

Editor's note: 85 LD. 380; Reconsideration granted; decision reaffirmed – See Milton D. Feinberg, Benson J. Lamp (On Reconsideration), 40 IBLA 222, 86 LD. 234 (April 11, 1979); Appealed – dismissed, sub nom. Lamp v. Andrus, et al., Civ.No. 80-171-M (D.N.M. July 17, 1981).

MILTON D. FEINBERG

BENSON J. LAMP

IBLA 77-414

Decided September 18, 1978

Appeals from separate decisions of the New Mexico State Office, Bureau of Land Management, dismissing protest against the award of any priority rights to the successful drawees of one simultaneous oil and gas lease drawing, and rejecting an oil and gas lease offer for failure to accompany the drawing entry card with the agency statement required by 43 CFR 3102.6-1. NM 29826.

Reversed in part, and dismissed in part.

1. Administrative Authority: Generally—Administrative Practice—Bureau of Land Management—Oil and Gas Leases: Applications: Drawings

Established and long-standing Departmental policy relating to the administration of the simultaneous oil and gas leasing system is binding on all employees of the Bureau of Land Management, until such time as it is properly changed.

2. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Applications: Drawings

The simultaneous drawing system presupposes that each properly filed offer be afforded the same opportunity for priority consideration. This requires that when drawing entry cards are improperly omitted from a drawing, the first drawing be considered as void, and priorities established at a second drawing, in which all entry cards are included, shall control consideration for the oil and gas lease.

APPEARANCES: James W. McDade, Esq., McDade and Lee, Washington, D.C., for appellant Lamp; David H. Wiggs, Jr., Esq., Kemp, Smith, White, Duncan & Hammond, El Paso, Texas, for appellant Feinberg.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

On February 8, 1977, a drawing entry card for one Benson J. Lamp was drawn with first priority for Parcel No. NM 396 in the Bureau of Land Management (BLM) simultaneous oil and gas lease drawing in New Mexico. The offer was assigned serial number NM 29826. On March 9, 1977, the New Mexico State Office, BLM, issued a decision requiring additional information as a prerequisite to the issuance of the oil and gas lease. On March 4, 1977, one Kelly Everette filed a protest against the issuance of the lease to appellant Lamp, arguing that Lamp had not used his "true address" and, therefore, Everette

questioned the existence of the offeror. This protest was dismissed on March 10, 1977. No appeal was taken from that dismissal.

Certain entry cards, however, had been excluded from the original drawing, and another drawing had been held on February 15, 1977, which included all of the entry cards. The offer of appellant Milton D. Feinberg was drawn with first priority at this new drawing. However, under instructions from the BLM Director's Office, appellant Feinberg was given no priority inasmuch as his card had not been one of those originally excluded from the drawing. On March 2, 1977, appellant Feinberg protested the issuance of the oil and gas lease to appellant Lamp, arguing that the results of the second drawing should control lease priorities. On April 6, 1977, the State Office dismissed Feinberg's protest.

On that same date, appellant Lamp submitted evidence in response to the State Office decision of March 9, 1977. By decision of April 27, 1977, the State Office rejected Lamp's lease offer because the offer had not been accompanied by the statement required by 43 CFR 3102.6-1.

On May 7, 1977, appellant Feinberg filed a notice of appeal from the April 6 decision dismissing his protest. On May 12, appellant Lamp filed a notice of appeal from the April 27 decision of the State Office. Thus, both appeals are presently pending before the

Board, though they involve totally different questions of law. Inasmuch as appellant Lamp's appeal would be mooted were we to rule in favor of appellant Feinberg, we will first examine the correctness of the State Office's decision rejecting his protest.

The action of the State Office in rejecting appellant Feinberg's protest was premised on instructions it received from the BLM Director's Office. <sup>1/</sup> The procedure which they were instructed to follow is contained in the State Office decision dismissing the protest:

1. The omitted entry card will be added to the batch of entry cards contained in the original drawing.
2. Three cards will be drawn from the new batch to determine the priority of the drawees with respect to being considered as the lessee.
3. If the entry card which was omitted in the original drawing is drawn as priority 1, 2 or 3, it will hold this priority as the final result of drawing replacing the same priority card from the original drawing.
4. If the entry card which was omitted in the original drawing is not drawn as priority 1, 2 or 3, the priorities established in the original drawing will remain unchanged and will be the final results of the drawing. [Emphasis in original.]

[1] We note initially that this revised procedure is not in accord with the former Departmental practice. The Department has

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<sup>1/</sup> While this procedure was apparently utilized in another case, W. J. Langley, 34 IBLA 213 (1978), that case was remanded to compile a complete record, and the substantive correctness of the new procedure was not then examined.

consistently held that the omission of a drawing entry card voids the drawing and requires a new drawing, with all entry cards included, for the purposes of establishing leasing priorities. See, e.g., Marshall & Winston, Inc., 25 IBLA 169 (1976); Herman A. Keller, 14 IBLA 188, 81 I.D. 26 (1974); R. E. Puckett, A-30419 (October 29, 1965). It is interesting to note that this rule actually predates the establishment of the simultaneous filing system. See John H. Anderson, 67 I.D. 209 (1960). 2/

The animating principle of these decisions has been expressed numerous times. Thus, this Board has stated "[i]t is clear that a drawing is considered fair only if each applicant has had an equal chance of winning. For that reason, drawings have been canceled where a drawing card has been omitted." (Citations omitted.) Verna C. Bucy, 21 IBLA 155 (1975).

We have closely examined this appeal and feel that for two separate reasons the decision of the State Office rejecting the Feinberg protest must be reversed.

In the first place, there is no question that the procedure herein utilized is directly contrary to prior Departmental policy.

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2/ While there was no formalized simultaneous filing procedure at that time, when noncompetitive over-the-counter offers to lease were received simultaneously a drawing was conducted to establish priorities. John H. Anderson, supra, dealt with a situation in which one such offer was not included in the drawing.

Indeed, the procedures adopted were expressly rejected in two prior Departmental decisions. See R. E. Puckett, supra; Leonard H. Treiman, A-29579 (October 4, 1963). Moreover, the binding nature of this policy was directly noted in John Halagan, A-29027 (October 4, 1962), wherein the Assistant Solicitor for Public Lands declared:

The land office action which reflects an assumption that, in the absence of a correct drawing affording the same opportunity to all offerors, anything done toward a determination of priorities is a nullity has received the express sanction of the Department.

See John H. Anderson et al., 67 I.D. 209 (1960). It was binding upon the Denver land office at the time of the action complained of.

In three recent cases this Board reversed actions by a BLM State Office for being in contravention of a BLM Instruction Memorandum. Raymond A. Berry, 35 IBLA 386 (1978); W. C. Yahmel, 34 IBLA 377 (1978); Margaret A. Ruggiero, 34 IBLA 171 (1978). See also, Tenneco Oil Co., 36 IBLA 1 (1978), Western Slope Gas Co., 10 IBLA 345 (1973). Implicit in our decisions in those cases was the recognition that subordinate employees of the Bureau of Land Management are bound by instructions issued by the Director, BLM. However, it is equally obvious that the Director, BLM, is similarly bound by established Departmental policies until such time as those policies are properly changed. The instructions at issue, being

clearly contrary to established and long-standing policies of the Department, must be treated as a nullity.

[2] Moreover, even were we to assume that the Director, BLM, was authorized to promulgate the change effectuated herein, we would find the new procedures to be both arbitrary and capricious. The basis for this conclusion can readily be demonstrated by an illustration. Let us assume that in a first drawing the following priorities were established: 1 - Smith; 2 - Jones; 3 - Doe. Subsequent to this first drawing, the State Office discovered that through inadvertence the drawing entry card of Harris has been omitted. A second drawing is held in which the following priorities occurred: 1 - Jones; 2 - Harris; 3 - Doe. Under the procedures advocated in the instruction memorandum the final priorities would be: 1 - Smith; 2 - Harris; 3 - Doe. Despite the fact that Jones had been drawn alternatively second and first, he would have no priority whatsoever. The effect of the procedure is to nullify Jones' filing. It has virtually ceased to exist, and his offer is as effectively excluded from consideration as if it had never been filed.

The benchmark of the simultaneous filing system is that all properly filed offers receive an equal opportunity to be selected for priority consideration. It is true that an offeror who has had an entry card drawn with first priority in a defective drawing feels that it is less than likely that he will be drawn first in

a subsequent drawing. The short answer to this is that the first drawing was defective. All that an offeror has a right to expect is that he be given an equal opportunity to participate with all of the other offerors. This is afforded him in the second drawing. The proposed system vitiates this right for those offerors whose priority is displaced by a formerly excluded card. The procedure thus runs afoul of the basic purposes and principles of the simultaneous filing system. For this reason alone, we would reverse the decision of the State Office on appellant Feinberg's protest.

Inasmuch as we have determined that the results of the second drawing established the priorities for the subject lease, it is unnecessary to examine the question whether the State Office properly rejected appellant Lamp's lease offer. His appeal is moot and is accordingly dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the April 6, 1977, decision of the State Office dismissing the protest of Milton D. Feinberg is reversed, and the appeal of Benson J. Lamp is dismissed as moot. The case files are remanded to the State

Office for adjudication of the offers drawn with priority in the second drawing.

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James L. Burski  
Administrative Judge

We concur.

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Douglas E. Henriques  
Administrative Judge

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Edward W. Stuebing  
Administrative Judge

