

DAVID A. PROVINSE

IBLA 79-3          Decided December 22, 1978

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting appellant's noncompetitive acquired lands oil and gas lease offer, M 41595 (ND).

Affirmed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Lands Subject to--Withdrawals and Reservations: Generally--Words and Phrases

Lands or minerals in lands were not "withdrawn" and "restored from a withdrawal" as those terms are used in the public land laws merely because an erroneous title opinion that the minerals are not owned by the United States is corrected to reflect that they are owned by the United States, and the oil and gas simultaneous filing procedures are applicable where those minerals were in a lease which expired before the correction of the status of the minerals was made.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Lands Subject to--Withdrawals and Reservations: Revocation and Restoration

Regardless of whether lands have been withdrawn from leasing and later restored, or were not withdrawn, an over-the-counter oil and gas lease offer must be rejected where the land involved was formerly embraced in an oil and gas lease which has expired by operation of law and has not been placed on the list of lands available for the filing of simultaneous oil and gas lease offers under 43 CFR Subpart 3112.

APPEARANCES: Jack W. Burnett, Esq., Billings, Montana, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE THOMPSON

David A. Provinse appeals from a decision of the Montana State Office, Bureau of Land Management (BLM), dated September 8, 1978, rejecting his over-the-counter oil and gas lease offer, M 41595 (ND) Acq., for the reason that the lands are not subject to over-the-counter offers until they have been listed for simultaneous filings under 43 CFR 3112.1-1. The lands involved here are lots 1, 2, 3, 4, 7, 8, and 11, SE 1/4 NE 1/4, N 1/2 SE 1/4, SE 1/4 SE 1/4, sec. 1, T. 146 N., R. 102 W., fifth principal meridian, North Dakota.

According to information furnished by Appellant, these lands were included in lease M-071486 (N.D.) which expired on March 31, 1976. Sometime after March 31, 1976, BLM removed the land from leasing following a title opinion by the Field Solicitor, Department of the Interior, Billings, Montana, that the United States did not own the minerals in these lands. On February 2, 1977, based on information furnished by appellant, a new title opinion declared the United States owned the minerals, and on or after March 15, 1977, it was noted on BLM's records that the land is subject to leasing. On August 22, 1978, prior to any posting of the lands as available for the filing of offers, appellant filed an over-the-counter oil and gas lease offer for the lands. In rejecting appellant's offer, BLM noted that "[T]his situation has been specifically addressed by the Interior Board of Land Appeals in David A. Provinse, 35 IBLA 217 (1978)," a case involving an earlier over-the-counter offer by appellant for lands which had been included in expired lease M-071486 (N.D.).

In his statement of reasons, appellant asserts that 43 CFR 3112.1-1 does not apply to lands that have been withdrawn from leasing and later restored, and that "officials of the Bureau agree" with this interpretation. He views the major issue in the case to be whether, in fact, the land was withdrawn. Appellant further argues that the earlier decision, David A. Provinse, supra, does not apply because the offer was filed before the lands were restored. Appellant urges this Board to interpret "the regulations as written \* \* \* using the ordinary and plain meaning of the words used therein." This argument is based on appellant's interpretation of the governing regulation as including the ordinary definition of "withdrawn" and excluding withdrawn and restored lands from the posting procedures. Appellant raises additional issues in an attempt to show that the previous decision should not be controlling here and that the regulations permit acceptance of his over-the-counter offer, if they are interpreted properly.

It is not clear from the record whether all the lands involved in this case were included in the offer rejected in the prior Provinse decision. However, from that decision and the information stated by appellant it is clear that the offered lands in both cases were included in lease M-071486 (N.D.), which expired in 1976.

Ordinarily where the parties, the facts, and the issues are the same, we would dismiss an appeal under the principle of administrative finality, the administrative equivalent of res judicata. Cf. Wilfred Plomis, 35 IBLA 1 (1978). Appellant, however, contends that the withdrawal issue raised by him here was not considered in the prior decision, and he asserts there are factual differences. In order to make perfectly clear why appellant's offer cannot be accepted and because there are some additional issues, we will entertain this appeal to resolve this matter finally.

[1] In effect, appellant is seeking to avoid the impact of the fact that the lands were included in the prior lease and the consequences of that fact as determined in the prior decision by contending the lands were withdrawn and then restored. He contends that regulation 43 CFR 3112.1-1 is not applicable to land withdrawn and then restored to leasing.

There are a number of difficulties with appellant's position. The only reason the lands were not deemed available for oil and gas leasing was because of an erroneous legal opinion that the minerals did not belong to the United States. Regardless of the semantical arguments appellant makes concerning the meaning of "withdrawal" and "restored from withdrawal," it is apparent that the lands were not withdrawn or restored as the terms are used in administering the public land laws. The authority and procedures governing withdrawals of public lands and resources and restorations are set forth in the regulations at 43 CFR Part 2300. To withdraw land there must first be authority under the law to do so, then proper affirmative procedural action taken by BLM, including the necessary notice requirements. 1/

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1/ As an example of one definition of "withdrawal" under the public land laws, we refer to the definition in the most recent general public land law, the Federal Land Policy and Management Act of 1976, where at section 103(j), 90 Stat. 2746, 43 U.S.C. § 1702(j) (1970), it is provided:

"The term 'withdrawal' means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land, other than 'property' governed by the Federal Property and Administrative Services Act, as amended (40 U.S.C. 472) from one department, bureau or agency to another department, bureau or agency."

If land is withdrawn from oil and gas leasing, no application for the oil and gas can be accepted until the land is restored. However, where there is only an erroneous legal opinion affecting the land and the land is otherwise subject to over-the-counter offers, if a timely appeal is taken from a decision rejecting the offer and on appeal the erroneous opinion is overturned, the offer could be accepted. This demonstrates the practical distinction between situations where lands are withdrawn from leasing in accordance with the requirements and procedures for withdrawals, and those situations where land is not considered available for leasing because it is erroneously deemed to belong to someone other than the United States.

Although as a practical matter an application may be rejected as the result of an erroneous legal opinion, the oil and gas cannot be said to have been withdrawn from leasing because none of the requirements for a withdrawal have been met. Thus, we reject appellant's contentions that regulation 43 CFR 3112.1-1 is not applicable here because the oil and gas had been withdrawn and then restored.

[2] However, even assuming arguendo, that there had been a withdrawal, we do not accept appellant's interpretation of the regulation. 43 CFR 3112.1-1 provides:

(a) Lands in canceled or relinquished leases or in leases which terminate by operation of law for non-payment of rental pursuant to 30 U.S.C. sec. 188, which are not withdrawn from leasing nor on a known geological structure of a producing oil and gas field shall be subject to the filing of new lease offers only after notation on the official record of the cancellation, relinquishment, or termination of such lease and only in accordance with the provisions of this section. All lands covered by leases which expire by operation of law at the end of their primary or extended terms shall likewise be subject to the filing of new lease offers only in accordance with the provisions of this section except that notation of such expiration of the leases need not be made on the official records.

(b) If no offers to lease all or any portion of the lands in the expired, canceled, relinquished or terminated leases are received during the period provided for in

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fn. 1 (continued)

There was no withholding of the oil and gas resources in the sense meant in this definition or in more general definitions of "withdrawal." There was no indication the resources were being held for public purpose, but only an incorrect determination that the resources were not public.

§ 3112.1-2, the lands for which no offers are received will thereafter become subject to lease in accordance with regulations in this part. [Emphasis supplied.]

Appellant contends that by its terms, this regulation does not require that lands be listed for simultaneous filings in cases where the lands have been "withdrawn from leasing." It is true that lands would not be listed as long as they are withdrawn from leasing, but it does not follow that because the lands may have been within a withdrawal during part of the life of a lease and for sometime thereafter that the special posting procedure established in 43 CFR 3112.1-2 <sup>2/</sup> would not be required once the lands are restored to leasing. The special simultaneous filing procedure of 43 CFR 3112 was established to preclude the "Land Office Rush" of filings when oil and gas leases terminated or expired. The reasons for the regulation to assure order and fairness in the oil and gas leasing program are as applicable where there has never been a withdrawal. Despite appellant's contentions that the ordinary and plain meaning of the language in regulation 43 CFR 3112.1-1 compels the result he desires, we find that the opposite is true. The clear meaning of the regulation is that lands in cancelled, relinquished, terminated or expired leases will not be subject to the filing of new lease offers until they are posted for the simultaneous filing procedure in 43 CFR 3112.1-2.

Therefore, we must conclude that regardless of whether or not the lands have been withdrawn from leasing and later restored, an over-the-counter oil and gas lease offer must be rejected where the land involved was formerly embraced in an oil and gas lease which has expired by operation of law and has not been placed on the list of lands available for the filing of simultaneous offers under 43 CFR Subpart 3112. See Robert S. Beckel, 31 IBLA 201 (1977); John F. Brown, 22 IBLA 133 (1975); Duncan Miller, 19 IBLA 188 (1975); Duncan Miller, 15 IBLA 275 (1974). We note that the procedures outlined for simultaneous filings in Subpart 3112 have been approved by the United

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<sup>2/</sup> The posting procedure is set out in 43 CFR 3112.1-2 which provides:

"On the third Monday of each month, or the first working day thereafter, if the proper office is not officially open on the third Monday, there will be posted on the bulletin board in each proper office a list of the lands in leases which expired, were canceled, were relinquished in whole or in part, or which terminated, together with a notice stating that such lands will become subject to the simultaneous filings of lease offers, from the time of such posting until 10 a.m. on the fifth working day thereafter. 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 the metes and bounds."

States Court of Appeals for the District of Columbia in Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257 (1963), cert. denied, 373 U.S. 951, as not arbitrary, but a reasonable means to implement the mineral leasing laws.

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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Joan B. Thompson  
Administrative Judge

We concur.

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Anne Poindexter Lewis  
Administrative Judge

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Joseph W. Goss  
Administrative Judge

