

**Editor's note: Reconsideration denied by order dated March 17, 1976**

JOHN OAKASON

IBLA 75-224

Decided January 21, 1976

Appeal from letter-decision of the Utah State office, Bureau of Land Management, denying appellant's request to amend oil and gas lease U-22677.

Affirmed.

1. Oil and Gas Leases: First Qualified Applicant--Oil and Gas Leases: Noncompetitive Leases--Rules of Practice: Appeals: Failure to Appeal

Where an offeror failed to take an appeal from a decision issuing a noncompetitive oil and gas lease but erroneously rejecting certain available lands while correctly rejecting other lands in the offer and the offeror failed to retender rental for the erroneously rejected lands, and where the error could be readily apparent to the offeror, and the offeror acquiesced for a year and a half in the lease as issued, such failure precludes the amendment of the lease and the offeror is deemed to have abandoned his preference right as the first qualified applicant to lease the land which was erroneously rejected.

APPEARANCES: Sheridan L. McGarry, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Appellant has appealed from the letter-decision of the Chief, Branch of Realty Services, Utah State Office, Bureau of Land Management (BLM), dated October 22, 1974, denying appellant's request to amend oil and gas lease U-22677 issued on April 18, 1973, for a primary term of 10 years to be effective on May 1, 1973.

On March 19, 1973, appellant filed an offer with the Utah State Office, BLM, for a noncompetitive oil and gas lease covering certain lands situated in Garfield County, Utah. The lands were:

T. 34 S., R. 7 E., S.L.M.

Sec. 28: All  
Sec. 20: S 1/2  
Sec. 22: NE 1/4  
Sec. 27: S 1/2 SE 1/4, NW 1/4 SE 1/4  
Sec. 35: All

T. 35 S., R. 7 E., S.L.M.

Sec. 1: All

On April 18, 1973, the State Office issued lease U-22677 and a decision regarding the offer. The decision explained that the enclosed lease included part of the lands in the offer, but that the remainder of the land was rejected because "the offer did not include all the available land in a protracted section." The enclosed lease, U-22677, covered the following described lands:

T. 34 S., R. 7 E., S.L.M.

Sec. 35: All

T. 35 S., R. 7 E., S.L.M.

Sec. 1: All

Although the decision extended the right of appeal, appellant did not appeal the decision.

Not until one and a half years later on October 15, 1974, did appellant inform the BLM State Office that an error had been made in the issuance of U-22677 and that he wanted to amend the lease to include Section 28. <sup>1/</sup>

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<sup>1/</sup> Shortly before appellant's October 15 letter, one Joan Chorney filed a noncompetitive oil and gas lease offer on October 8, 1974, for Section 28: All, T. 34 S., R. 7 E., S.L.M. Appellant has filed a protest against the issuance of a lease pursuant to such offer.

The BLM Office letter-decision of October 22, 1974, refusing to amend the lease, admitted that an error may have been made in the lease. But it stated that since the decision of April 18, 1973, which rejected the offer in part, had not been appealed, such decision became final 30 days later, even though it was in error.

In appealing the October 22, 1974, letter-decision appellant has filed a petition to amend the oil and gas lease alleging that U-22677, as issued, failed to include all of sec. 28, T. 34 S., R. 7 E., S.L.M., pursuant to the offer. Appellant points out that the State Office serial page covering U-22677 shows the lease as being issued to cover all of Section 28. 2/

Appellant alleges also that no lease covering section 28 had been issued as of the date of the appeal and, therefore, appellant requests amendment of U-22677 to include all of section 28.

The provision of the regulations covering amendments to noncompetitive oil and gas leases reads:

If any of the land described in item 2 of the offer is open to oil and gas filing when the offer is filed but is omitted from the lease for any reason and thereafter becomes available for leasing to the offeror, the original lease will be amended to include the omitted land unless, before the issuance of the amendment, the land office receives a withdrawal of the offer with respect to such land or an election to receive a separate lease in lieu of an amendment. Such election shall consist of a signed statement by the offeror asking for a separate lease accompanied by a new offer on the required form describing the remaining lands in his original offer, executed pursuant to this section. The new offer will have the same priority as the old offer. It need not be accompanied by the filing fee. The rental payment held on the original offer will be applied to the new offer. The rental and such an amendment shall be the same as if the land had been included in the original lease when it was issued. If a separate lease is issued, it will be dated in accordance with § 3110.1-2. (Emphasis added.)

43 CFR 3110.1-5.

2/ While the serial page did show Section 28 as being part of U-22677, a discrepancy is apparent on the face of such page because Sections 35 and 1 are also listed, yet the acreage total shown is only 1280.40 acres.

Appellant contends that section 28 has been open and available for oil and gas leasing from the date of his original offer up to and including the date of the appeal, that he has never withdrawn his application to such land, and that he has not made an election to have a separate lease issued to him covering such lands.

The reasoning in a number of earlier Departmental decisions is persuasive in disposing of this case. Such decisions were issued during a period when Departmental procedures governing noncompetitive oil and gas leases differed somewhat from the present procedures; <sup>3/</sup> however, the law set forth in such cases is still applicable.

The general rule is that where an erroneous decision of the local BLM office fails to recognize the preferential right of the first qualified applicant to obtain a noncompetitive oil and gas lease on a tract of land, and where the error is as obvious to the applicant as to anyone else, the failure of the applicant to appeal the decision is considered an abandonment of the preferential right; and that right cannot be reestablished to the prejudice of third parties whose rights have intervened. Jeanette L. Luse, 61 I.D. 103 (1953); C. A. Rose, A-26354 (May 13, 1952). In our case, there is an intervening offer. See n. 1.

In the Rose case, Rose applied for two tracts of acquired lands, one of which had been included in a prior application. After a lease had issued for such tract under the prior application, BLM, in a decision referring to the existence of a lease on one of the two tracts applied for, rejected Rose's application in its entirety. Although the right to appeal was expressly provided for, Rose failed to appeal the specific rejection of his application.

In the Luse case, the applicant filed an application for certain described lands. The lease forms returned to the applicant inadvertently omitted certain lands described in the application. However, the omission was apparent on the face of the lease executed by the

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<sup>3/</sup> When a person desired a noncompetitive oil and gas lease offer under the old procedure he was required to file in the proper BLM office an application describing the lands sought for leasing. The BLM office then sent to the applicant copies of a lease describing such of the lands sought as were available for leasing. When the lease forms were signed and returned to the BLM office a lease was issued.

Under the current procedure and that used in the present case, a person files a noncompetitive oil and gas lease offer in the proper BLM office describing the desired lands. The BLM, after reviewing the availability of such land, issues a lease for the available lands on the same form as the offer without further participation or opportunity for review by the offeror.

applicant. The Department held that since the error in omitting certain lands should have been more apparent to the applicant than anyone else, and since the applicant must be deemed to have known what land was included in the application, and no appeal was taken from the decision offering the applicant the lease, the applicant was deemed to have abandoned the preferential right initiated by the application and to have acquiesced in the lease as it was issued.

The Luse case was later distinguished in Richfield Oil Corporation, 71 I.D. 243 (1964), a case in which a lease was amended in the face of a conflicting offer. In Richfield one Lutz filed a noncompetitive oil and gas lease offer for four sections of land, describing one section as "Section 13: All including River Bed." A lease was subsequently issued for lots 1, 2, 3, 4, 5, 6 and 7 in section 13. That included all the legal subdivisions of section 13 except lot 8, which comprised 4.08 acres. A decision issued the same date as the lease suspended the offer as to certain riverbeds pending a determination of their status. The decision also stated that the "enclosed lease embraces the remainder of the land applied for." Thereafter, Richfield filed an offer for lot 8. BLM amended the Lutz lease to include lot 8 and rejected Richfield's offer. Richfield appealed.

The Luse case was distinguished on the basis that the applicant in Luse should have known that the land description on the lease form was not the same as that described in the application. In Richfield the discrepancy was not apparent to Lutz. He applied for all of section 13. There was a lot 8 in that section. However, the lease described only lots 1, 2, 3, 4, 5, 6 and 7 and the accompanying decision stated that the lease embraced the land applied for exclusive only of the riverbed lands. The omission of lot 8 could only have been discerned by reference to the official plat in the BLM office. Richfield Oil Corporation, supra at 246. <sup>4/</sup>

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<sup>4/</sup> The Richfield case, supra, referred to the regulation which is now 43 CFR 3110.1-5, which had been promulgated in 1950 (then 43 CFR 192.42(j)), and stated (at 71 I.D. 246-47):

"Thus, it is clear that under the current regulations the acceptance of an offer for less land than that applied for does not, without more, necessarily mean that the offer is rejected as to the land not included. The land omitted may be included in a prior offer which has not been adjudicated or may be for some other reason not immediately available for inclusion in the lease. Thus the failure of the land office in this case to include lot 8 in Lutz' lease did not purport to be such a rejection of Lutz' offer for lot 8 as to require him to appeal in order to retain his preference right to lease lot 8. It is true that the land office

[1] The instant case does not fall within the purview of the exception created by Richfield because the offer was not suspended. Although there are minor differences in the Luse case and the present case, the rationale of the rule of Luse, rather than the exception to that rule in Richfield applies here and will be followed. In this case the offer was clearly rejected as to section 28. Oakason is charged with knowledge that section 28 had been erroneously omitted from his lease. His offer was for 2520.40 acres, three full sections plus portions of three other sections. His lease was returned to him describing the lands in the lease. They did not include section 28. Further, the lease gave an acreage total of 1280.40 and appellant was given a refund of \$620. Six hundred forty dollars and fifty cents was retained as the rental for 1280.40 acres. In addition, the \$640.50 rent for the rental year beginning May 1, 1974, was paid by appellant on such date. Three full sections would have been 1920 acres plus \$320.00 more in rental. Oakason was in at least as good a position as the BLM office to perceive the error. This is similar to Luse and different from Richfield where the remainder of the offer was suspended rather than rejected.

Appellant has cited 43 CFR 3110.1-5 as the authority for amending U-22677. Such regulation is not applicable in this case. The regulation covers situations in which land is omitted from a lease because it has been included in a prior offer which has not been adjudicated or because the land is not immediately available for inclusion in the lease for any other reason, but not where there has been a clear rejection of the offer for such land. See n. 4 quoting from Richfield Oil Corporation, supra. The underlined sentence in the regulation quoted, supra, concerning "rental payment held on the original offer" demonstrates that the regulation was contemplated to cover situations where an offer is suspended in part and a lease issued in part and rental is retained to cover the suspended offer. Amendment of the lease is done by BLM without any action being required of the lessee. Indeed, by paragraph 7 of the lease offer form the offeror is bound by his signature on the offer to any amendment of land applied for prior to withdrawal of the offer. Obviously an offeror would not be bound to accept an amendment to a lease where the offer has been rejected and refund of the

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fn. 4 (continued)

decision said only that the offer was being suspended as to the river bed lands. On the other hand, it did not say that the offer was being rejected as to lot 8. On the contrary, it said that the lease being issued included all the remaining land. I believe, therefore, that it would be improper to charge Lutz with notice that his offer was being rejected as to lot 8 and that he must appeal from the rejection to preserve his rights to that tract."

rental made without an appeal by the offeror and retender of the rental to preserve the offer. Likewise, there is no binding obligation of the United States to amend the lease under those circumstances where there has been no retained rental to preserve the offer, especially in the face of an intervening application. Cf. Gwen Gaukel, A-29017 (December 14, 1962).

In sum, in the present case the land was available for leasing to appellant at the time the offer was filed and at the time the lease was issued. Only through error was section 28 omitted from the lease. Such error was obvious or should have been obvious to appellant. For that reason, appellant should have appealed the omission of section 28 from the lease and tendered the rental payment within 30 days of receipt of such lease and rejection decision. His failure to do so must be considered as an abandonment of his preference right as the first qualified applicant for section 28.

For the above stated reasons, the State Office decision denying the amendment is affirmed and appellant's protest against the issuance of an oil and gas lease to Joan Chorney pursuant to her offer U-28268 to lease section 28, T. 34 S., R. 7 E., S.L.M., is dismissed, all else being regular.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joan B. Thompson  
Administrative Judge

We concur:

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Martin Ritvo  
Administrative Judge

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Anne Poindexter Lewis  
Administrative Judge

