

INTERIOR BOARD OF LAND APPEALS

Future Energy Development, Inc., and Geotermica, Ltd.

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FUTURE ENERGY DEVELOPMENT, INC.
GEOTERMICA, LTD.

IBLA 2001-290

Decided October 14, 2003

Appeals from decisions of the California State Office, Bureau of Land Management, notifying lessees that their geothermal lease had terminated automatically by operation of law and denying a petition for reinstatement. CACA 17700.

Affirmed.

1. Geothermal Leases: Reinstatement--Geothermal Leases: Rentals--Geothermal Leases: Termination

When lessees failed to timely pay annual rental due on a geothermal lease on which there was no well capable of producing geothermal resources in commercial quantities, the lease terminated by operation of law. Termination is not conditioned on BLM notice of rental obligations.

2. Geothermal Leases: Reinstatement

A lessee seeking reinstatement of a geothermal lease must pay back rental due with the petition for reinstatement, and must also show that any failure to pay timely was justified or not based upon a lack of reasonable diligence. Lessees cannot meet this test by arguing that economic conditions for lease development were poor, where they made no effort to apply under the Geothermal Steam Act for relief from lease conditions.

APPEARANCES: Francis C. J. Pizulli, President, Geotermica, Ltd., Santa Monica, California, and James P. Miner, President, Future Energy Development, Inc., Santa Monica, California, for appellants.

OPINION OF ADMINISTRATIVE JUDGE HEMMER

Future Energy Development, Inc., and Geotermica, Ltd., appeal from an April 23, 2001, decision of the Chief, Branch of Energy, Mineral Science, and Adjudication, California State Office, Bureau of Land Management (BLM), denying appellant's petition for reinstatement of geothermal lease CACA 17700. By decision dated January 24, 2001, BLM informed appellants that the lease had terminated by operation of law effective October 1, 1997, because the rental payment was not timely received by the Minerals Management Service (MMS) on that date or during ensuing rental years. The April 23, 2001, decision denied the subsequent petition for reinstatement on grounds that the parties had not shown that the failure to pay rental was justified.

BLM issued geothermal lease CACA 17700 for 2,579.95 acres within the Coso Known Geologic Resource Area, in portions of secs. 29-32, T. 21 S., R. 38 E., Mount Diablo Meridian, Inyo County, California, to Grant S. Lyddon, for a primary term of 10 years. (Lease CACA 17700, effective date Oct. 1, 1985, §§ 2 and 3.) Lyddon transferred by assignment a 100 percent interest to Future Energy effective October 1, 1991. (Nov. 22, 1991, Assignment from Lyddon to Future Energy.) Future Energy conveyed a 40 percent interest in the lease to Geotermica effective January 1, 1992. (Dec. 17, 1991, Assignment from Future Energy to Geotermica.) In addition, the record shows that the lessees issued several overriding royalty interests to other parties.

On February 23, 1995, BLM issued an order to appellants entitled "Diligent Exploration Expenditure Required." BLM informed appellants that CACA 17700 expired on September 30, 1995, and that the lessees were required either to submit a diligent exploration expenditure (DEE) report indicating efforts to explore for geothermal resources or to pay additional rental in the amount of \$7,740 "on or before the end of the tenth lease year." (Feb. 23, 1995, BLM order (emphasis BLM's), citing 43 CFR 3203.5.)

On July 7, 1995, James P. Miner, President of Future Energy submitted a letter to BLM stating that on a "work trip" to three lease sites, including CACA 17700, he discovered "limited access signs posted on published roads leading to potential drill sites." (July 7, 1995, letter from Miner to BLM.) He stated that he was attempting to locate drill sites for a proposed exploration program and needed vehicular access, prior to the "DEE deadline of October 1, 1995." Id.

On August 23, 1995, Miner sent a letter to BLM requesting an extension of the lease term by an additional 5 years effective October 1, 1995. Miner also stated that he expected to receive some DEE credit from work relative to CACA 17700, and on nearby lease CACA 17701. Miner explained efforts the lessees had undertaken to

consider exploration of the lease and stated that they had not secured a power contract but that current economic factors were favorable to development of this property in the near future. (Aug. 23, 1995, letter from Miner to BLM at 2.)

On October 1, 1995, when the 10-year lease term would have caused lease CACA 17700 to expire, Miner stopped payment on the \$7,740 check for the rental payment he was obligated to make for the lease. See Oct. 7, 1995, letter from Miner to BLM (Miner cancelled the check due to “confusion” over the lessees’ obligations; see also checks and accounting statements in record). By letter dated January 8, 1996, BLM provided until February 1, 1996, for the lessees to complete payment of the rental. Miner made the payment on January 31, 1996. (Feb. 2, 1996, letter from BLM to Miner; Jan. 31, 1996, Receipt and Accounting Advice.)

By that February 2, 1996, letter, BLM advised Miner that it would process the lessees’ request for a lease extension. BLM identified information it needed to undertake the process under 43 CFR 3203.1-4(c). The letter asked the lessees

to provide this office, in writing, with your decision on whether you plan to conduct annual “significant expenditures” (analogous to [DEE]) of \$15.00/acre or make annual “payments in lieu of commercial production” (analogous to additional rental) of \$3.00/acre during the 5 year extension. The decision is important since it will apply during the entire 5 year extension, as required under 43 CFR 3203.1-4(c)(2)(iii). In other words, if your decision is to conduct “significant expenditure,” you will be required to expend at least \$15.00/acre on exploration on the lease each year and will not be able to change to “payments in lieu of commercial production” during the 5 year extension. * * *

Your decision will determine if other requirements will need to be met before the extension will be granted. If you decide to conduct significant expenditures, then you should be prepared to submit a report documenting your expenditures to this office within 60 days following the anniversary of the lease (October 1, 1996). If you decide to make “payments in lieu of commercial production,” you will be required to submit your first annual payment of \$7,740.00 along with your decision. Subsequent “payments in lieu of commercial production” for the 2nd through the 5th year of the extension will need to be submitted to MMS at the same time you submit your lease rental.

(Feb. 2, 1996, letter from BLM to Miner at 1.)

By letter dated May 8, 1996, BLM advised both lessees that it had not received any response to its request and that if none was forthcoming the lease would be

terminated. (May 8, 1996, letter from BLM to Future Energy and Geotermica.) On June 10, 1996, both companies responded and stated their intention to “make annual payments in lieu of commercial production.” (June 10, 1996, letter from lessees to BLM.)

On October 17, 1996, BLM issued a decision granting the 5-year extension for lease CACA 17700. BLM stated:

Since the lease has been extended and Future Energy has elected to make in lieu payments, the lease is hereby modified under the provisions of 43 CFR 3203.1-4(c)(2)(i) to require in lieu payments.

The future in lieu payments in the amount of \$7,740.00 (2,580.00 acres X \$3.00 = \$7,740.00) must be paid *on or before* the lease anniversary date (October 1) of each lease year to [MMS]. * * *

The computer billing equipment that MMS uses does not bill for in lieu payments. Therefore, the lessee must make the payments without the benefit of notification. * * *

In addition, the lessees will continue to pay the annual lease rental of \$5,160.00 to MMS on or before the lease anniversary date of each year. Failure to pay a lease rental timely will automatically terminate the lease by operation of law.

(Oct. 17, 1996, BLM decision (emphasis in original).)

The record indicates that the lessees had further problems paying their lease obligations. A letter to the file from a BLM employee dated December 6, 1996, states:

On October 3, 1996: This office received \$5,150.00 [sic] (check No. 1842) from Lucy E. Csimas. The money was to be applied as rental for the 11th lease year (Oct. 1, 1995 - Sept. 30, 1996). However, this check was returned due to non-sufficient funds. On October 31, 1996, I notified James P. Miner of Future Energy * * * that the check had been returned and allowed 2 weeks from Oct. 3, 1996, for the delinquent rental payment (11th year) [to] be filed in this office. Mr. Miner assured me that the payment would in fact be received within the two-week period. I also informed Mr. Miner that the 12th lease year (Oct. 1, 1996 - [Sept. 30,] 1997) must be submitted to the MMS timely or the lease would be terminated by law. He assured me that the payment would be sent ASAP.

On Dec. 6, 1996: I called Mr. Miner and informed him that we (BLM State Office) have not received the \$5,150 [sic] rental payment for the 11th year *and* that MMS has not received the 12th year rental payment as of this date.

Via a conference call * * * Mr. Miner was given until the end of business Dec. 13, 1996, in which to ensure that both the 11th (Oct. 1995) *and* 12th (Oct. 1996) lease year rental payments were filed in this office or the lease would be terminated.

I also informed Mr. Miner, that in addition to the annual rental identified above, that the 12th year [in-lieu payment] in the amount of \$7,740 which was due on or before the anniversary date (Oct. 1, 1996) must also be filed in this office along with the annual rental payments.

Therefore, in order to meet the lease requirements in accordance with the regulation, the total amount due in this office on or before the close of business Dec. 13, 1996, is **\$18,060**.

(Dec. 6, 1996, Note to File, CACA 17700 (emphases in original).) It appears from the record that lease payments were received on December 16, 1996, and applied to the lease on January 14, 1996. (Apr. 18, 1997, memorandum from MMS to BLM.) No subsequent payment information appears in the record.

On January 24, 2001, BLM issued a decision entitled “Geothermal Lease Terminated, Right to Petition for Reinstatement.” In the decision, BLM stated that full rental payments of \$5,160 due on October 1 for each year from 1997 through 1999, had not been paid on the lease and that it terminated by operation of law effective October 1, 1997. BLM also advised the lessees of the right to petition for reinstatement, under 43 CFR 3213.17.

On February 27, 2001, the lessees submitted a Petition for Reinstatement in which they purported to “appeal the [BLM] decision to terminate lease CACA 17700.” With respect to the termination, they argued that “they made diligent exploration and lease payments to MMS.” They complained, however, that after October of 1997, “we received no notices of lease payments due.” (Petition at 1.) The lessees went on to recite the fact that they had once entered the property but that closure signs allegedly prevented their entry to the land. *Id.* at 2. They claimed that after 1991 “there were no power contracts available that would allow the economic development of a geothermal resource” and that the Secretary has the “mandate and authorization to roll back lease payments during periods of economic hardship.” *Id.*

The lessees also asked for reinstatement. They acknowledged that the Geothermal Steam Act permits the Secretary to reinstate a lease where the failure to pay rental is “justifiable or not due to a lack of reasonable diligence.” *Id.*, citing 30 U.S.C. § 1004 (2000). Referring apparently to the payment problems which occurred with respect to the payments due in October 1996, the lessees argued that the “check was sent to BLM unsigned.” *Id.* Nonetheless they asserted that they met the test of the statute for reinstatement.

BLM did not respond to the appeal of the termination decision or forward it to the Board. Rather, BLM treated the petition as one only for reinstatement, and denied it in a decision dated April 23, 2001. BLM stated that the lease had terminated “by operation of law because the rental payment for the lease was not received by [MMS] on or before the lease anniversary date.” It proceeded to discuss and reject appellants’ various arguments.

Appellants timely submitted a notice of appeal of the April 23, 2001, decision. They argue in a Statement of Reasons (SOR) that, as they documented in their July 1995, letter to BLM, the blocking of access to the leased property constituted a material breach which excused further performance by the Lessees. (SOR at 2.) They also argue that their lack of ability to obtain power contracts because of the recent energy crisis in California authorized the Secretary to suspend lease operations and waive lease rentals. *Id.* In a Supplemental Statement of Reasons (SSOR), appellants assert that the denial of their casual use of the lease, by virtue of the signs documented in 1995, constituted a de facto suspension of the lease term, and also effectively suspended the rental obligation, citing regulatory provisions and precedent defining casual use. (SSOR at 3.)

[1] To the extent appellants challenge the termination decision, their reasons appear in their Petition for Reinstatement and the SSOR. They argue in the Petition that their failure timely to pay rental was premised on BLM’s failure to send them notice of the payment obligations, and that this and the poor economic climate permitted a “roll back” in rental payment obligations. They also argue that the allegations of sign-posting provided in Miner’s 1995 letter justify a suspension in rental payment obligations.

Appellants misunderstand the nature of their lease obligations and rights under CACA 17700. Under the Geothermal Steam Act, lessees shall make:

payment in advance of an annual rental of not less than \$1 per acre or fraction thereof for each year of the lease. If there is no well on the leased lands capable of producing geothermal resources in commercial quantities, the failure to pay rental on or before the anniversary date shall terminate the lease by operation of law * * *.

30 U.S.C. § 1004(c) (2000).

BLM regulations implement the statutory provision:

How can my lease automatically terminate?

If you do not pay the rent on or before the anniversary date, your lease automatically terminates by operation of law.

43 CFR 3213.14. See George M. Wilkinson, 130 IBLA 79, 81 (1994).

A lessee, by law, must pay rentals and failure to do so subjects the lease automatically to statutory lease termination. Appellants do not and did not argue that they paid the rentals in 1997, 1998, or 1999, or tried to. Their leases terminated automatically and BLM's January 24, 2001, decision effectuating that statutory process was correct.

To the extent appellants suggest they were freed from the obligation by a lack of BLM notice of the payment obligation, this assertion is unfounded in law or fact. Nothing in the law or BLM regulations plausibly may be construed to premise rental payment obligations on BLM notice or action. The notice appears in the plain terms of the statute, the regulation, and the lease itself. Further, the lessees were bound to follow the statute and regulations by section 3 of the lease. As a factual matter, the lease extension decision, which the lessees requested, advised them unequivocally of their obligations to pay rental and in lieu payments without benefit of notice. Appellants have no reasonable argument that the statutory termination process occurs only after BLM notice. As we have noted, other than under the express terms of 30 U.S.C. § 1004 (2000), "there is nothing in the statute or implementing regulations that permits BLM to extend the time for payment of rental after the anniversary date so as to avoid lease termination." George M. Wilkinson, 130 IBLA at 81.

To the extent appellants argue that economic conditions or BLM signs evident on a field visit in 1995 somehow constituted a suspension or "roll back" of their rental obligations or a suspension of the lease itself, they are mistaken. The Geothermal Steam Act does allow the Secretary to suspend the rental payment obligation for the duration of a lease suspension. 30 U.S.C. § 1010 (2000). However, there was no lease suspension in effect here, which would be a prerequisite for a BLM finding that the rental term did not apply. 43 CFR 3212.13(b). While appellants argue that there was a de facto lease suspension in effect, lessees cannot argue de facto suspensions to justify their failure to comply with lease terms. Harvey E. Yates Co., 156 IBLA 100, 108-09 (2001). Likewise, the fact that signs were along a road on a site visit in 1995 cannot constitute a de facto suspension, when the

lessees specifically state they had no intention of developing the lease because economic conditions did not permit it. Moreover, in obtaining a lease extension appellants chose not to conduct annual “significant expenditures” in furtherance of exploration or development and instead chose to make payments in lieu of commercial production. They are in no position to argue, in those circumstances, that BLM signs hindered them in any way, let alone in paying annual rental obligations.

The Geothermal Steam Act permits the Secretary to waive rental payments “in the interests of conservation and to encourage the greatest ultimate recovery of geothermal resources, if he determines that this is necessary to promote development or that the lease cannot be successfully operated under the lease terms.” 30 U.S.C. § 1012 (2000). BLM regulations require a lessee to request a waiver and set forth the reasons for the request, consistent with the stated authorization provided the Secretary in the statute. 43 CFR 3212.15. Appellants do not demonstrate that they requested a waiver or could have met these terms.

Finally, appellants appear to believe that the lease termination was based upon the problems accompanying their efforts to make payment in 1996. If so, this is a misunderstanding. The decision identifies the lessees’ failure to make annual rental payments in 1997, 1998, and 1999 as the cause of the automatic termination, as required by 30 U.S.C. § 1004 (2000). The serial register page for the lease makes clear that the rentals were not paid for these years. Failure to pay on October 1st in any one of these years would compel statutory termination. On this basis we affirm BLM’s lease termination decision.

[2] The next issue appealed is BLM’s refusal to grant lease reinstatement. The statute states:

where any lease has been terminated automatically by operation of law under this section for failure to pay rental timely and it is shown to the satisfaction of the Secretary of the Interior that the failure to pay timely the lease rental was justifiable or not due to a lack of reasonable diligence, he in his judgment may reinstate the lease if--

(1) a petition for reinstatement, together with the required rental, is filed with the Secretary of the Interior; and

(2) no valid lease has been issued affecting any of the lands in the terminated lease prior to the filing of the petition for reinstatement * * *.

30 U.S.C. § 1004(c) (2000). We need consider this issue no further because appellants made no effort to comply with the terms of this statutory provision. They were obligated by law to submit with their petition full payment of the unpaid rental. In George M. Wilkinson, 130 IBLA at 82, we held:

There is no evidence that a petition for reinstatement accompanied by back rental was ever filed with BLM in this case, but on appeal Wilkinson asks the Board of Land Appeals to find that his lease was improperly cancelled and to reinstate it * * *. This cannot be accepted as a proper petition for reinstatement since, regardless whether it was timely presented to BLM, it offers no evidence to show qualification for reinstatement, nor was it accompanied by payment of rental owed. The petition is therefore denied. See Caroline L. Hunt, 43 IBLA 314, 316 n.3 (1979).

Appellants have made no effort to meet the statutory requirement for reinstatement and this failure defeats their petition.

Even if we were to ignore this statutory provision, we could not find on this record that appellants have demonstrated that their failure to pay rental for 3 consecutive years was justified under the terms of the statute. The Board has held that “failure to make timely payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected its actions in paying the rental fee.” Zonal Corp., 145 IBLA 227, 229 (1998).^{1/} Appellants make no effort to conform to this test in explaining their failure to pay rentals for three years. To the extent that appellants mean to rely on economic conditions preventing them from obtaining a power contract as circumstances outside their control, this reliance is misplaced. As noted above, the Geothermal Steam Act contains various statutory provisions offering lessees opportunities to apply for relief in the form of lease suspension and suspension of lease terms if need be. 30 U.S.C. §§ 1010, 1012 (2000). Nothing in the statute or regulations, or Board precedent, permits lessees to violate the statutory requirement that rentals be paid, and then claim that outside economic conditions justified their unilateral action in doing so in order to obtain lease reinstatement.

^{1/} In, inter alia, Hydra-Co Enterprises Inc., 102 IBLA 46 (1988), the Board refused to permit a lessee to meet the statutory test based on assertions of problems with its internal payment systems.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the January 24, 2001, and April 23, 2001, decisions are affirmed.

Lisa Hemmer
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge