonetheless, we note that Tekxon states, on appeal, that it was unable to pay the required back rental on or before May 4, 2012, owing to “temporary liquidity” problems. NA/Request at 2; SOR at 2. Such inability to pay would not have rendered the failure to pay inadvertent. See *Dena F. Collins*, 86 IBLA 32, 36 (1985).