

JAMES W. SMITH

IBLA 70-674

Decided July 13, 1972

Appeal from decision by Wyoming land office, Bureau of Land Management, rejecting (1) a petition for cancellation of oil and gas lease W-11012, and (2) rejecting application W-24620 for a preference-right oil and gas lease.

Petition for cancellation dismissed. Rejection of application affirmed as modified.

Oil and Gas Leases: Cancellation

Where land included in an existing oil and gas lease is known to contain valuable deposits of oil and gas, the lease may not be canceled administratively by the Department but may be canceled only by judicial proceedings. 30 U.S.C. § 184 (1970); 43 CFR 3108.3.

Oil and Gas Leases: Lands Subject To -- Oil and Gas Leases: Preference

Right Leases

Where an application for a preference right oil and gas lease is filed for land included in an outstanding oil and gas lease of record, the application must be rejected because the land is segregated by that lease -- whether the outstanding lease is valid, void or voidable.

Oil and Gas Leases: Known Geological Structure -- Oil and Gas Leases:
Words and Phrases

Cancellation --

Dictum: With regard to cancellation of an oil or gas lease, the terms "known geologic structure" and "known to contain valuable deposits of oil or gas" could be distinguished on the basis that the presumptive productivity referred to in the definition of known geologic structure may be a matter of expert opinion, whereas the words "known to contain valuable deposits" connote matters of actual fact. 43 CFR 3100.0-5 and 3108.3.

The Superior Oil Company, A-28897 (September 12, 1962) and William Wostenberg, A-26450 (September 5, 1952) distinguished in dictum.

APPEARANCES: Owen J. Donley, Esq. and Raymond K. Peete, Esq. for appellant James W. Smith.

OPINION BY MR. GOSS

James W. Smith has appealed from a decision of the Cheyenne, Wyoming, land office of the Bureau of Land Management, dated June 26, 1970, which (1) rejected his petition for cancellation of oil and gas lease W-11012 which had been issued to F. H. Mott and assigned to Sierra Trading Corporation and others and (2) rejected appellant's application, W-24620, for issuance to him of a preference-right lease. The land office held that since appellant had acquired the surface title by a patent issued subsequent to the Mineral Leasing Act of February 25, 1920, § 20; 30 U.S.C. § 229 (1970), he is not eligible to claim the benefits of section 20 of that Act.

It appears from the record that appellant is the current owner of the surface title of the land in the W 1/2 NW 1/4 and W 1/2 SE 1/4 NW 1/4 sec. 26, T. 57 N., R. 97 W., 6th P.M., Wyoming. Appellant obtained a patent for the tract from the United States, March 22, 1965, upon completion of the requirements for a reclamation homestead. The patent contains a reservation of oil and gas to the United States.

Appellant received the patent under settlement rights originally initiated by his mother, Nancy Cook, whose reclamation homestead

entry (Cheyenne 043893) was allowed on February 28, 1919, prior to the enactment of the Mineral Leasing Act. The land office records show that her final proof of compliance with the ordinary homestead laws was accepted December 12, 1925. The entrywoman did not submit final reclamation proof. Appellant stated he acquired her title prior to the entrywoman's death in 1936, however the record contains no reference to any deed or formal assignment document. Appellant also was grantee of a 1941 tax deed. Appellant submitted final reclamation affidavit and acknowledgement of mineral reservation in 1965, and final certificate and patent were then issued.

On June 29, 1954, in a report of the Geological Survey, U.S. Department of the Interior, the land in question was classified as having prospective value for oil and gas. As of March 1, 1968, and prior to appellant's petition herein, the Department issued to F. H. Mott the challenged oil and gas lease W-11012, which included appellant's patented land. According to the record, there is a well (Federal 2-26) in production on the lease. ^{1/} The original lessee subsequently assigned his rights under the lease to the Sierra Trading Corporation which now holds the lease jointly with Peter Graf and Harry Rubin.

^{1/} The well is located on appellant's land in the W 1/2 SE 1/4 NW 1/4 sec. 26, T. 57 N., R. 97 W., 6th P.M. The tract is communitized with the patented E 1/2 SE 1/4 NW 1/4 sec. 26, T. 57 N., R. 97 W., 6th P.M., under a communitization agreement of June 1, 1969, designated Com. Agr. NW-307.

In his appeal appellant contends that (1) as surface owner of lands included within oil and gas lease W-11012 he is entitled to a preference-right lease for his patented land under 30 U.S.C. § 229 (1970), and (2) inasmuch as he did not receive a notice of the lease application as required by 43 CFR 3120.4 (1968) 2/, now 43 CFR 3102.2-2 (1972), the existing oil and gas lease is invalid.

The first question for determination 3/ is whether under any factual circumstances this Board has authority to grant the relief prayed for -- i.e., administrative cancellation of the existing lease to permit appellant to assert his own claim to a lease for the oil and gas in his patented land.

2/ 43 CFR 3120.4 (1968) reads:

"Preference right of patentee or entryman to a lease.

"(a) An entryman or patentee who made entry prior to February 25, 1920, or an assignee of such entryman or a vendee of such patentee if the assignment or conveyance was made prior to January 1, 1918, for lands not withdrawn or classified or known to be valuable for oil or gas at date of entry shall be entitled, if the entry or patent is impressed with a reservation of the oil or gas, to a preference right to a lease for the land. A settler whose settlement was made prior to February 25, 1920, on land in the same status but which has since been withdrawn, classified, or is known to contain oil or gas, also has such a preference right.

"(b) Any offeror for a lease to lands owned, entered or settled upon as stated above must notify the person entitled to a preference right of the filing of the offer and of the latter's preference right for 30 days after notice to apply for a lease. If the party entitled to a preference right files a proper offer within the 30-day period, he will be awarded a lease; but if he fails to do so, his rights will be considered to have terminated."

3/ See Silver Surprise, Inc. v. Sunshine Mining Co., 74 Wash. 2d 519, 445 P.2d 334, 336 (1968) and authorities cited therein; Stoll v. Gottlieb, 305 U.S. 165, 171 (1938); Morris v. Gilmer, 129 U.S. 315, 325 (1889).

Section 31 of the Mineral Leasing Act applies to cancellations based on post-lease events. Boesche v. Udall, 373 U.S. 472 (1963). On the other hand section 27, codified as 30 U.S.C. § 184 (1970), sets forth one procedure for cancellation and applies to pre-lease as well as post-lease matters. Section 27 provides in part:

Cancellation, forfeiture, or disposal of interests for violation; bona fide purchasers and other valid interests; sale by Secretary; record of proceedings.

(h)(1) If any interest in any lease is owned, or controlled, directly or indirectly, by means of stock or otherwise, in violation of any of the provisions of this chapter, [4/] the lease may be canceled, or the interest so owned may be forfeited, or the person so owning or controlling the interest may be compelled to dispose of the interest, in any appropriate proceeding instituted by the Attorney General. Such a proceeding shall be instituted in the United States district court for the district in which the leased property or some part thereof is located or in which the defendant may be found. (Emphasis added.)

Under Boesche v. Udall, supra, 5/ it is clear that the Secretary has authority to cancel a lease administratively for invalidity at its

4/ Chapter 85, 41 Stat. 448, codified as Chapter 3A, 30 U.S. Code. The provision in section 27 that it applies to any violation of Chapter 3A, 30 U.S. Code precludes construing section 27 as limited to such matters as acreage violations.

5/ In Boesche v. Udall, before the Court of Appeals, the appellant for the first time attempted to raise the issue of whether the lease was known to contain valuable deposits of oil and gas. This procedure was opposed by the appellee. Brief for Appellee at 26-27 and Response to Supplemental Memorandum at 17, Boesche v. Udall, 303 F.2d 204, (D.C. Cir. 1961) supra. Neither the Court of Appeals nor the Supreme Court ruled upon the substance of appellant's contentions. Rather, the lease was treated as not containing known valuable deposits.

inception; the Secretary has, however, interpreted section 27 and limited that authority by promulgating 43 CFR 3108.3 6/ which reads:

Judicial proceedings.

Leases known to contain valuable deposits of oil or gas may be cancelled only by judicial proceedings in the manner provided in sections 27 and 31 of the act.

It has long been established that the Secretary is bound by his own regulation so long as it remains in effect. McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955). A regulation promulgated pursuant to the Mineral Leasing Act has the force of law and binds the Secretary as well as others.

Chapman v. Sheridan-Wyoming Coal Co., Inc., 338 U.S. 621, 629 (1950).

It has been judicially recognized that the valuable deposits regulation should be construed as a limitation upon Departmental cancellation authority. Pan American Petroleum Corp. v. Pierson, 181 F. Supp. 557 (D. Wyoming 1960), rev. on other grounds, 284 F.2d 649 (10th Cir. 1960), cert. den. 366 U.S. 936 (1961). In Pan American the District Court stated (p. 563):

From what I have said I hold the Supervisor is proceeding in contravention of * * * his own regulation, and in violation of the terms of the

6/ 43 CFR 3108.3 (1972), the valuable deposits limitation, was formerly numbered 43 CFR 192.161 (1949) and 43 CFR 3129.2(c) (1965).

lease when he proceeds administratively to cancel leases on lands known to contain valuable oil and gas deposits. * * * (Emphasis added.)

The Associate Solicitor set forth the current interpretation of the Department 7/ in Changing Concepts in Federal Oil and Gas Lease Title Security, 10 ROCKY MOUNTAIN MINERAL LAW INSTITUTE, 339, 357 (1965):

Section 31 of the Mineral Leasing Act expressly limits cancellation by the Secretary where the land covered by the lease is known to contain valuable deposits of oil. It is arguable, however, that this limitation does not apply to cancellation for prelease mistake or fraud because the statutory prohibition refers only to cancellation for violation of the terms of the lease and has no reference, either directly

7/ It appears that the Department had previously taken a contrary position. Reference to broad Secretarial powers of cancellation appear in Brief for Respondent, Boesche v. Udall, supra, and in Response to Supplemental Memorandum (at 5-11), Boesche v. Udall, 303 F.2d 204 (D.C. Cir. 1961) -- although without reference to the valuable deposits limitation. In the Supreme Court Brief, the Solicitor General argued (at 27) that the Secretary's authority to cancel for error does not derive from either section 27 or 31, nor does it derive at all from the Mineral Leasing Act. For the purpose of the case now on appeal, it is not necessary to consider this point. When the Secretary promulgated 43 CFR 3108.3, he restricted his cancellation authority.

In The Superior Oil Company, supra, and Wm. Wostenberg, supra, the administrative cancellation of a noncompetitive oil and gas lease which had been erroneously issued for lands within the known geologic structure of a producing oil or gas field was upheld on appeal -- also without discussion of the valuable deposits limitation. In order to decide the case herein under consideration it is not necessary to determine whether land within the "known geologic structure of a producing oil or gas field" under 43 CFR 3100.0-5 is also "known to contain valuable deposits of oil or gas" under 43 CFR 3108.3. The two terms could be distinguished on the basis that the presumptive productivity referred to in the definition in 43 CFR 3100.0-5 may be a matter of expert opinion, whereas the words "known to contain valuable deposits" in 43 CFR 3108.3 connote matters of actual fact.

or indirectly, to cancellation for reasons existing at the time of issuance of the lease. However, by regulation [43 CFR 3129.2(c) (1965), the valuable deposits limitation] the Secretary has interpreted his authority as being limited to lands not known to contain oil or gas. (Footnotes omitted.)

See also Hoffman, Oil and Gas Leasing on the Public Domain, 157 (1951) and Stull, The Authority of the Secretary of the Interior to Cancel Noncompetitive Oil and Gas Leases by Administrative Action, 5 ROCKY MOUNTAIN MINERAL LAW INSTITUTE 1, 30 (1960).

There is a producing well on the outstanding oil and gas lease herein concerned. As a lease known to contain valuable deposits of oil and gas, the lease is not subject to administrative cancellation but may be canceled only by instituting proceedings in the appropriate United States district court. Cf. Pan American Petroleum corp. v. Pierson, supra; L. P. Glasebrook et al., A-27332 (August 7, 1956).

Both this Board and the Wyoming land office are thus without authority to cancel the assigned lease, regardless of whether or not cancellation would be proper under the circumstances.

Even if it were not for the bar of 43 CFR 3108.3, appellant has not submitted a case which proves a preference right. In his petition of June 10, 1970, appellant asserts that he received title from

his mother not by inheritance but by deed during her lifetime. Appellant's mother's entry was not allowed until February 28, 1919. Under 30 U.S.C. § 229, construed in 43 CFR 3120.4 (1968), supra, an assignee of an entrywoman is entitled to a preference right only if his conveyance was prior to January 1, 1918. S. N. Hodges et al. v. Phillips Petroleum Company, 60 I.D. 184 (1948). But cf. Alexander Fraser and Carl Harvey, 48 L.D. 237 (1921). An additional question as to appellant's claimed preference right exists in connection with the tax deed which appellant received in 1941, but this question need not be decided at this time.

The rejection of appellant's lease offer by the land office was proper, regardless of whether his preference claim is valid, because of the existing oil and gas lease on the land. Land included in an outstanding oil and gas lease is not available for leasing to others, and an application for such land must be rejected whether or not the outstanding lease was properly issued. Harold H. Sternberg, A-30700 (May 25, 1967). So long as an oil and gas lease is outstanding and of record -- whether it is valid, void or voidable -- it segregates the land. The land is not available until cancellation of the existing lease is noted on the records of the local land office. Barash v. Seaton, 256 F.2d 714 (D.C. Cir. 1958), Max Barash, The Texas Co., 66 I.D. 11 (1959).

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 petition for cancellation of existing lease is dismissed and the decision of the Bureau of Land Management rejecting appellant's application for lease is affirmed as modified.

We concur:

Joseph W. Goss, Member

Newton Frishberg, Chairman

Frederick Fishman, Member

Anne Poindexter Lewis, Member

Edward W. Stuebing, Member

Separate concurrence by Mrs. Thompson.

This separate concurrence is offered because I believe erroneous implications may be drawn from the majority opinion as to proper administrative practice in a case of this type. I agree with the afterthought in the majority opinion that appellant has not shown he is entitled to a preference right. I believe, however, that this is the determinative issue raised on appeal and should be resolved more clearly before telling appellant, as the majority has done, that this Department has no authority to grant him relief and, implicitly, that he must seek his relief in the courts. Cf. Securities and Exchange Commission v. Chenery Corp. et al., 332 U.S. 194, 196 (1947). If appellant has no preference right, obviously he has no right to compel cancellation of the existing oil and gas lease and there is no need to decide whether or not there is authority to cancel a producing oil and gas lease.

In formulating the priority of the issues to be considered, I believe, the majority opinion has put the proverbial cart-before-the-horse. In stating that the first question for determination is whether this Board has authority to cancel the lease, the majority in footnote 3 has cited court cases all dealing with the question of the courts' subject matter jurisdiction. They are not relevant here. What this Board has before it is an appeal from a land office decision rejecting an oil and gas lease preference-right application

under section 20 of the Mineral Leasing Act, 30 U.S.C. § 229 (1970), and rejecting a petition based upon that preference right to cancel a conflicting existing oil and gas lease.

Obviously this Department has the primary jurisdiction to determine whether an applicant under the Mineral Leasing Act is entitled to an oil and gas lease. The Supreme Court in considering a more difficult question, *i.e.*, whether the Department in administrative proceedings could determine the validity of a mining claim (under the mining laws, 30 U.S.C. § 22 *et seq.* (1970)), and declare the claim to be null and void even though it had no power without going to court to eject the claimant, stated that the Department was the proper forum for determining the question and that the Secretary of Interior was entrusted with the duty to regulate the acquisition of rights in the public lands and the general care of the lands. Cameron et al. v. United States, 252 U.S. 450 (1920). *See also*, Best et al. v. Humboldt Placer Mining Co. et al., 371 U.S. 334, 336 (1963), where it was stated this Department "has been granted plenary authority over the administration of public lands, including mining lands." * * *

The Secretary of Interior's general managerial powers over public lands and interests reserved by the United States have been granted by Congress. *See* 43 U.S.C. 1457 (1970), and 43 U.S.C. § 2 (1970), where he is directed to "perform all executive duties * * * in anywise respecting * * * public lands." In R.S. § 2478, 43 U.S.C.

§ 1201, he is authorized to "enforce and carry into execution, by appropriate regulations, every part of the provisions of [the Title dealing with public lands] not otherwise specially provided for." The Mineral Leasing Act grants regulatory authority to the Secretary, 30 U.S.C. § 226 (1970). This broad authority includes the administration of oil and gas deposits in patented lands which are reserved to the United States and leasable under the Mineral Leasing Act. See Boesche v. Udall, 373 U.S. 472 (1963); cf. Chapman v. Sheridan-Wyoming Coal Co., Inc., 338 U.S. 621, 627 (1950).

As this Department has subject matter jurisdiction to determine whether a preference-right oil and gas lease application should be granted, I believe the land office quite properly first considered whether the applicant was a qualified preference-right applicant before determining whether the existing oil and gas lease must be canceled. This determination of priority comports with the realities of administrative adjudication processes and should not be confused with unrelated court procedures. Without the Department's determining whether an applicant is a qualified preference applicant, he might be forced to go to the courts with the possibility of having the case returned to the Department to first determine his rights before the matter is finally resolved. It is more fair to the applicant to be informed decisively that he does not qualify under the law, rather than on appeal, for this Board sua sponte, to rest

on the supposed lack of authority to cancel the existing conflicting lease.

Aside from the administrative practicalities and fairness to the applicant in determining the priority of determinations here, I believe there are other difficulties and problems inherent in the majority's reliance on the question of authority to cancel the existing lease. First, this question is premised upon an assumption that if the applicant has a preference right no relief can be afforded by this Department. This premise is based solely upon its interpretation of regulation 43 CFR 3108.3, and its reliance upon the principle that the Secretary's regulations have the force of law and bind him as well as others, citing McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955), and Chapman v. Sheridan-Wyoming Coal Co., Inc., *supra* at 629.

McKay v. Wahlenmaier is especially relevant here because the court was concerned with this Department's determination of the first qualified applicant under section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (1970). The regulations discussed therein set forth requirements for applicants. The court concluded the Department erroneously failed to cancel an oil and gas lease which had been issued in contravention of a regulation. It went further and said it could have canceled the lease where the application could have been rejected, in any event, because of unfair collusive multiple

filings. 226 F.2d 42, 43. The court's discussion of the authority to cancel a lease is interesting. It stated at 42:

* * * He [the Secretary] concluded he has authority to cancel an oil and gas lease "for reasons existing at the time of its issuance" which clearly show "that the lease was obtained in contravention of some statutory provision or some regulation issued by the Department," 11 but added, "Such a reason, is not revealed by the record in this case." [Emphasis by the court.]

Footnote 11 stated:

We think the Secretary unduly restricted his own power of cancellation. He has the right to cancel a lease improvidently issued to a disqualified applicant, to the prejudice of the rights of others, whether or not there is involved a violation of some provision of the statute or of a regulation. This is particularly true where fraud, deception or concealment caused the lease to be issued.

This discussion by the court indicates the duty the Secretary has to determine the qualified applicant for a lease and to cancel a lease issued to an unqualified applicant.

Let's now turn to the regulation concerning the preference right. 43 CFR 3102.2-2(b) requires that any offeror for a lease to lands for which there might be a preference right

* * * must notify the person entitled to a preference right of the filing of the offer and of the latter's preference right for 30 days after notice to apply for

a lease. If the party entitled to a preference right files a proper offer within the 30-day period, he will be awarded a lease; but if he fails to do so, his rights will be considered to have terminated.

Smith contended that he had never been given notice of the filing of the offer. The majority's determination of authority to cancel the lease must be premised, as indicated, upon the existence of a preference right and, also, upon the lessee's failure to comply with this mandatory notice provision. It has failed to face the dilemma which this poses. If the lease was issued in violation of a regulation, McKay v. Wahlenmaier, says the lease must be canceled to award the land to a qualified applicant. If the Secretary is bound by the regulation supposedly limiting the authority to cancel producing oil and gas leases, he is also bound by this regulation imposing a mandatory duty upon an applicant for a lease. Is the Secretary more bound by his own self-limitation of authority than the other regulation? I think not.

If the Secretary has the authority to cancel a producing oil and gas lease for pre-lease defects, as the majority appears to concede, recognizing the Supreme Court's opinion in Boesche v. Udall, which clearly upheld such authority in a general way, although a producing lease was not involved, a question is raised as to the propriety of a self-limitation of that power and authority to the derogation of the statutory rights of others. If the regulation

is only an interpretation of section 27 of the Mineral Leasing Act, as suggested, the correctness of the interpretation is doubtful. Boesche v. Udall, *supra*. If a regulation does not comport with the law, it need not be followed, and the Secretary may declare it invalid. Continental Oil Company, 70 I.D. 473 (1963). For the above reasons and other reasons which need not be discussed, I believe the majority's reliance upon this Department's supposed lack of authority to grant relief here is not well founded and presents more problems and questions than it resolves.

I would rest this decision upon an affirmance of the land office's decision rejecting the preference right application and petition because the applicant has no preference right.

The only issue to which the appellant's appeal is addressed is the question of whether or not he has a preference right. The land office had concluded that the applicant has no basis for asserting a preference right to a lease after discussing certain facts of record, and, therefore, it rejected the lease offer and petition for cancellation. 1/ Appellant's claim to a preference right stems

1/ It pointed out that lease W-11012 was in a producing status. However, this was not given as any reason for the action taken therein. It also indicated the names of the present owners of the lease, but it failed to designate them as adverse parties upon whom service of appeal documents would be required. Where there are such adverse interests in a case of this type, the Bureau offices should designate the holders of the interests as adverse parties so that they will be given notice of all matters in the appeal proceedings

from section 20 of the Mineral Leasing Act, 30 U.S.C. § 229 (1970), which provides in part:

In the case of lands bona fide entered as agricultural, and not withdrawn or classified as mineral at the time of entry, but not including lands claimed under any railroad grant, the entryman or patentee, or assigns, where assignment was made prior to January 1, 1918, if the entry has been patented with the mineral right reserved, shall be entitled to a preference right to a permit and to a lease, as herein provided, in case of discovery. * * *

With respect to the preference right, appellant has shown that he is the patentee on lands impressed with a mineral reservation. He did not himself, however, make entry on the land prior to the date of the Mineral Leasing Act of February 25, 1920. Homestead entry was made by Nancy Cook, with entry allowed on February 28, 1919. Appellant states that the lands were not classified as being valuable for oil and gas purposes until July 1, 1954, so, therefore, the land was of the character contemplated by section 20 when entry was made. He states that Nancy Cook was his mother. Her homestead entry final proof was filed on May 12, 1924, and accepted by the Department on December 12, 1925. Appellant asserts that he completed the reclamation proof at a later date, with patent No. 49-65-0037 issued to him on March 22, 1965, with the oil and gas reserved to the United States.

fn. 1 (Cont.)

and be able to participate therein if they desire. In view of the result reached in this case, however, the holders of the lease have suffered no harm by this failure.

In contending that he has a preference right, appellant cites S. N. Hodges, A-25761 (April 20, 1950), as holding that a settler whose settlement was made prior to February 25, 1920, on land open to settlement and not then withdrawn or classified for oil and gas, may be entitled to a preference right lease under section 20. The Hodges decision, however, is no support for his assertion of a preference right as he was not a settler prior to that date. Appellant then states that Alexander Fraser and Carl Harvey, 48 L.D. 237 (1921),

* * * appears to hold that although a preference right is not a right which passes by inheritance, when the heir of the entryman completes the entry, he then succeeds to the rights of the entryman and thus becomes the entryman. As a result, he should also receive the preference right.

Appellant contends the facts of his case fit the ruling in that case.

I believe the mere reference to the Fraser and Harvey, *supra*, decision by the majority does not answer appellant's contention. Fraser and Harvey applied to assignees of desert land entryman. It concluded that Congress did not intend by section 20 of the Mineral Leasing Act to limit the right of assignment of desert-land entries or to deprive an assignee under that law of any rights or privileges which the laws conferred upon the original entryman. It is agreed that Congress did not so limit any existing right. However, section 20 created a new right and expressly limited its applicability to

assigns of the entryman or patentee where the assignment was made prior to January 1, 1918. Since the Fraser and Harvey decision, section 20 has been interpreted as meaning more literally what it says regarding assignments of entries. S. N. Hodges et al. v. Phillips Petroleum Co., 60 I.D. 184, 188 (1948), stated that section 20 has been consistently interpreted by this Department

* * * as not applying to those whose rights as patentees or entrymen originated after the enactment of the act (February 25, 1920), or to those whose rights as assignees originated after January 1, 1918. * * *

The regulation 43 CFR 3102.2-2 (1972), in effect at least since the 1949 edition (then numbered, 43 CFR 192.70, also formerly at 43 CFR 3120.4 (1968)), indicates there is a preference right for

An entryman or patentee who made entry prior to February 25, 1920, or an assignee of such entryman or a vendee of such patentee if the assignment or conveyance was made prior to January 1, 1918, * * * A settler whose settlement was made prior to February 25, 1920, * * *.

In a case similar to that presented here, Martha K. Wilson, George L. Underwood, Cheyenne 043835, 071818, the Assistant Director, Bureau of Land Management on April 30, 1953, ruled that the section 20 preference right was not applicable where the holder of a reclamation homestead entry acquired the entry through mesne assignment from the original entryman, "since the right extends only to the original entryman or his assigns where the assignment was made prior to January 1, 1918."

It is submitted that the above interpretations of section 20 have, in effect, overruled the Fraser and Harvey decision. I believe this decision, therefore, should clearly state that that decision has been overruled, or, in any event, shall not be followed in the circumstances of this case.

It is apparent from the record that appellant acquired his interest in the entry by assignment prior to patent and, therefore, has no preference right under section 20.

In his petition stated under oath appellant stated: "Affiant acquired title to the above described homestead prior to the time his mother died, which was in 1936." If this statement is true, clearly Smith took the entry by transfer or assignment prior to the death of the entryman and must be considered as an assignee of the entry. Thus, he would not be entitled to a preference right since the assignment was made after January 1, 1918, and, therefore, no preference right to such an assignee can be recognized under section 20 of the Mineral Leasing Act. A letter of August 10, 1964, from R. B. Bowman, as Smith's attorney, stated that Smith "now holds the record title to these lands under a tax sale." A later letter of October 16, 1964, from that attorney stated that there had never been any determination of heirship or probate of Nancy Cook's estate. He stated that Smith is the present record owner, subject to a contract of sale to Mrs. Eunice Zurawski, and that it is for the purpose

of furnishing merchantable title that he required the patent. 2/ He stated the basis of Smith's title "is a Commissioners' Tax Deed as well as his adverse possession of the property for more than 10 years." A copy of this deed, dated April 2, 1941, to Smith is in the record, Cheyenne 043893. In the final statement to supplemental reclamation proof, Smith certified that "I made or hold as an assignee Homestead Entry No. 043893." The certificate for patent stated, "James W. Smith, assignee by mesne conveyance of Nancy Cook." From the above, it is evident that Smith's interest in the entry was as an assignee, and he is not entitled to a preference right.

Joan B. Thompson, Member

I concur:

Douglas E. Henriques, Member

2/ If the land upon which the preference right is based has been conveyed by Smith, obviously neither he nor the transferee would have a preference right.

