

BRUCE ANDERSON

IBLA 77-53

Decided May 2, 1977

Appeal from decision of the New Mexico State Office, Bureau of Land Management, denying partially request for refunds of rentals paid on canceled oil and gas lease NM 0558441.

Affirmed in part; set aside and remanded in part.

1. Accounts: Refunds! ! Oil and Gas Leases: Rentals

Where a noncompetitive oil and gas lease is canceled for having been erroneously issued because the lands involved were part of an incorporated city (43 CFR 3101.1-1(a)(3)) the Department may return the rentals pursuant to the repayment statute, 43 U.S.C. § 1374 (1970), in appropriate circumstances where the lessees have derived no benefit from the possession of the lease and there are no other factors militating against repayment.

APPEARANCES: Bruce Anderson, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Bruce Anderson has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated October 14, 1976, denying his request for refund of all rentals paid on canceled oil and gas lease NM 0558441.

The lease was originally issued to one Richard H. P. Paden on January 1, 1966, and assigned effective July 1, 1966, to James P. Witmer. By subsequent assignment, effective August 1, 1966, Witmer conveyed a 50! percent interest in the lease to appellant Bruce Anderson. 1/

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1/ Although Witmer held a 50! percent interest in the canceled lease, he did not join Anderson in this appeal.

By letters dated October 7 and 9, 1975, appellant advised the BLM that he contemplated drilling on the lease but had learned that the lease was within the city limits of El Reno, Oklahoma. Appellant requested a clarification of the status of the lease.

The BLM confirmed that the subject lands had been included within the corporate limits of El Reno since April 13, 1962, and were therefore not subject to noncompetitive oil and gas leasing. Accordingly, on December 17, 1975, the BLM issued a decision canceling the lease in its entirety. No appeal was taken from this decision.

In letters to the BLM dated May 7 and 12, 1976, respectively, Anderson and Witmer requested a refund for the rentals paid for the entire term of the lease. The total amount paid, \$ 11,925, was at the rate of \$ 1,192.50 per year for the period from January 1, 1966 through December 31, 1975.

The decision partially denying the requested refund stated in part as follows:

Considering that there were two assignments of the lease and that the lease had been in existence for nearly ten years before it was discovered that it had been issued erroneously, it is the conclusion of this office that the lessees have derived a benefit from possession of the lease and have had almost full enjoyment thereof. It was only during the latter part of the tenth year in which drilling operations were supposed to have been scheduled that the lessees were deprived of any rights.

Accordingly, it has been determined that the lessees Bruce Anderson and James P. Witmer are entitled to the refund of the rental paid only for the tenth year in the amount of \$ 1,192.50. Their request for refund of the rentals for the remaining years is hereby denied.

Appellant, relying on Beard Oil Company, 1 IBLA 42, 77 I.D. 166 (1970), contends in substance that the decision is in error and that all rentals paid should be refunded.

In Beard, supra, the Board held that a refund of rentals paid for a canceled lease could be made where the lease was issued to other than the first qualified applicant as a result of mistake of law or fact not attributable to the lessee. However, such refund was conditioned upon a showing that cancellation of the lease was not due to some fault of the lessee and proof that there was no arrangement or agreement by the lessee with parties seeking cancellation of the lease. The rationale of Beard is that the lessee gained no advantage from his lease because a cancellation

would nullify any benefit he might have derived from it prior to its cancellation. Charles J. Babington, 17 IBLA 435 (1974).

The statutory authority for refunds 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.

[1] The Board has held in several decisions following Beard, *supra*, that rentals may be refunded in appropriate circumstances under the repayment statute. Albert J. Finer, 27 IBLA 61 (1976); Babington, *supra*; J. V. McGowen, 9 IBLA 133 (1973).

According to the record before us, the lands involved in lease NM 0558441 were never legally subject to noncompetitive oil and gas leasing, because they were part of the incorporated city of El Reno, Oklahoma. (43 CFR 3101.1-1(a)(3).) There is no indication that the lessees derived any benefits from the possession of this lease, nor that they held the lease for any length of time with knowledge that it was improperly issued. Assuming that lessees are without fault and all else being regular, it is our conclusion that the rentals may properly be refunded. The State Office may require appellant to furnish such proof as it deems necessary to establish his good faith and absence of fault in acquiescing and retaining the lease for such a long time. Beard, *supra* at 170.

Therefore pursuant to the authority delegated to the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is affirmed insofar as it granted a refund of the rental paid for the 10th year, and set aside and remanded insofar as it denied repayment of the other 9 years' rentals for lease NM 0558441.

Anne Poindexter Lewis  
Administrative Judge

We concur:

Martin Ritvo  
Administrative Judge

Edward W. Stuebing  
Administrative Judge  
(Concurring Separately)

## ADMINISTRATIVE JUDGE STUEBING, CONCURRING:

The claim for a refund of rentals presented in this case is so closely correlated to that which we considered in Beard Oil Co., 1 IBLA 42, 77 I.D. 166 (1970), that the same considerations of law are generally applicable. However, the instant case involves certain circumstances not encountered in Beard, and these should be examined in order to determine whether they mandate a different result.

In Beard the lands were available for leasing, but were erroneously issued to the applicant (Beard Oil Co.) having an inferior priority, in derogation of the statutory right of applicants who held first priority. In my concurring opinion in that case I noted:

[Beard Oil Company] 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.

This refers to that section of the Mineral Leasing Act, 30 U.S.C. § 184(h)(2), which precludes administrative cancellation or forfeiture of an oil and gas lease which issued in conformity with the provisions of the Act (albeit in error), but then was acquired by a bona fide purchaser.

Since in this case the original lessee, Padon, assigned it in its entirety to Witmer, who in turn assigned 50 percent to Anderson, the questions raised are:

1. Were Witmer and/or Anderson bona fide purchasers of their interests in the lease?
2. If so, did the New Mexico State Office, by its administrative cancellation of the lease, violate 30 U.S.C. § 184(h)(2)?

There is nothing in the record before us to suggest that either Witmer or Anderson, at the time they acquired their respective interests, had actual knowledge that the leased lands were within the corporate limits of the city of El Reno, nor is there any basis to suppose that they did not pay value for those interests, although further inquiry would be necessary to establish their bona fides more conclusively. Did they, then, have constructive notice? City of El Reno Ordinance No. 2030, is a matter of public record and clearly shows that the land in question has been within the city limits at all times pertinent to the inquiry. However, in an opinion dated November 25, 1975, the Field Solicitor, Santa Fe, advised the Bureau's New Mexico State Director that he did not regard this as sufficient to put the lessees on notice. I would defer to that opinion. Therefore, for the purposes of this review we may assume the bona fide status of Messers. Witmer and Anderson.

Were they, then, protected by the statute, supra, and did the Bureau act wrongly in canceling the lease? The question is moot. If we answer in the affirmative we must also note that the lessees failed to appeal the cancellation, and the decision became final. Thus, right or wrong, the lessees acquiesced in the decision, just as did the lessee in Beard Oil Co., supra, when it withdrew its appeal. But I believe the question must be answered in the negative, i.e., that the Bureau acted properly in canceling the lease. As noted above, in Beard, where the statute would have operated to preserve the lease if a bona fide assignee had been involved, the land was legally available at the time the lease issued to the wrong applicant. In this case the land was not legally available when the lease erroneously issued, and the mistake of the Bureau in issuing it could not create a vested property interest contrary to law. Joseph T. Kurkowski, 15 IBLA 13, 18 (1974), and cases cited therein.

In Oil Resources Incorporated, 14 IBLA 333 (1974), where an oil and gas lease was issued for lands in a wildlife refuge, this Board held that the lease was a nullity and that the protection afforded a bona fide purchaser by 30 U.S.C. § 184(h)(2) is not available where the lease was void from its inception. See Skelly Oil Co., 16 IBLA 264, 275 (dissenting opinion), 1/ for a discussion of the effect of the statute where the lease is merely voidable rather than void.

Accordingly, as the land was not legally available, I consider that the lease here at issue was null and void from its inception. No rights ever having vested in the original lessee or the two assignees, there could be no legal "enjoyment" of the lease by them, and the monies paid by them pursuant to such lease were never legally "earned" by the United States. A full refund is in order.

Edward W. Stuebing  
Administrative Law Judge

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1/ The majority opinion was reversed and the lease reinstated by the Court in Skelly Oil Co. v. Secretary, Civ. No. 74-411 (D. N.M. filed July 16, 1975).

