

ROSE MARY JOHNSON, ET AL.

IBLA 71-18 etc. 1/

Decided April 13, 1972

Appeal from decisions (F-8563, etc.) by Alaska state office, rejecting oil and gas offers.

Affirmed.

Oil and Gas Leases: Applications: Drawings-- Regulations:
Validity--Secretary of the Interior

The regulation, 43 CFR 3112.1-1 (1972), prescribing that no oil and gas offers for lands in terminated or canceled leases will be received until the records have been noted and the lands have been posted in accordance with 3112.1-2 (1972) is a valid exercise of the Secretary's authority to prescribe rules and regulations under the Mineral Leasing Act, as amended, 30 U.S.C. 181, et seq. (1970).

Oil and Gas Leases: Applications: Generally--Oil and Gas Lease:
Applications: Filing

A person who files an oil and gas offer which is violative of applicable regulations acquires no rights thereby.

APPEARANCES: Robert F. Martin, Esq. for the appellants.

OPINION BY MR. FISHMAN

The appellants, listed in Appendix A attached hereto, have appealed from decisions of July 29, 30, and 31, 1970, rejecting their oil and gas offers. The basis of the rejection was that the offers embraced lands formerly in terminated leases and the lands had not been posted as available for the filing of new offers in accordance with 43 CFR 3112.1-1 2/ (35 F.R. 9692 of June 13, 1970), citing Union Oil Company of California, A-29904 (February 20, 1964).

1/ The appeal docket numbers, the serial numbers of the cases, and the names of the parties are set forth in Appendix A.

2/ 3112.1-1 (1972) is identical.

The appellants contend in essence that the regulation is arbitrary, capricious, unreasonable, and should be vacated. They urge that the procedure prescribed by the regulation is unrealistic and places the power in personnel of the Bureau of Land Management to withhold lands from leasing, militating against the "rights" of the appellants.

43 CFR 3112.1-1 (1972) provides:

(a) Lands in canceled or relinquished leases or in leases which terminate by operation of law for non-payment of rental pursuant to 30 U.S.C. sec. 188, which are not withdrawn from leasing nor on a known geological structure of a producing oil and gas field shall be subject to the filing of new lease offers only after notation on the official record of the cancellation, relinquishment, or termination of such lease and only in accordance with the provisions of this section. All lands covered by leases which expire by operation of law at the end of their primary or extended terms shall likewise be subject to the filing of new lease offers only in accordance with the provisions of this section except that notation of such expiration of the leases need not be made on the official records.

(b) If no offers to lease all or any portion of the lands in the expired, canceled, relinquished or terminated leases are received during the period provided for in § 3112.1-2, the lands for which no offers are received will thereafter become subject to lease in accordance with regulations in this part.

43 CFR 3112.1-2 (1972) provides:

On the third Monday of each month, or the first working day thereafter, if the land office is not officially open on the third Monday, there will be posted on the bulletin board in each land office a list of the lands in leases which expired, were canceled, were relinquished in whole or in part, or which terminated, together with a notice stating that such lands will become subject to the simultaneous filings of lease offers, from time of such posting until 10 a.m. on the fifth working day thereafter. The posted list will

describe the lands by leasing units identified by parcel numbers, which will be supplemented by a description of the lands in accordance with § 3101.1-4, by subdivision, section, township and range if the lands are surveyed or officially protracted, or if unsurveyed, by metes and bounds.

The validity of earlier regulations 43 CFR 192.43 (1963), embodying substantially the same provisions, was upheld in Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257 (D.C. Cir. 1963), cert. denied, 373 U.S. 951 (1963), in which the court stated at 258-259:

Appellant * * * stands firmly on the literal language of the statute. It was the "person first making application" after the prior leases expired, it argues, and consequently the Secretary must comply with the statutory mandate. The Secretary relies upon the regulation, which he justifies as necessary to end the mad scrambles, breaches of the peace, damage to tract books, and corruption of land office employees as applicants compete to be the "person first making application." Appellant does not contest the existence of these problems with respect to cancellation or other premature termination of a lease, but asserts (1) that these problems do not exist where leases terminate by expiration, (2) that other methods of meeting these problems are available, and (3) that in any event this regulation on its face conflicts with the statutory requirement and is therefore invalid.

The Secretary has full authority under the Act "to prescribe necessary and proper rules and regulations" to accomplish its purposes. Stripped to its essence, the question presented here simply is: does Regulation 192.43 comport with the Secretary's statutory authority? It is not for us, nor for appellant, to suggest a method for solving the problems which have arisen in the administration of the Mineral Leasing Act. Congress has consigned that function to the Secretary. Our inquiry ends when we determine whether or not the method adopted by the Secretary is "unreasonable and plainly inconsistent" with the statute, having in mind that regulations "constitute contemporaneous constructions by those charged with administration of these

statutes which should not be overruled except for weighty reasons." Commissioner v. South Texas Co., 333 U.S. 496, 501, 68 S.Ct. 695, 92 L.Ed. 831 (1948).

In administering the Mineral Leasing Act, the Secretary exercises a discretionary, rather than a ministerial function. Compare *Udall v. States of Wisconsin, Colorado and Minnesota*, 113 U.S. App. D.C. 183, 306 F.2d 790 (1962). The provisions of the Act "plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion." *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 418, 51 S.Ct. 502, 75 L.Ed. 1148 (1931). This, of course, does not mean that the Secretary is permitted to grant a lease to one other than "the person first making application." It does mean that the Secretary is to determine who that first person is. Hence the provision in the Act authorizing the promulgation of regulations. 41 Stat. 450, 30 U.S.C. § 189. It is likewise clear that the language "person first making application" is not so definite, particularly when prior experience with its application is considered, as to render an interpretative or implementing regulation inappropriate. Compare *Helvering v. R. J. Reynolds Co.*, 306 U.S. 110, 114, 59 S.Ct. 423, 83 L.Ed. 536 (1939); *Morrissey v. Commissioner*, 296 U.S. 344, 354-355, 56 S.Ct. 289, 80 L.Ed. 263 (1935). [Footnotes omitted]

The foregoing amply disposes of the appellants' contentions that the regulation is arbitrary, capricious, unrealistic, etc. With respect to appellants' assertion that the posting system places undue authority in Bureau personnel in determining when lands in terminated or cancelled leases are to be available for the further filing of oil and gas offers, the short answer is that the procedure is one selected by the Secretary and is a reasonable exercise of his authority. In whom would the appellants place such authority? It is obvious that some procedure is necessary to avoid the highly competitive race to be first to file after notation of the land office records, which was the former procedure. As pointed out in *Thor-Westcliffe, supra*, at 258, the regulation is deemed "* * * necessary to end the mad scrambles, breaches of the peace, damage to tract books, and corruption of land office employees. * * *"

Appellants assert that the rejection of their offers is violative of their "rights". It is well settled that an offer, not conforming to applicable regulations, gives rise to no rights. ^{3/} See McKay v. Wahlenmeier, 226 F.2d 35 (D.C. Cir. 1955). Cf. King v. Udall, 266 F. Supp. 747 (D.C. D.C. 1967).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decisions of the Alaska state office are affirmed.

Frederick Fishman, Member

We concur:

Edward W. Stuebing, Member

Anne Poindexter Lewis, Member

^{3/} This is not to suggest that the issuance of oil and gas leases is other than discretionary; however, if a lease is to be issued, it must be issued to the first qualified applicant. See Udall v. Tallman, 380 U.S. 1, 13 (1965), rehearing denied, 380 U.S. 989 (1965).

APPENDIX A

IBLA	Serial No.	Names of Applicants
71-18	F-8563	Rose Mary Johnson Naomi Ambrose Ronald S. McMahan Jack Smalley
71-19	F-8525	Rose Mary Johnson Alfred Kenigy Manfred Mane William Wheeler Ima Lee Oates Yolana Rockar
71-20	F-8560	Rose Mary Johnson Naomi Ambrose Alfred Kenigy Ronald S. McMahan Jack Smalley
71-21	F-8562	Rose Mary Johnson Beula M. Knox Gertrude J. Kornfeind Helen Mane Alfred Kenigy
71-22	F-8564	Rose Mary Johnson Naomi Ambrose Ronald S. McMahan Jack Smalley Walter R. Burks
71-22	F-8565	Rose Mary Johnson Naomi Ambrose Ronald S. McMahan Jack Smalley Walter R. Burks
71-22	F-8567	Rose Mary Johnson Naomi Ambrose Ronald S. McMahan Jack Smalley Walter R. Burks

71-23 F-8566 Rose Mary Johnson
Naomi Ambrose
Ronald S. McMahan
Jack Smalley
Alfred Kenigy
Gertrude J. Kornfeind

71-25 F-8561 Rose Mary Johnson
Beula M. Knox
William B. Wheeler
Helen Mane
Alfred Kenigy

