

MILTON KNOLL

IBLA 78-605

Decided December 19, 1978

Appeal from decision of the New Mexico State Office, Bureau of Land Management, rejecting oil and gas lease offer, NM 33430.

Affirmed.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Rentals-- Payments: Generally--Accounts: Payments

Where an offer is drawn No. 1 for a tract consisting of 39.97 acres, BLM requests payment specifically of \$40 advance rental, and the offeror remits \$39.97 within the 15-day period spelled out in 43 CFR 3112.4-1, the submittal of \$39.97 does not constitute satisfactory payment within the ambit of that regulation.

APPEARANCES: C. Arthur Morrow, Esq., Morrow, Gordon & Byrd, Newark, Ohio, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Milton Knoll has appealed 1/ from a decision dated August 10, 1978, rendered by the New Mexico State Office, Bureau of Land Management (BLM), rejecting his oil and gas offer.

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1/ By decision of August 17, 1978, BLM erroneously rescinded its decision of August 10, 1978, on the theory that noncompliance with 43 CFR 3112.4-1 "automatically disqualified" appellant's offer. However, 43 CFR 4.410 makes the right of appeal mandatory in the circumstances, since appellant was "adversely affected."

Mr. Knoll's offer was drawn first on May 9, 1978, for Parcel NM 556 consisting of 39.97 acres. The offer was rejected for the stated reason that appellant had failed to submit the correct rental (\$40) in accordance with 43 CFR 3112.4-1, but rather had submitted payment of \$39.97, within 15 days from the notice given him. Payment of \$40 was tendered to BLM by check dated October 9, 1978. BLM had sought rental payment for the offer by notice dated June 21, 1978, specifically calling for payment of \$40. The record does not show the date that notice was served on appellant, but he concedes that he was served "[o]n or about June 21, 1978." On May 9, 1978, a notice had been sent to him to apprise him that he drew No. 1 priority and to inform him that "you will be notified when to submit first year's rental." On May 26, 1978, BLM received from appellant a check for \$39.97. On August 24, 1978, appellant filed his notice of appeal and statement of reasons.

[1] The seminal question presented is whether appellant's submittal of \$39.97 may be deemed to constitute "payment" within the ambit of 43 CFR 3112.4-1, set forth below.

Payment of money is delivery by the debtor to the creditor of the amount due. Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 250 (1868). Payment is generally understood to be a discharge by a compliance with the terms of the obligation. Stone v. Webster, 144 P.2d 466, 468 (1943). 2/ The 3-cent deficiency precludes a finding of compliance with the regulation.

2/ In Billy Mathis, A-30512 (July 6, 1966), the Department discussed deficient oil and gas lease rentals on page 5 as follows:

"Although the amount of 14 cents is of such insignificance as to be unworthy of note, yet, if the Department were to accept a sum deficient by so little as payment in full, it must necessarily establish some guide as to what is and what is not an acceptable deviation from full payment. Having no authority to accept anything less, of course, it cannot establish any such guide.

"We concur in the Bureau's finding that the Departmental regulation requiring payment of the same rental for a fraction of an acre that is required for a full acre is a reasonable exercise of discretionary authority conferred upon the Secretary by the Mineral Leasing Act. While the act, itself, says nothing with respect to fractional acres, the regulatory requirement is fully consistent with the statutory requirement that rental be charged 'of not less than 50 cents per acre for each year of the lease.' The Secretary might, with equal justification, have issued a regulation requiring rental for fractional acres to be computed on the basis of fractions of 50 cents. Having determined the requirement of the act as to fractional acres as he did, however, he may not thereafter apply one system of computation to one lease and a different system to another.

The applicable regulation, 43 CFR 3112.4-1, provides as follows:

A lease will be issued to the first drawee qualified to receive a lease upon payment of the first year's rental. Rental must be received in the proper office of the Bureau of Land Management within fifteen (15) days from the date of receipt of notice that such payment is due. The drawee failing to submit the rental payment within the time allowed will be automatically disqualified to receive the lease, and consideration will be given to the entry of the drawee having the next highest priority in the drawing.

Appellant suggests that submission of \$40 as rental "would equate to a price of \$1.0008 per acre." Appellant thereby ignores 43 CFR 3103.3-2 which fixes per noncompetitive leases "an annual rental of

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fn. 2 (continued)

"We find, also, that the regulation (43 CFR 3125.1(a)) is clear and unambiguous in requiring the same rental for a fraction of an acre that is required for a full acre. The requirement of 'an annual rental of 50 cents per acre or fraction thereof for each lease year' cannot, without substantial effort, be construed as meaning anything other than '50 cents per acre or fraction of an acre.' But if any misunderstanding is possible from the regulation, the offer and lease form, itself, which Mathis signed in applying for a lease, provides most explicitly that the lessee will pay '[f]or each lease year a rental of 50 cents per acre or fraction of an acre.' Thus, there is no sound basis for Mathis' failure to understand the rental requirement for a fraction of an acre.

"The Department is not unmindful of the fact that, regardless of whether or not there is a sound basis for misinterpretation of the regulation, the land office, as well as the lessee, failed to follow the regulation and lease terms in computing the rental in this case. To hold the lessee to a standard which the Bureau apparently is not able to meet may seem unduly harsh. Nevertheless, it remains our view that the Department is without authority to grant equitable relief in cases of this nature and that, in the absence of legislation granting such authority, the burden must remain upon the lessee to assure meticulous compliance with the lease rental requirements, and a lessee cannot be excused for noncompliance because of error on the part of a land office employee."

See also Duncan Miller, 73 I.D. 211 (1966); Niobrara Oil and Mineral Corp., A-29502 (January 11, 1963). Cf. Duncan Miller, 17 IBLA 267 (1974); Duncan Miller, A-30566 (August 11, 1966); Duncan Miller, A-30067 (March 12, 1964).

\$1 per acre or fraction thereof for each lease year" (emphasis supplied). See also 43 CFR 3103.3-1.

Since it is clear that appellant had notice on or about June 21, 1978, of the requirement to pay \$40, the receipt by BLM of that sum on or after October 9, 1978, could in no wise be regarded as compliance with the regulation.

Appellant also adverts to 30 U.S.C. § 188 (1976), relating to reinstatement of cancelled leases. He contends that the Department would be authorized to issue a notice of deficiency of rental and accept payment within the time frame set. This section is inapplicable in the circumstances since 30 U.S.C. § 188(b) (1976), recites as follows:

(b) Any lease issued after August 21, 1935, under the provisions of section 226 of this title shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States land office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such district, then in the post office nearest such land. Notwithstanding the provisions of this section, however, upon failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil or gas in paying quantities, the lease shall automatically terminate by operation of law: Provided, however, That when the time for payment falls upon any day in which the proper office for payment is not open, payment may be received the next official working day and shall be considered as timely made: Provided, That if the rental payment due under a lease is paid on or before the anniversary date but either (1) the amount of the payment has been or is hereafter deficient and the deficiency is nominal, as determined by the Secretary by regulation, or (2) the payment was calculated in accordance with the acreage figure stated in the lease, or in any decision affecting the lease, or made in accordance with a bill or decision which has been rendered by him and such figure, bill, or decision is found to be in error resulting in a deficiency, such lease shall not automatically terminate

unless (1) a new lease had been issued prior to May 12, 1970, or (2) the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency sent to him by the Secretary.

As that subsection clearly shows, the deficiency provisions apply only "if the rental payment due under a lease" is a nominal deficiency. In the case at bar, the payment is not due for an issued lease. Appellant had adequate actual notice that \$40 was the proper payment; his failure to heed that notice caused his offer to be defective.

Appellant's reference to Duncan Miller, 31 IBLA 371 (1977), as supportive of his position, is inapposite because it relates to an over-the-counter filing, governed by 43 CFR 3103.3-1 which gives specific sanction to protecting the priority of an over-the-counter filer whose advance rental, submitted with his offer, is deficient by not more than 10 percent. See also 43 CFR 3111.1(d).

The 10 percent rule, followed in Miller, has a rational basis, since an over-the-counter offeror often has no access to plats of survey and thus has no certain method of establishing acreages (and commensurately rentals) with exactitude. In the case at bar, the notice of June 21, 1978, clearly demanded payment of \$40 rental.

Appellant's invocation of George Gabriel, 33 IBLA 44 (1977), is also inapposite. In Gabriel, the offeror paid timely the full rental demanded of him. He was requested by decision of March 8, 1977, to submit additional rental to satisfy the change in rental rate effected by a change in the regulations. That decision afforded him no right of appeal. Gabriel held:

[T]hat the decision [below] was interlocutory in nature and appellant was not bound to appeal from the decision in order to preserve the priority status of his offer.

\* \* \* \* \*

Accordingly we hold that appellant herein having appealed the decision of July 26, 1977, rejecting his offer and having paid the requested rental within the appeal period, the payment is timely so that lease N 16138 may issue to George Gabriel all else being regular.

In Gabriel there was no regulatory mandate for the time of payment of the additional rental required.

Concededly, the 3-cent deficiency is miniscule. However, in a recent decision of the Board, we addressed ourselves to minor

deviations from the regulations, saying in Elizabeth Pagedas, 38 IBLA 130, (1978), as follows:

While it may be argued that the deviation here is miniscule and ought to be overlooked, McKay v. Wahlenmaier, 226 F.2d 35, 43 (D.C. Cir. 1955), is dispositive of that argument:

It is argued that, since the Secretary devised the regulation, he alone has the right to say what the consequences of violating it shall be. Whether that is so, we need not decide. The Secretary is bound by his own regulation so long as it remains in effect. \* \* \* He is also bound, we think, to treat alike all violators of his regulation. He may not justify, simply by saying the violation is unimportant, his departure in a single case from an otherwise consistent policy of rejecting applications which do not conform to the regulation. [Footnote omitted.]

See also Boesche v. Udall, 373 U.S. 476 (1963); cf. Tina A. Regan, 33 IBLA 213 (1977).

In Winkler v. Kleppe, No. C.-76-127 K, (D.Wyo. May 19, 1977), the court, in discussing an inadvertent failure to comply with regulations, stated:

In this appeal plaintiff alleges that he is entitled to have the decision Joseph A. Winkler, 24 IBLA 380 (dated April 29, 1977) which rejected a simultaneous oil and gas lease offer for failure to comply with federal regulations, set aside on the grounds that the decision was arbitrary, capricious, and an abuse of discretion and not in accordance with the law.

The administrative record shows the facts giving rise to this controversy as follows:

In a drawing of simultaneous filing of oil and gas lease offers conducted by the Wyoming State Office of the Bureau of Land Management, the offer of "J. A. Winkler Agency" was first drawn for parcel 123. The Wyoming State Office rejected the offer because it was neither accompanied by a statement of corporate qualifications nor made reference to a corporate serial number as required by 43 CFR 3102.4-1. Plaintiff appealed to the IBLA contending that he inadvertently stamped the card

with his office stamp and that he intended to file the card in his individual capacity and not as a business entity.

The IBLA upheld the state office's rejection of the offer. Because the ostensible offeror on the drawing entry card was "J.A. Winkler Agency", which connotes some [sic] entity other than an individual, and the offer was signed in an individual capacity, the IBLA held that the entry form was not properly executed. Further, the IBLA observed that since it was plaintiff's own inadvertence that created the ambiguity, the BLM was under no duty to resolve the ambiguity in plaintiff's favor.

Having reviewed the administrative record and having heard oral argument of counsel, the Court concludes the Secretary neither acted in an arbitrary or capricious fashion, nor did he abuse his discretion in rejecting plaintiff's offer for failure to comply with mandatory federal regulations. To the contrary, the Secretary's failure to abide by his own mandatory regulations would have been arbitrary and capricious. [Emphasis supplied.]

In Nininger v. Morton, C.A. No. 74-1246 (D.C. D.C.), filed March 25, 1975, the court, in dealing with 43 CFR 3112.4-1, the regulation here in issue, stated: "[T]he error here is that of plaintiff. He failed to take necessary precautions to see that if notice of his priority should be delivered in his absence, he would be able to timely remit payment."

In the case at bar, appellant's error cannot be waived in the face of intervening rights of the No. 2 and No. 3 drawees. The Board in considering a similar matter stated in Donald E. Jordan, 35 IBLA 290, 295 (1978), as follows:

Appellant's contention based on the arguendo assumption that if the payment did arrive late the authorized officer could nevertheless have accepted it and issued the lease to appellant is without merit. The regulation, 43 CFR 3112.4-1, plainly states, "The drawee failing to submit payment within the time allowed will be automatically disqualified to receive the lease, and consideration will be given to the entry of the drawee having the next highest priority in the drawing" (Emphasis added). The disqualification, being automatic, thus affords no latitude for any exercise of discretion. Moreover, this automatic disqualification advances the priority of the next drawee and precludes implementation of 43 CFR 1821.2-2(g), because the rights of a third party have intervened eo instante, upon the failure of the first

drawee to submit payment timely. Robert D. Nininger, 16 IBLA 200 (1974), *aff'd*, Nininger v. Morton, Civ. Action No. 74-1246 (D.D.C. filed March 25, 1975), wherein the Court stated the following conclusion of law: " \* \* \* The regulations 1810.2(b) and 3112.4-1, Title 43, Code of Federal Regulations, are mandatory and apply to the plaintiff. Said regulations do not permit the consideration of excuses for failure to remit payment." (Emphasis added.)

\* \* \* Appellant's contention that the proviso for automatic disqualification represents a forfeiture has been advanced in other cases. The short answer to that assertion is that no forfeiture has occurred. The mere filing or drawing of an offer for a noncompetitive lease creates no vested rights in the offeror. Donald Reese, 15 IBLA 101 (1974); C. Burglin, 21 IBLA 234 (1975), *aff'd*, Burglin v. Secretary of the Interior, Civ. No. A 75-113 (D. Alaska, filed Dec. 29, 1976); Burglin v. Morton, 527 F.2d 486 (9th Cir. 1976). "An application for a lease, even though first in time \* \* \* is a hope, or perhaps an expectation, rather than a claim." Schraier v. Hickel, 419 F.2d 663, 666 (9th Cir. 1969). Therefore, where such an application is rejected for any legally cognizable reason, no constitutional issues are raised.

Although appellant indicates that the original submittal of \$39.97 should have been returned to him when found to be deficient, moneys are not returned until final administrative disposition of the case.

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 affirmed.

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Frederick Fishman  
Administrative Judge

We concur.

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James L. Burski  
Administrative Judge

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Joan B. Thompson  
Administrative Judge

