

Editor's note: Appealed – remanded for hearing, sub nom. Coyer v. Andrus, Civ.No. C78-104K (D.Wyo. Feb. 12, 1979); reaffirmed on judicial remand – Donald W. Coyer (On Judicial remand), 50 IBLA 306 (Oct. 14, 1980); appealed - aff'd, Civ. No. C 80-372 K (D. Wyo. March 5, 1981), rev'd No. 81-1415 (10th Cir. Nov. 4, 1983), 720 F.2d 626; cert denied, sub nom. Easterday v. Coyer, 104 S.Ct. 2346, 466 US 972 (May 14, 1984)

ALFRED L. EASTERDAY

IBLA 78-73 Decided March 22, 1978

Appeal from decision of the Wyoming State Office, Bureau of Land Management, dismissing protest against issuance of oil and gas lease W-59232.

Reversed.

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications:
Sole Party in Interest—Oil and Gas Leases: First Qualified Applicant

When an individual files an oil and gas lease offer through a leasing service under an agreement where the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein. Such an agreement creates for the leasing service an interest in the lease as that term is defined in 43 CFR 3100.0-5(b).

2. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications:
Sole Party in Interest—Oil and Gas Leases: First Qualified Applicant

Where an individual files an oil and gas lease offer through a leasing service under

an agreement with the service which has been determined by this Department to create an interest in the lease for the service, and the service files a waiver of that interest with the BLM prior to a simultaneous drawing, without communicating such waiver to the client, and without any contractual consideration running from the client to the leasing service, the waiver is without effect as a matter of law and the successful drawee is required to make a showing as to sole party in interest under 43 CFR 3102.7.

3. Oil and Gas Lease: Applications: Drawings

A first-drawn simultaneous drawing entry card which is defective because of noncompliance with a mandatory regulation must be rejected and may not be "cured" by submission of further information.

APPEARANCES: Morton J. Schmidt, Esq., Morton J. Schmidt & Associates, Ltd., Milwaukee, Wisconsin, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Alfred L. Easterday has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM) which dismissed his protest to the issuance of oil and gas lease W-59232 to Donald W. Coyer.

Appellant filed a protest after Coyer's filing card was drawn first for parcel No. 44 in the May 1977 simultaneous drawing held in the Wyoming State Office, BLM. Appellant charged an alleged violation of 43 CFR 3112.5-2 1/ which prohibits multiple filings.

1/ 43 CFR 3112.5-2 Multiple filings, provides:

"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 § 3110.1-6(b), all offers filed by either party will be rejected. Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater probability of success

Appellant pointed out that prior to the drawing Coyer had executed a service agreement with his filing agent, Resource Service Company (RSC), which provided for a service fee and royalty payment in force at the time of the drawing. Appellant stated that under the agreement RSC would participate in any proceeds derived from the lease.

Appellant also argued that because RSC had an interest in the lease, Coyer was required to file a statement telling of the additional party in interest as required by 43 CFR 3102.7. 2/

The State Office was very familiar with the terms of the RSC service agreement, having challenged that same agreement in a previous simultaneous oil and gas filing. That case had been taken on appeal to this office in Sidney H. Schreter, William F. Wopp, Jr., 32 IBLA 148 (1977). The State Office noted in its dismissal of the protest that Fred Engle, d/b/a Resource Service Company (RSC), in order to protect his clients during the consideration of that appeal, had submitted an amendment and disclaimer dated January 13, 1977. He waived all rights to an exclusive agency and agreed not to enforce the objectionable portions of the service agreement calling for a percentage commission on all lease sales and royalties benefiting his

fn. 1 (continued)

in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly 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 § 3102.1-2 intervene, whether the pertinent information regarding it is obtained by or was available to the Government before or after the lease was issued."

2/ 43 CFR 3102.7 Showing as to sole party in interest, provides:

"A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer. Upon execution of the lease the first year's rental will be earned and deposited in the U.S. Treasury and will not be returnable even though the lease is canceled."

clients. Subsequently, Engle notified all of his clients who were winners in the simultaneous drawings that they were not bound by the objectionable provisions of the original service agreement. Therefore, the State Office treated the objectionable provisions as if they had no effect because they would not be enforced by RSC.

When Coyer was notified by RSC that he was the winner for parcel No. 44, he chose to execute a new agreement with RSC containing similar language as that of the original agreement. The State Office found that the execution of the new agreement after the drawing did not violate 43 CFR 3102.7 because the lessee was free to develop or assign the lease as he deemed best without interference.

Appellant objects to the State Office decision stating that it ignores the language of 43 CFR 3102.7 and 3100.0-5(b). He contends the service agreement created an interest in RSC in the subsequent lease which required a filing as to parties in interest in compliance with 43 CFR 3102.7. It is his position that the conditional disclaimer filed by RSC, which is not communicated to the winner until after the drawing, did not relieve the lessee of the filing requirement. Such a disclaimer changed nothing as to the preexisting arrangement which he asserts remained in effect at the time of the drawing.

[1] As indicated by both the State Office and appellant, the exact language of the service agreement used by RSC and as executed by the parties in this case has been examined at length by this Board in Sidney Schreter, William Wopp, Jr., supra. 3/ We found that the agreement provides RSC with more than a mere hope or expectation of sharing in the profits. RSC has an enforceable right by the terms of the agency provision of the agreement to share in the profits of any sublease, assignment, or sale of a lease, whether such sublease, assignment, or sale is negotiated by RSC or by the offeror. In addition, such a right is enforceable for a period of 5 years.

3/ The critical section of the agreement provides:

"If I am successful in a drawing, I hereby authorize you to act as my sole and exclusive agent to negotiate for me and on my behalf with any party, firm or corporation for sub-lease, assignment or sale of any rights I obtain by reason of being successful in a drawing for the best price obtainable by you. Any final negotiated price is subject to my approval. If you have successfully negotiated a sale, assignment or lease of my rights by reason of a successful drawing or if I do so during the term of this agency, I hereby agree to pay you for your services in accordance with the schedule detailed below. This agency to negotiate shall be valid for a period of five (5) years." [Emphasis in original.]

Since RSC has a prospective claim to a benefit from a lease, the service agreement provides RSC with a defined share of any profits which may be derived from the lease pursuant to the agreement which was in existence at the time the offer was filed. Therefore, we concluded in Schreter that the agreement created an "interest" in the lease as that term is defined in 43 CFR 3100.0-5(b).

However, the current case presents a different situation for our consideration, where during the pendency of the Schreter appeal, RSC filed an amendment and disclaimer with the Wyoming State Office, BLM, January 13, 1977.

Under the terms of that document if it is ultimately determined by the Department and the courts that this service agreement vests an interest in the lease or offer to lease in RSC, Fred Engle, d/b/a Resouce Service Company, proclaims:

I, * * * do hereby state and aver that I do hereby waive and renounce any exclusive agency which I may have by reason of said service agreements with said offerors from and after this date. * * * I do hereby further state and aver that said waiver and renunciation shall become operative forthwith and shall inure forthwith for the benefit of all said offerors.

[2] From our review of the sequence of events which culminated in the May drawing for parcel No. 44, we do not find that Engle's filing of his waiver document with the Wyoming State Office effectively amended the service agreement with Coyer.

Engle's unilateral action did not alter the contractual obligations of the parties as they existed as of the date of the drawing. First, the waiver document was not communicated to Coyer until after the drawing, and a new agreement was not ratified by Coyer until after he was declared the winner for parcel No. 44. The waiver served notice to the BLM that RSC did not intend to enforce the objectionable provisions of the service agreement. However, without notice to, or an agreement with Coyer, Engle was not bound to carry out the terms of the alleged amendment. It is fundamental to the formation of a contract that there be mutual assent or a meeting of the minds on all essential elements or terms in order to form a binding contract. For both parties to be bound to an agreement there must be a distinct and common intention which is communicated by each party to the other. 17 Am. Jur. 2d, Contracts § 18 (1964). That element is obviously lacking here.

Next, there was no consideration given to Engle by his client for his forbearance from enforcing his contractual rights. It is

a fundamental legal requisite for the formation of an enforceable contract that legally sufficient consideration be given for a promise. A promise has no consideration when nothing was in fact given in exchange for the promise or when no action was taken in reliance upon it, either because the promise was intended as a gratuity or because the thing for which it was offered was not given. Williston on Contracts, Third Edition Section 101; 17 Am. Jur. 2d, Contracts § 85. For these reasons we find Engle's waiver was without effect as a matter of law. The original service agreement remained in effect as of the date of the drawing giving RSC an interest in the lease as defined by 43 CFR 3100.0-5(b). Therefore, we hold that Coyer, as a successful drawee, was required to make a timely showing as to RSC's interest under 43 CFR 3102.7.

Appellant has also provided evidence that RSC may have represented some 200 other client-offerors in this drawing for parcel No. 44. Since we find that Engle's amendment and waiver were ineffective, it then follows that any other offerors availing themselves of RSC's services in the drawing would have remained bound by their original service agreements with RSC in a like manner. Engle did gain an increased probability of success in the drawing. Accordingly, the regulation prohibiting multiple filings, 43 CFR 3112.5-2, has also been violated.

[3] As for the execution of the new agreement by the parties with the same terms after the drawing, such actions were of no consequence. The facts show that by letter of May 9, 1977, Engle notified Coyer that he was the winner and explained the question raised by the BLM concerning the binding effect of the service agreement and requested Coyer to reestablish their mutual interest relationship. Coyer signed the new agreement the same date. However, the parties cannot retroactively cure the defect after they knew that the offer was the first one drawn for the parcel.

The Board has repeatedly held that the requirements of 43 CFR 3102.7 are mandatory and that an offer not in compliance therewith must be rejected. Emily Sonnek, 21 IBLA 245 (1975); Joy Goodale, 18 IBLA 38 (1974); Wesley Wamock, 17 IBLA 338 (1974); Mary West, 17 IBLA 84 (1974); D. O. Keon, 17 IBLA 81 (1974). A first-drawn simultaneous drawing entry card which is defective because of noncompliance with a mandatory regulation must be rejected and may not be "cured" by submission of further information. Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd, B.E.S.T., Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976).

Therefore, 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 reversed and remanded for action consistent herewith.

Edward W. Stuebing
Administrative Judge

We concur.

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge

