

JOHN P. LEVYCKY

IBLA 76-737

Decided May 12, 1977

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting a simultaneous oil and gas lease offer W-55664.

Affirmed.

1. Oil and Gas leases: Applications: Generally! ! Oil and Gas Leases: Applications: Drawings

Simultaneous oil and gas drawing entry cards must be fully executed by the applicant and when the applicant omits a state prefix in the parcel number, the lease offer is properly rejected.

APPEARANCES: John P. Levycky, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

John P. Levycky appeals from the July 12, 1976, decision of the Wyoming State Office, Bureau of Land Management (BLM), rejecting a simultaneous oil and gas lease offer.

The oil and gas lease offer was for acquired land in the State of Kansas, in Ts. 16 & 17 S., R. 6 W., Parcel No. 303, Ellsworth County. The regulation governing over! the! counter filing of noncompetitive oil and gas lease offers for acquired land requires that an offer for simultaneous oil and gas lease of acquired lands not surveyed under the rectangular survey system must be accompanied by a map. 43 CFR 3101.2-3(b)(3). The notice announcing the availability of lands for leasing stated that the map required by that regulation must accompany each offer.

John P. Levycky's entry card was drawn as the second qualified drawee. The offer of the first qualified drawee was rejected because his application was not accompanied by a map. He was notified by the BLM on June 25, 1976, of the rejection of his offer and of his right to appeal. Levycky received a carbon copy of this notice.

On July 2, 1976, Mr. Levycky wrote the BLM inquiring how he could obtain a map of the Parcel. In his letter appellant shows an understanding of the regulations, and acknowledgment of the fact he should have acquired a map prior to filing an Entry Card. The State Office, BLM, rejected appellant's oil and gas lease offer on July 12, 1976, for failure to comply with 43 CFR 3101.2-3(b)(3), and informed appellant of appeal procedures. The BLM also informed appellant at that time he could acquire a map from the Army Corps of Engineers. Appellant obtained a map, and filed it along with his timely Notice of Appeal received by the BLM on August 9, 1976.

Appellant points out that he did not have time to get a map in the few days between the announcement of the drawing and the close of the simultaneous filing period.

[1] Under the simultaneous oil and gas leasing procedure all offers for the same land are considered simultaneously, and priorities are determined by drawing. If the first drawee is disqualified for some reason, his offer is rejected, and the second drawee, if qualified, is entitled to receive the lease. Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974) 1/; see 43 CFR 3112.2-1(a)(3).

An examination of appellant's entry card reveals that it has a defect other than the failure to file a map which in itself necessitates a rejection of his entry card. The notice of lands available for filing listed many parcels. Each parcel is designated by the prefix WY and a number, such as WY-303, the parcel for which appellant filed. This method of designating parcels was designed to avoid some confusion arising from the former system of using only numbers followed by another space for the insertion of the name of the state in which the land was.

Upon the adoption of the new method of numbering parcels, the "state prefix" became a part of the parcel number. Its use in describing the tract applied for on the entry card became mandatory. An entry card which omits the "state prefix" is not a fully executed card, as required by the pertinent regulation, 43 CFR 3112.2-1(2). In several recent cases the Board has affirmed the rejection of a simultaneous offer because there was not set out on the entry card the full designation of the parcel by both number and letter prefix. Etta D. Harris, 29 IBLA 259 (1977); E. Fenton Carey, 29 IBLA 196 (1977). Therefore, appellant's entry card must, in any event, be rejected for this reason.

1/ Aff'd, B.E.S.T., Inc. v. Morton, Civ. No. 75-060 (D. N.M., filed Aug. 19, 1975); aff'd, 544 F.2d 1067 (10th Cir. 1976).

Further, in my opinion appellant did not earn a priority as of the date and time of the simultaneous filing because of noncompliance with the requirement set out in the notice of lands available for filing, and is disqualified for his noncompliance. Cf. Frank G. Wells, 28 IBLA 113 (1976). Appellant's compliance after the close of the simultaneous filing period cannot cure the defect of his offer. Southern Union Production Co., 22 IBLA 379 (1975). If no qualified drawee is found, the lands must be included in a subsequent list of lands available for simultaneous filing. 43 CFR 3112.5-1. Ballard E. Spencer Trust, Inc., supra.

I cannot agree with the comments in Judge Stuebing's concurring opinion that the failure to file a map would not be fatal by itself. Whether it is necessary, is not too pertinent for we have often enforced requirements whose necessity has escaped us and which have subsequently been removed from the regulation, e.g., Duncan Miller, 29 IBLA 1 (1977), statement of offeror's ownership in interest not owned by United States.

Again I do not find it arbitrary. All the acquired lands listed in the notice were subject to the same requirement.

Finally even though the map may not be required by the simultaneous filing regulations (and it is difficult to see what purpose it serves), it was required by the notice itself. That notice sets out the terms of the filing and all who seek to partake in it must comply. It would be grossly unfair to permit one who does not comply to prevail by arguing that compliance was unnecessary. We cannot tell how many other would! be offerors were dissuaded from filing solely because they could not obtain a map timely. The proper course would be to object to the drawing and seek to have it delayed or the map requirement removed. Since none of the offerors complied with all the requirements of notice, the parcel should be made available in another drawing, as the regulation requires. 43 CFR 3112.5-1; Ballard E. Spencer Trust, Inc., supra.

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 Wyoming State Office is affirmed.

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING, DISSENTING IN PART, CONCURRING IN PART:

Where the BLM has identified a parcel of land as available for oil and gas leasing, assigned it a designated number, and listed it for the simultaneous filing of lease offers, I regard the imposition of the requirement that the drawing entry cards each be accompanied by a map as (1) unauthorized, (2) arbitrary, and (3) unnecessary.

The requirement is unauthorized because the regulation which requires the submission of such maps is found at 43 CFR Subpart 3101. The regulations governing the simultaneous filing of oil and gas lease offers are contained in Subpart 3112. The only reference in Subpart 3112 to a need to supplement to descriptions of the leasing units identified by parcel numbers imposes the duty to do so on BLM, not on the applicant, viz:

§ 3112.1-2 Posting of Notice.

* * * * *

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.

All that is required of the applicant under Subpart 3112 is that he identify the leasing unit desired by parcel number, viz:

§ 3112.2-1 Offer to lease.

(a) Entry Card. Offers to lease such designated leasing units by parcel numbers must be submitted on a form approved by the Director. "Simultaneous Oil and Gas Entry Card" signed and fully executed by the applicant or his duly authorized agent in his behalf. The entry card will constitute the applicant's offer to lease the numbered leasing unit by participating in the drawing to determine the successful drawee.

* * * * *

(2) Only one complete leasing unit, identified by parcel number, may be included in one entry card. Lands not on the posted list may not be included. An offeror (applicant) is permitted to file only one

offer to lease (entry card) for each numbered parcel on the posted list.

Note that nowhere in Subpart 3112 is there any requirement that the parcel for which the offer is made be identified by the offeror in any manner except by the designated parcel number. Moreover, there is no incorporation by reference in Subpart 3112 to the regulations in Subpart 3101. There is, however, an incorporation by reference to the regulations in Subpart 3102, viz.:

§ 3112.3 Qualifications.

§ 3112.3-1 Compliance with subpart 3102 is required.

This is extremely significant, because had those who devised the simultaneous filing regulations intended that applicants should file a map in these circumstances, they could easily have incorporated an appropriate reference to compliance with Subpart 3101. Inclusio Unius Est Exclusio Alterius. The inclusion of a reference to Subpart 3102 without mention of Subpart 3101 must be construed to mean that Subpart 3101 was not intended to apply.

Similarly, the drawing entry card, which is "the form approved by the Director," supra, includes the following printed admonition:

Compliance must be made with the provisions of 43 CFR 3102.

Again, there is no mention of a requirement to comply with any provision of Subpart 3101 in the regulations governing the filing of simultaneous oil and gas lease offers.

Thus, I conclude that no authority exists in the regulations to require compliance with 43 CFR 3101.2-3(b)(3) in this instance, and the imposition of the requirement is unauthorized.

However, if somehow it could be made to appear that 43 CFR 3101.2-3 does apply in these circumstances, it is clearly arbitrary to require only compliance with sub! subparagraph (b)(3) thereof. If the regulation is applicable to simultaneous filings, it is obviously applicable in its entirety. This would require that all lands be described by the applicants in a simultaneous filing in the manner prescribed by 43 CFR 3101.2-3(a), (b) and (c). Surveyed lands would have to be described by legal subdivision, non! conforming, unsurveyed or accreted lands would have to be described by metes and bounds. Of course, this would serve only to frustrate the utility of the drawing entry card, defeat the purpose of assigning designated parcel numbers to the leasing units, increase the difficulty of filing simultaneous offers, and load the BLM offices

with a burden of useless paper. Yet that would be the only way to escape being arbitrary if we insist on compliance with that portion of the regulation which requires submission of a map.

The submission of a map in these circumstances is unnecessary. The fact of the matter is that BLM has already identified the parcel as available at the time it designates it as a leasing unit, assigns it a parcel number, and states the contained acreage thereof to the second decimal. All lands listed for simultaneous filing were included in previous leases which have expired or have been terminated, canceled or relinquished. 43 CFR 3112.1-1. Thus, BLM knows very well what land it is making available, and doubtless already has a map thereof in the record of the previous lease. The submission of another map is simply superfluous, and the demand that applicants submit one is clearly capricious.

Although I find no basis whatever for the imposition of the map requirement in this case, the fact that others do suggests the presence of some latent ambiguity in the regulations. It is a maxim of long standing in this Department that a regulation should be so clear that there is no basis for an applicant's noncompliance therewith before it may be so interpreted as to deprive him of a statutory right. If there is doubt as to the meaning or intent of a regulation, that doubt should be resolved in favor of the applicant. Wallace S. Bingham, 21 IBLA 266, 288; 82 I.D. 377, 384 (1975), and cases collected therein.

I would reverse the decision of the Wyoming State Office insofar as it depends on the tardy submission of the map as the reason for rejection of the offer. However, I agree that appellant's failure to employ the letter prefix to the parcel designation is fatal to his offer, as we have held in so many previous cases.

Edward W. Stuebing
Administrative Judge

ADMINISTRATIVE JUDGE HENRIQUES, CONCURRING SPECIALLY:

The situation presented in this case is troublesome. I agree with Judge Stuebing that the requirement in 43 CFR 3101.2-3(b)(3) is not applicable to drawing entry card offers filed in the simultaneous procedure set out in 43 CFR Subpart 3112, and that the Wyoming State Office erred in requiring the submission of a map with a drawing card entry for a designated parcel of acquired lands.

I would dispose of this case solely for the reason that the drawing entry card of Levycky is incomplete because the parcel is identified only as "303," instead of as "WY 303" as shown on the list of lands available for simultaneous filing. This holding is in accord with earlier rulings on this point by the Board, Etta D. Harris, 29 IBLA 259 (1977); E. Fenton Carey, 29 IBLA 196 (1977).

Douglas E. Henriques
Administrative Judge

