

CHARLES J. BABINGTON

IBLA 70-531

70-548

Decided November 7, 1974

Appeals from decisions by Eastern States Land Office, Bureau of Land Management, denying applications for refund of rentals paid in connection with canceled oil and gas leases ES 4409, 4477, 4483.

Affirmed in part; set aside and remanded in part.

1. Accounts: Refund--Oil and Gas Leases: Rental

Where a noncompetitive oil and gas lease is canceled because it was erroneously issued to a nonqualified offeror whose entry card was drawn in the simultaneous filing procedures, this Department may order a refund of all rentals paid in connection with the canceled lease; however, the rental will not be refunded if the lessee has derived a benefit from the possession of the lease or if he has held the lease with knowledge that it was improperly issued.

APPEARANCES: Charles J. Babington, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Charles J. Babington has appealed to the Director, Bureau of Land Management, 1/ from the refusal of the Eastern States Land Office to return the first year's rental paid in connection with noncompetitive oil and gas leases ES 4409, ES 4477, and ES 4483 (Mississippi).

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1/ The Secretary of the Interior in the exercise of his supervisory authority transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, to the Board of Land Appeals, effective July 1, 1970. Circular 2273, 35 F. R. 10009, 10012.

Babington filed entry-cards, both in his own name and as attorney or agent in fact for each of four trusts, whose beneficiary in each case was one of his grandchildren, for parcels of land being offered for oil and gas leasing pursuant to the simultaneous filing procedure set out in the pertinent regulation, 43 CFR 3123.9 (1969), now 43 CFR Subpart 3112. Three of the entry cards were drawn first and, as a result, the leases with which this appeal is concerned were issued. Each was effective as of October 1, 1968. Lease ES 4409 was issued to Charles J. Babington, as attorney and agent for J.P.H.B. Trust, lease ES 4477 was issued to Charles J. Babington personally, and lease ES 4483 was issued to Charles J. Babington as attorney and agent for C. J. B. Jr. Trust.

In a decision dated October 16, 1968, the Eastern States Land Office canceled leases ES 4477 and ES 4483. It found that both of these leases had been improperly issued and must be canceled because Babington, by filing for himself and as trustee and agent for his minor children, had submitted multiple filings and enhanced his chances of being successful in the drawing. 43 CFR 3123.3(a) (1968); now 43 CFR 3112.5-2. It also held that ES 4483 must be cancelled because Babington, as attorney in fact and agent, had failed to submit certain documents required with offers filed by attorneys in fact or agents and by guardians or trustees for minor children.

On appeal, the Bureau of Land Management in a decision of February 10, 1970, affirmed, holding that both grounds relied upon by Eastern States land office were correct, but for different reasons.

Babington did not take an appeal to the Secretary. He asked for a return of the rentals paid in each lease, except for those paid on that part of ES 4477 which he had assigned to one Homer Lynn. <sup>2/</sup> The land office refunded the rental payments for the second year, but denied repayment for the first year.

Meanwhile in September 1969, Babington wrote the land office that ES 4409, which had not been canceled, was in the same situation as the other leases and contended that he should not be required to pay rental on it until its status was settled. He then relinquished all but 159.88 acres of ES 4409 and paid the rental of \$80.00 for only that retained acreage. Upon the issuance of the Bureau of Land Management decision of February 10, 1970, Babington asked for a refund

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<sup>2/</sup> A partial assignment of 301.76 acres from lease ES 4477 had been filed for approval by the land office before the decision canceling the lease was served. It was concluded by the Bureau of Land Management that the assignee was entitled to protection as a bona fide purchaser and lease ES 4477 was permitted to remain extant as to the 301.76 acres assigned, but the overriding royalty retained by Babington was forfeited.

the \$80 and all of the first year's rental of \$600.00. In a decision dated March 20, 1970, the Eastern States Land Office canceled ES 4409 and directed the refunding of \$80.00, but again refused to refund the first year's rental.

In each case the Land Office held it would not repay the first year's rental because of the provisions of one of the regulations then in effect dealing with the simultaneous filing procedure.

The regulation stated:

Upon determination of the successful drawee for a particular leasing unit the first year's rental will not be returnable and will be earned and deposited in the U. S. Treasury upon execution of the lease on behalf of the United States. 43 CFR 3112.4-1 (1972) 3/

The appellant contends the cited regulation applies only to successful drawees who received valid leases and does not apply to the situation where the offeror is later determined not to be qualified to receive a lease at all, as in his case. He argues that as the regulation does not clearly provide for confiscation of the first year's rental from unqualified offerors who may be successful drawees, the action by the land office to retain the first year's rental in these three cases is wholly improper.

The regulation seeks to prevent abuses of the simultaneous drawing procedure. It is intended to eliminate any incentive for a successful offeror to fail to complete the lease issuing process after having had the period between the drawing and the lease issuance to negotiate for its disposition. That is, he cannot use that period to attempt to sell the lease and then, not having done so, seek to have his rental refunded. The same intent lay behind another part of the regulation which authorizes the return of the rental only if a "simultaneous" offeror withdraws his offer before the drawing is held. 43 CFR 3112.5-3 (1972). 4/ Another provision of the oil and gas regulation states that the failure to submit a sole party in interest statement within fifteen days of the filing of an offer will not only lead to the cancellation of the lease, if one has issued, but "upon execution of the lease the first year's rental will be earned and deposited in the U. S. Treasury and will not be

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3/ This regulation has been amended to require that the successful drawee pay the rental within 15 days after he has been notified that he has been the successful drawee. 38 F.R. 22230 (August 17, 1973), 43 CFR 3112.4-1. He need no longer submit the rental with his entry card. 43 CFR 3112.2-1(a)(1).

4/ This provision was deleted from the regulation the same time as 43 CFR 3112.4-1 was amended.

returnable though the lease is canceled." 43 CFR 3102.7. This provision, too, is intended to deny a lessee a period in which he can have a free ride on a lease.

The statutory authority for a refund is provided by section 204(a) of the Public Land Administration Act of July 14, 1960, 43 U.S.C. § 1374 (1970), as follows:

In any case where it shall appear to the satisfaction of the Secretary of the Interior that any person has made a payment under any statute relating to the sale, entry, lease, use, or other disposition of the public lands which is not required, or is in excess of the amount required by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds.

The Board has held that these regulations do not preclude the return of rental in appropriate circumstances under the repayment statute, supra. J. V. McGowen, 9 IBLA 133 (1973).

As we said in McGowen, at 138:

The question then is whether the repayments sought should be granted. The present statute, supra, leaves that determination to the discretion of the Secretary. In the exercise of his discretion, the Secretary may examine the circumstances of each lease to ascertain whether the rentals should be refunded.

This Board, while holding that a refund of rentals could be made where a lease was issued to other than the first qualified applicant as a result of a mistake of law or fact not attributable to the lessee, warned that a refund might not be made if the cancellation of the lease is due to some fault of the lessee himself or if he stands to benefit through any arrangement with parties seeking the cancellation of the lease. Beard Oil Company, 1 IBLA 42, 77 I.D. 166 (1970).

The concurring opinion in Beard adds a pertinent comment:

One further point should be considered. Even assuming that the cancellation of the lease was legally enforceable, during the years when Beard Oil Company held the lease it had certain rights. It might have treated the lease as an article of commerce and sold it to an innocent purchaser for value, thereby putting

it beyond the reach of the protestants. It had the right to explore the leasehold and gain geological data which could have influenced its decision to consent to the cancellation rather than resist it. If the company had completed a producing well, the very fact of production would have been fatal to the noncompetitive application, and defeated any administrative cancellation of Beard's lease. There is nothing to suggest that the company had knowledge of the prior right of the protestants to receive the lease, but if it could be demonstrated that it took the lease with such knowledge for the purpose of exercising whatever rights the lease bestowed, then the company would have gotten what it bargained for and no refund would be due it.

For these reasons I suggest that extreme caution and thorough investigation of such cases is required in the future to protect the public interest, 1 IBLA at 49, 77 I.D. at 171.

This caveat is quite relevant to the facts of this appeal.

Lease ES 4409, which was not canceled until March 20, 1970, remained intact until just before its anniversary date, October 1, 1969, when Babington relinquished all except 160 acres of it. It is apparent from his letter of September 1969, that he had been aware for almost a year that this lease was subject to the same defect as the others and should have been canceled for the same reason. Yet he remained silent until the obligation to pay another year's rental was upon him.

During this 11 months he had full control of the lease and could have sold it to a bona fide purchaser or indeed drilled on it himself. In other words he held a lease for almost a year which he could have used to gain an advantage to himself and which he could have transferred safely to another, who then could have maintained it. A lessee who, with knowledge that it is subject to cancellation, holds a lease from which he could benefit has received a substantial portion of the rights granted him by the lease. He ought not be allowed to recoup the rental paid for that time. Therefore the denial of a repayment of the first year's rental paid on this lease is affirmed.

The other two leases were canceled within the first month of the lease year. Within that brief period Babington found a buyer for part of lease 4477. Presumably during the same period he was attempting to sell the rest of that lease.

The rationale of the Beard case is that the lessee gained no advantage from his lease because a cancellation would deprive him of any benefit he might have derived from it prior to its cancellation.

Has Babington been deprived of any benefit from this lease? The Mineral Leasing Act, as amended, provides that if the cancellation of a lease in its entirety cannot be accomplished because of an interest conveyed to a bona fide purchaser, the partial interest returned by the lessee shall be sold to the highest bidder. 30 U.S.C. § 184(h)(2) (1970); Duncan Miller, A-30600 (December 1, 1966). Whatever interest Babington has in this lease will be disposed of in accordance with the statute.

However, the statute makes no attempt to recapture any bonus payment Babington may have received as consideration for the assignment. Accordingly, since Babington may well have gained a benefit from the lease, of which he cannot be deprived, the rationale for refunding the rental is not applicable. Therefore, the denial of a refund for any part of the first year's rental of this lease is affirmed.

The third lease, ES 4483, is in the same situation as the lease in Beard, that is, while the lessee had time to attempt to dispose of it or otherwise use his rights under the lease, there is no indication that any disposition was accomplished or usage made. In such circumstances, assuming that Babington is without fault and all else being regular, the rental may properly be refunded. The Land Office's decision is set aside to this extent.

Therefore pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Land Office is affirmed insofar as it denied repayment of the first year's rental for leases ES 4409 and 4477 and set aside and remanded insofar as it denied repayment of the first year's rental for lease ES 4483.

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Martin Ritvo  
Administrative Judge

We concur:

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Edward W. Stuebing  
Administrative Judge

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Joan B. Thompson  
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING IN PART; DISSENTING IN PART:

I feel that the clear language of 43 CFR 3123.9(c)(3)(1968) precludes the repayment of the first year's rental for any of the leases involved herein.

Section 204(a) of the Public Land Administration Act of July 14, 1960, 43 U.S.C. § 1374 (1970) provides that the decision of whether or not to refund unrequired or excess payments is discretionary with the Secretary "where \* \* \* any person has made a payment \* \* \* which is not required \* \* \* by applicable law and the regulations issued by the Secretary \* \* \*." (Emphasis added.)

With respect to simultaneous filings of oil and gas lease offers, the Secretary exercised this discretion by promulgating section 3123.9(c)(3). In 1968 that regulation provided in part:

Upon determination of the successful drawee for a particular leasing unit, the first year's rental will not be returnable and will be earned and deposited in the United States Treasury upon execution of the lease in behalf of the United States. However, if an applicant withdraws his entry card prior to the drawing or if his offer to lease is rejected, the advance rental will be returned to him \* \* \*. (Emphasis added.)

The Department is bound by the regulation as to all matters within its ambit. McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). The Secretary has not retained additional discretion to be exercised under the statute in contravention of his regulation.

According to the express language of the regulation, the first year rental is classified as earned and not returnable. The words "earned" and "not \* \* \* returnable" must be construed to have been included in the regulation for a serious purpose, and it would seem that the purpose is other than "to direct \* \* \* the manner in which the receivers of public moneys are to account for the same." Cf. Instructions of the First Assistant Secretary, 50 L.D. 589 (1924) and John J. Kotkin, 49 L.D. 344 (1922), wherein the regulation there concerned specified the payment was "earned" but did not specify that it was "not returnable." In Kotkin it is stated at 346 that the word "earned" [standing alone] should not be construed

as "not repayable." With this history, it is difficult to picture how the regulation could have been drafted to more explicitly provide that the rental "will not be returnable."

Where a lease is subject to cancellation because of some fault of the Government, it cannot be said that the rental has been earned by the Government. In such circumstances, it is clear that section 3123.9(c)(3) was not intended to bar repayment in the Secretary's discretion under 43 U.S.C. § 1374 (1970). Beard Oil Company, 1 IBLA 42, 77 I.D. 166 (1970).

Such a situation is not presented in the case now before the Board. Here, appellant failed to submit required documents and the record shows that he made improper multiple filings under 43 CFR 3123.3(a) (1968). Said section then provided:

§ 3123.3 Rejection of offer.

(a) When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3123.9, all offers filed by either party will be rejected. \* \* \* In the event a lease is issued on the basis of any such offer, action will be taken for the cancellation of all interests in said lease held by each person who acquired any interest therein as a result of collusive filing unless the rights of a bona fide purchaser as provided for in § 3104.2 intervene, whether the pertinent information regarding it is obtained by or was available to the Government before or after the lease was issued.

The Board of Land Appeals in Beard, supra, when allowing a refund, made it clear that a refund would not be available "if the cancellation of the oil and gas lease is due to some fault of the lessee himself or if he stands to benefit through any kind of an arrangement with parties seeking the cancellation of the lease." 77 I.D. at 169. Under the Beard rationale (which did not involve simultaneous offers and the application of section 3123.9(c)(3)), appellant herein would not be entitled to a refund because his actions and not the actions of the Government constituted the "fault" which required cancellation of the leases. 1/

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1/ In J. V. McGowen, 9 IBLA 133 (1973), the successful drawee in a simultaneous filing failed to timely file certain statements

As majority points out, appellant had time to attempt to dispose of the lease to a bona fide purchaser or otherwise use his right under the lease. Where the first year rental has thus been "earned" by the Government, I do not feel it may be returned regardless of whether or not appellant actually exercised his power to dispose of the lease.

For the above reasons, I believe the Land Office decision should be affirmed.

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Joseph W. Goss  
Administrative Judge

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(fn.1 cont'd)

required by 43 CFR 3102.7; therefore, "the cancellation of the \* \* \* lease [was] due to some fault of the lessee himself" under the Beard test. McGowen's repayment should have been denied under 43 CFR 3112.4-1 (1971), which section incorporated the pertinent portion of former section 3123.9(c)(3). Sections 3123.3(a) and 3123.9(c)(3) are not arbitrary, and the regulations are controlling on the Board. McKay v. Wahlenmaier, supra.

ADMINISTRATIVE JUDGE FISHMAN CONCURRING IN PART; DISSENTING IN PART:

The main opinion would return the rentals only in ES 4483. I would also return the rentals in ES 4409 and ES 4487.

43 CFR § 3112.4-1 (1971) states as follows:

Upon determination of the successful drawee for a particular leasing unit the first year's rental will not be returnable and will be earned and deposited in the U.S. Treasury upon execution of the lease on behalf of the United States.

The Bureau of Land Management decision of February 11, 1970, upheld the cancellation of the leases. That decision became final in the absence of an appeal therefrom. The cancellation of the leases was predicated upon grounds that the leases should not have been issued by the Bureau, *i.e.*, preexisting deficiencies. I do not purport to pass upon the correctness of the cancellation, although I have some doubts on the subject.

In an unpublished opinion, dated May 31, 1961 (C.G. designation B-128712-O.M.), the Assistant Comptroller General, in construing the Public Land Administration Act of July 14, 1960, Title II § 204(a), 43 U.S.C. § 1374 (1970), stated:

Since the effect of the court decisions in this instance was that the Secretary had no legal authority to execute \* \* \* [the leases in issue] it is reasonable to conclude that he had no legal authority to exact the payments provided for thereunder.

The most recent repayment statutory provision is embodied in 43 U.S.C. § 1374 (1970) and reads as follows:

In any case where it shall appear to the satisfaction of the Secretary of the Interior that any person has made a payment under any statute relating to the sale, entry, lease, use, or other disposition of the public lands which is not required, or is in excess of the amount required, by applicable law and the regulations issued by the Secretary, the Secretary, upon application or otherwise, may cause a refund to be made from applicable funds. [Pub.L. 86-649, Title II, § 204(a), July 14, 1960, 74 Stat. 507.]

The Department has not promulgated regulations thereunder. Consequently, only the finding of the Department that the payment was "\*\*\* not required, or is in excess of the amount required \*\*\*" is necessary to trigger repayment. In view of the opinion of the Assistant Comptroller-General, it seems clear that the payments in ES 4409 and ES 4483 were "\*\*\* not required \*\*\*".

Assuming, arguendo, that fraud were involved in the procurement of the leases, in the absence of implementing regulations, interdicting payment in such circumstances, repayment would not be barred as a matter of law. However, since an application for repayment is in the nature of a request for equitable relief, one who had clearly practiced fraud, would not be entitled to equitable relief, i.e., the repayment. In any event, it does not appear that fraud was practiced in the cases at bar. With respect to two leases, there was a failure to make the showing required of corporate and trustee offerors, a patent defect. With respect to all the leases, the appellant filed a drawing card in his own behalf and drawing cards as attorney-in-fact for a trustee on behalf of four trusts for minors. No effort was made to conceal what the Bureau ultimately determined to be multiple filings for the same tract, and indeed, the "multiple filings" were readily ascertainable. The filing of the multiple offers, therefore, did not constitute fraud. Cf. Frackelton v. United States, 54 Ct.Cl. 152 (1919).

Even if the application for repayment were to be considered under 43 U.S.C. § 263 (1970), and the regulations thereunder, 43 CFR, Subpart 1822 (1971), I believe appellant should be considered as an "innocent" party.

The main opinion rejects the request for repayment on ES 4409 because appellant had been "aware for almost a year that this lease was subject to the same defect as the others and should have been cancelled for the same reason that he remained silent until the obligation to pay another year's rental was upon him."

During this 11 months he had full control of the lease and could have sold it to a bona fide purchaser or indeed drilled on it himself. In other words he held a lease for almost a year which he could have used to gain an advantage to himself and which he could have transferred safely to another, who then could have maintained it. A lessee who, with knowledge that it is subject to cancellation, holds a lease from which he could benefit has received a substantial portion of the rights granted him by the lease. He ought not be allowed recoup the rental paid for that time. Therefore the denial of a repayment of the first year's rental paid on this lease is affirmed.

With respect to ES 4483 the main opinion would withhold return of the rentals because the lessee had assigned a portion of the lease to a bona fide purchaser.

The genesis of the concept that an oil and gas lessee is not entitled to return of rentals for an erroneously issued lease where he has had the opportunity to enjoy the fruits of the lease is the July 1, 1955, opinion of the Comptroller-General (B-123118). He held with respect to the return rental paid under oil and gas leases for lands covered by mining claims that:

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\* \* \* [I]n the absence of any interference with the lessor's possession and beneficial use of the land, it would seem clear that the lessee properly may not now assert a claim for refund of any payments properly payable under the lease, particularly since the lessee was not deprived of any rights under the lease prior to the issuance of patent to the mineral claimant.

See L. N. Hagood et al., 65 I.D. 405, 407 (1958). Hagood was tested in Edwin Still et al. v. United States, Civil No. 7897, D. Colo. and a compromise was reached between the parties, presumably on the basis that the suit had some merit.

The Comptroller General's opinion initiated the concept that if a lessee enjoyed, or could have enjoyed, the fruits of his lease, he could not recover rentals erroneously paid. Still suggests that the doctrine is not sound.

The crucial question presented is, conceding that the government may return the rentals, whether such rentals ought to be returned. My view is that, absent fraud against the government, rentals paid on oil and gas leases, subsequently deemed to have been erroneously issued, should be returned.

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Frederick Fishman  
Administrative Judge

We concur in this dissent:

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Anne Poindexter Lewis  
Administrative Judge

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Douglas E. Henriques  
Administrative Judge

