



Key Issues Confronting Industry in Federal Oil and Gas Leasing and Permitting – A Series Topic 7: Lease Reinstatements

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This next installment in our series on key issues in federal oil and gas leasing and development addresses lease reinstatements for leases that may have terminated by failure to timely pay annual rentals.

Under the Mineral Lease Act (MLA), the primary term of a federal oil and gas lease is 10 years. Lessees must pay annual rentals unless the lease is producing oil or gas in paying quantities, the lease is under a suspension of operation and production, or included in a communitized area, or within a participating area of a valid federal exploratory unit.

Under the MLA, 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.” 30 U.S.C. § 188(b). A lease will not automatically terminate if a timely rental payment is made, but it is only nominally deficient. BLM provides that a deficiency is nominal if it is less than \$100 or 5% of the total payment due, whichever is less. 43 C.F.R. § 3108.2-1

However, under certain circumstances, federal oil and gas leases “may” be reinstated by paying the past due rentals, petitioning for reinstatement, and paying any necessary fees. *Id.* Thus, BLM’s decision to reinstate leases is discretionary, and no statute mandates that BLM must grant lease reinstatements even if the operator meets the statutory and regulatory requirements.

There are two types of reinstatements, Class I and Class II, and the standards for obtaining each are slightly different.

Class I

To obtain a Class I reinstatement, the lessee must file a petition with the BLM, the required fee, and any back rental within 60 days after receipt of the Notice of Termination from BLM. BLM is authorized to grant a Class I reinstatement only if the full amount of the rental due is paid within 20 days after the lease anniversary date and the lessee establishes that the failure to timely

pay “was either justified or not due to a lack of reasonable diligence on the part of the lessee” 30 U.S.C. § 188(c); 43 C.F.R. § 3108.2-2. The most common issue with Class I reinstatements is whether the lessee’s failure to pay was justified or not due to reasonable diligence. IBLA precedent provides guidance on these standards. In *Gilbert and Bonnie Sockwell*, 125 IBLA 150 (1993), the Board held “failure to exercise reasonable diligence may be considered justified if it is demonstrated that, at or near the lease anniversary date, there existed sufficiently extenuating circumstances outside the lessee’s control which affected the lessee’s actions in failing to make timely payment.”

The Board has held that situations in which extenuating circumstances *outside the lessee’s control* were found to be justified include: death or illness of the lessee or a member of the lessee’s close family; injury to a key employee; severe winter weather; and natural disasters, such as floods or earthquakes. *Ramoco, Inc. v. Andrus*, 649 F.2d 814, 815 (10th Cir. 1979) (citing Board cases); *see also, e.g., Marian L. Kleiner*, 129 IBLA 216, 217-18 (1994). It is very difficult to demonstrate extenuating circumstances outside of the lessee’s control and BLM denies Class I reinstatements more often than not.

Under a Class I Reinstatement, the lease is reinstated with the same annual rental rate and same royalty rate.

Class II

A Lessee may still have options if it does not meet all of the standards for a Class I reinstatement, i.e. if the annual rental is not paid within 20 days of the due date, or the lessee cannot establish its failure to pay was justified. U.S.C. § 188(d)-(e); 43 C.F.R. § 3108.2-3. BLM may reinstate an oil and gas lease when a lessee shows that the failure to pay timely “was justified or not due to lack of reasonable diligence, or, no matter when the rental was paid, it is that such failure to timely pay was inadvertent.” 43 C.F.R. § 3108.2-3(a). This type of reinstatement is known as Class II. Unlike a Class I, a Class II Reinstatement merely requires that the failure to timely pay the rentals was “inadvertent.”

In order to obtain a Class II Reinstatement, the lessee must file a Class II petition for reinstatement, the required fee, and any required back rental, on or before the earlier of 60 days after receipt of the notice of termination; or 24 months after the termination of the lease. 30 U.S.C. § 188(d)(2).

The main difference with a Class II Reinstatement is that BLM reinstates the lease with a higher annual rental rate of not less than \$10/acre for competitive leases, not less than \$5/acre for noncompetitive leases, and a higher royalty rate of 16 2/3%.

Instruction Memorandum No. 2013-177; NEPA Compliance for Oil and Gas Lease Reinstatement Petitions

Under the plain language of the statute and regulations “reinstatement” is an action that takes the lease back to its original terms. There does not appear to be any provision or authority in the MLA or BLM’s regulations authorizing BLM to add or change the lease terms through the imposition of additional lease stipulations. However, in 2013, BLM issued Instruction Memorandum No. 2013-177, *NEPA Compliance for Oil and Gas Lease Reinstatement Petitions* (August 13, 2013), fundamentally changing BLM’s process for complying with the MLA and issuing lease reinstatements.

Historically, BLM considered reinstatement of a lease terminated for nonpayment of rent to be a “routine administrative action.” However, as the basis for the IM, the Office of the Solicitor stated that since the MLA and BLM’s regulations use the permissive language “may reinstate,” BLM cannot only decline to reinstate an expired lease for failure to meet the criteria in those sections, but BLM can also decline to reinstate or modify a lease for reasons not delineated in those sections, such as considerations based on additional National Environmental Policy Act (NEPA) evaluation.

BLM IM 2013-177 imposes additional criteria for reinstatement not found in the MLA or BLM’s regulations despite the fact that BLM conducted no formal rulemaking. For example, under IM 2013-177, BLM now requires full compliance with NEPA, including any new or supplemental NEPA analysis, and obtaining the consent to reinstatement from the appropriate surface management agency (if not BLM). If during BLM’s NEPA consistency review, BLM identifies any new or modified lease stipulations from a more recent resource management plan, BLM will apply these new lease stipulations to the reinstated lease. While Congress used the term “reinstatement” rather than “re-issue” with respect to federal oil and gas lease reinstatements, there has not been any further guidance from the IBLA or courts with regard to IM 2013-177 and application of new lease terms to reinstated leases.

Although IM 2013-177 states that BLM should complete this analysis timely, lease reinstatements are sometimes taking years for BLM to complete.

For more information regarding federal oil and gas lease issues, please contact [Bill Sparks](#).

Previous and upcoming articles in this series include:

- BLM’s Discretion to Lease [\[view\]](#) December 2014
- Navigating Lease Protest Process and Oppositions to Leasing Decisions [\[view\]](#) January 2015
- Modifying Lease Terms and Cancelling Existing Leases [\[view\]](#) March 2015
- Suspensions of Operations and/or Production [\[view\]](#) June 2015

- Leases in Extended Term With and Without a Well Capable of Production [[view](#)] July 2015
- Leases Extended by Diligent Drilling [[view](#)] November 2015
- Federal Exploratory Units and Communitization Agreements—A Brief Overview

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