

Editor's note: Reconsideration denied by order dated Sept. 11, 1979; Appealed – aff'd, Civ. Nos. 79-3314 to 79-3319 (D.D.C. May 29, 1981), 517 F.Supp. 137; reversed, Nos. 81-1847 to 81-1852 (D.C. Cir. July 2, 1982) 684 F.2d 957

FREDERICK W. LOWEY ET AL.

IBLA 78-371

Decided May 14, 1979

Appeals from decisions of the New Mexico State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers filed in the simultaneous filing program.

Affirmed.

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

When an individual files an oil and gas lease offer through a leasing service under a contractual agreement whereby 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 a commission according to a set schedule on any sale plus a percentage of any royalties, 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

A purported disclaimer by a leasing service of its interests in its clients' offers which is filed with BLM prior to the filing of these offers, but which, by its own

terms, does not apply to the interests held by the service in these offers, is ineffectual and does not erase these interests. This disclaimer is also ineffectual as a matter of law even as to a client's offer to which it does apply, where it is unsupported by consideration and where it is not communicated to the client, as it may be retracted by the service. The service's interests in these offers therefore remain extant as of the filing of its clients' offers, notwithstanding the purported disclaimer, and where the existence of its interests is not disclosed on the offer cards as required by 43 CFR 3102.7, BLM properly rejects the offers.

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 subsequent actions.

4. Equitable Adjudication: Generally—Estoppel—Federal Employees and Officers: Authority to Bind Government—Oil and Gas Leases: Applications: Generally

The Government is not estopped from rejecting oil and gas lease offers because the offerors' leasing agent alleges that he relied on a representation by officers of BLM that his disclaimer of his interest in the offer was valid and therefore failed to amend his service agreement with his clients to remove the interest-creating provision, where it appears that BLM did not in fact so represent.

APPEARANCES: Thomas W. Ehrmann, Wayne E. Babler, Jr., and William R. Hamm, Esqs., Milwaukee, Wisconsin, for appellants and for Fred Engle, d/b/a Resource Service Company; 1/ James W. McDade, Esq., Washington, D.C., for intervenor Eloise B. Miller; Melvin Leslie, Esq., Salt Lake City, Utah, for intervenor Geosearch, Inc.; Daniel Ashley Jenks, intervenor, pro se; Don M. Fedric, Esq., Roswell, New Mexico, for

1/ Notices of appeal were filed by Harry W. Theuerkauf, Esq., Milwaukee, Wisconsin.

intervenor Fred T. Leebrick; Patricia Boleyn Walker, Esq., Office of the Solicitor, Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Frederick W. Lowey et al. (appellants), 2/ have appealed from the several decisions of the New Mexico State Office, Bureau of Land Management (BLM), rejecting their respective simultaneous oil and gas lease offers. BLM found that Fred Engle, d/b/a Resource Service Company (RSC), an oil and gas leasing service, held an interest in these offers when they were filed, and that the offerors failed to disclose the existence of this interest as required by 43 CFR 3102.7. BLM also noted that there were many offers filed by other clients of RSC for the parcels involved and that this fact indicated that the prohibition against multiple filing set out in 43 CFR 3112.5-2 had also probably been violated. BLM accordingly rejected these offers, and the offerors appealed to this Board. We affirm.

[1] The terms of the agreements between Engle and each appellant are identical and clearly created an "interest" in Engle, as we have held in the past in other appeals concerning him. Alfred L. Easterday, 34 IBLA 195 (1978); 3/ Sidney H. Schreter, 32 IBLA 148 (1977); Lola I. Doe, 31 IBLA 394 (1977). We have also so held in cases concerning exclusive sales agency agreements with other leasing services. Marty E. Sixt, 36 IBLA 374 (1978); B. F. Sandoval, Jr., A-29975 (June 12, 1964).

The critical section of the agreement provides:

If I [the offeror] am successful in a drawing, I hereby authorize you [Engle] 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. [4/] This agency to negotiate shall be valid for a period of five (5) years. [Emphasis in original.]

2/ See Appendix.

3/ Appeal pending.

4/ The "schedule below" provides for Engle to receive a share of any royalties paid to his clients, in addition to a share of the cash price paid for the leases.

This agreement provides Engle with more than a mere hope or expectancy of sharing in the profits from any sale and subsequent royalties derived from leases won by his clients. It gives him an enforceable right to share both in the profits of any sublease, assignment, or sale of a lease, whether negotiated by him or the offeror, and in all royalties, for a period of 5 years. As we concluded in Doe supra, and reconfirmed in Schreter, supra, and Easterday supra, this agreement gave Engle an "interest" in appellants' offers, as defined by 43 CFR 3100.0-5(b).

[2] As in Easterday, supra, there is presented here the question of the effect of an alleged amendment and disclaimer filed with the New Mexico State Office on March 29, 1977. ^{5/} This document, dated January 13, 1977, notes the existence of various service agreements with Engle's clients and of the exclusive sales agency granted thereby to him, and states as follows:

AMENDMENT AND DISCLAIMER

WHEREAS, the undersigned, FRED ENGLE, d/b/a RESOURCE SERVICE COMPANY, is a party to various contracts designated as service agreements with various customers for drawings connected with the issuance of non-competitive oil and gas lease rights of the United States under Title 43 of the Code of Federal Regulations, and

WHEREAS, these service agreements individually provide that the undersigned is given an exclusive five (5)-year agency to negotiate the sale, subject to the customer's approval, of any lease obtained from the federal government by an offeror, and

WHEREAS, it is the understanding and intention of the undersigned and the understanding and intention of the undersigned's customers that said exclusive agency does not vest in the undersigned any lease or offer to lease which which may disqualify from obtaining a lease under said program, and

WHEREAS, the United States Department of the Interior, Bureau of Land Management has not determined whether said exclusive agency vests in the undersigned an interest in the lease or offer to lease of an offeror, and

WHEREAS, it is possible that the Bureau of Land Management may opine that said exclusive agency, in fact, vests

^{5/} In Easterday, supra, the amendment and disclaimer was filed on January 13, 1977, in the Wyoming State Office, Bureau of Land Management.

in the undersigned an interest in the lease or offer to lease of an offeror, and

WHEREAS, it is the intention and desire of the undersigned to avoid any adverse consequences or delays which may result should the Bureau of Land Management adopt such opinion.

NOW, THEREFORE, I, FRED ENGLE, d/b/a RESOURCE SERVICE COMPANY, 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 insure forthwith for the benefit of all said offerors.

I do hereby further state and aver that this Amendment to said service agreements is expressly made on the premise and understanding that said exclusive agency does not create an interest in me but that this disclaimer is being made in the event that a determination is made that the exclusive agency vests in me an interest in the lease or offer to lease which may disqualify the offeror.

I do hereby further state and aver that in the event a determination is made following the exhaustion of all administrative remedies and judicial remedies that said exclusive agency does not constitute an interest of the undersigned in said oil and gas leases, then and in that event this Amendment and Disclaimer shall be null and void as if never executed.

Dated at Milwaukee, Wisconsin, at 4:40 o'clock p.m. this 13th day of January, 1977.

RESOURCE SERVICE COMPANY

By: [/s/] Fred Engle

[2] This purported "disclaimer," "amendment," "waiver," or "renunciation" is dated January 13, 1977, and refers to the fact that Engle, d/b/a RSC, "is a party to various contracts designated as service agreements with various customers." (Emphasis supplied.) It goes on to state that Engle did "hereby waive and renounce any exclusive agency which [he] might have by reason of said service agreements," i.e., by reason of those agreements to which he was a party as of January 13, 1977 (emphasis supplied). The disclaimer contains no provision whatever addressing agency rights created by any

future service agreements. Thus, the purported disclaimer does not apply to five of the six service agreements in question here, as all of the offerors except John A. Gallagher entered into their agreements with Engle after January 13, 1977. ^{6/} The purported disclaimer, even even if it were legally effective, did not erase the interest held by Engle in these five offers, as, by its own terms, it did not apply to the service agreements creating these subsequent interests.

These five appellants (whose briefs were prepared by Engle's counsel) argue that the fact that Engle filed this disclaimer prior to entering into service agreements with them demonstrates that Engle did not really intend that the agreement should create an interest in him, and that no interest was created by these agreements, as there was no meeting of the minds to do so. As noted above, the disclaimer does not address Engle's intentions concerning any agreements not extant on January 13, 1977, and so fails to establish that he did not intend to create the interest in future agreements.

Even were we to accept that Engle actually did not intend to enforce or be bound by the exclusive agency provision of its form service agreement when he entered into them with these five offerors, this provision would nevertheless be efficacious, as it established that the intention of a party to enter into a contract is judged by his expressed or manifested intentions, not determined by any secret intentions. 17 AM. JUR. 2d Contracts § 19 (1964). If his words and acts, judged by a reasonable standard, show an intention to agree, his real but unexpressed state of mind is immaterial. Lucy v. Zehmer, 196 Va. 43, 84 S.E.2d 516 (1954). This is basic contract law.

Moreover, we will not consider parol or extrinsic evidence which is offered to modify, explain, or vary the terms of the integrated, written contractual agreements between Engle and his several clients. Those agreements, as written, are complete and unambiguous, and there is no allegation of fraud or error in the preparation of the writing. Williston on Contracts, Third Edition, § 631 et seq.

Engle duly signed agreements with these five offerors giving him the right to a percentage commission of any sale of their lease rights and any royalties for 5 years and apparently did not indicate to these offerors, either orally or in writing, that he did not intend to include this exclusive sales agency provision. It would have been a very simple matter for Engle to manifest his alleged actual intention not to create this right by striking the language from these agreements before signing them, or before submitting them to his various clients for their signatures. It is reasonably concluded from these facts that Engle did intend to contract for the

^{6/} See Appendix.

creation of this interest and did so. The fact that Engle had purported to disavow similar rights created in other, earlier, agreements does not overcome this conclusion.

We have held above that Engle's purported disclaimer does not apply to the service agreements between him and five of the six offerors here. Nor did the disclaimer remove Engle's interest in the sixth offer, or, assuming arguendo its applicability to the other five, would it validate them, as the disclaimer was unenforceable at the time of the filing of the offer(s), and subsequently.

As we held in Alfred L. Easterday, supra:

Engle's unilateral [sic] 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 [the offeror] until after the drawing, and a new agreement was not ratified by Coyer until after he was declared the winner for [the] parcel * * *. 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.

We adhere to and reconfirm this holding.

The general rule is that the terms of a contract may be modified with the mutual assent of both parties, provided that there is consideration for the new agreement. 17 AM. JUR. 2d Contracts § 465

(1964). The requirements that there be consideration and mutual assent attach, even though the benefit is disclaimed by the one to whom it is due. "Generally, if one party to a contract, in agreeing upon a modification of it, neither assumes an additional obligation nor renounces any right, the promise of the other is a nullity and void." 17 AM. JUR. 2d Contracts § 469 (1964).

As explained by Williston, one to whom a duty is owed may release the obligor from his duty to perform, but the release must be supported by consideration: "In view of the general abolition of the common law seal, the release is classified as an informal writing which is supported by a sufficient consideration and purports to be an immediate termination of the maker's contractual right or rights to compensation." (Emphasis supplied.) Williston on Contracts, Third Edition § 1820 (1972). In contrast, a statement unsupported by consideration by an obligee that performance of the duty is unnecessary is ineffective: "A voluntary statement by a creditor, even before a debt has become due, that the debt need not be paid would generally not be held to excuse the debtor from liability." Williston on Contracts, Third Edition § 690 (1961).

Corbin states as follows: "Suppose A and B have exchanged promises (a bilateral contract), A promising to pay for services that B promises to render. Can B effectively discharge his right to payment by merely saying to A 'I waive the right to payment for my services?' The answer to this is also No." 3A Corbin, Contracts § 752 (1960). He adds that "[o]ne who has a contractual right against another * * * has the power to discharge his right and the other's duty by the execution and delivery of a [written] release," and notes that "[i]n order to be effective as a discharge at common law, the writing was required either to be under seal or to be given in exchange for a sufficient consideration." 5A Corbin, Contracts § 1238 (1964), citing Restatement, Contracts § 402(1).

The closest Departmental statement on the question came in Appeal of Sam Bergesen, 62 I.D. 295 (1955), containing the dictum that a Government contracting officer's waiver of a benefit inuring to the Government is void in the absence of new and valuable consideration therefor moving to the Government.

The reason that such a "waiver" is ineffective is that it may be rescinded by the obligee, thus renewing the obligor's duty and reestablishing the obligee's right of action:

[W]aiver of performance of an obligation, which means permission not to perform it, excuses the obligor from performing so long as the waiver or permission continues, and if the waiver continues so long that the performance by the obligor will be essentially different from that which he originally bargained to render, all right to enforce the

obligation is lost. [7/] Prior to that time the creditor may withdraw his permission even though he originally stated that he waived permanently all right. [Emphasis supplied.]

Williston on Contracts, Third Edition § 690 (1961). After the obligee rescinds his release, his right of action against the obligor is renewed, and he may sue the obligor to enforce this right: "The party claiming to rescind is allowed to manifest his intention by bringing suit to enforce the chose in action and, on plea of release being made [by the obligor], by showing the invalidity of the release." Williston on Contracts, Third Edition § 1820 (1972).

Where the person who owes the duty (the promisor) relies to his detriment on the statement by the person to whom it is owed (the promisee) that the duty is discharged, the promisee will be estopped in some jurisdictions from asserting that his release was not supported by consideration, under the doctrine of promissory estoppel. According to Williston, "[i]t may, however, sometimes operate as a fraud to enforce liability on a promise after the promisee has stated that performance need not be made; and where this is true the promissory estoppel due to the justifiable reliance on the statement should excuse liability." Williston on Contracts, Third Edition § 690 (1961). Williston regards this as the only restriction on the rule that the release can be revoked at will by the obligee: "[The promisee] cannot act in such a way as to make his permission work an injury to the obligor [and so create an estoppel], but this is the only limitation on his right of revocation." (Emphasis supplied.) Ibid.

In the instant case, appellants promised to pay, on a commission basis, for the service of having sales of their leases arranged, which service Engle promised to render. Engle's bare statement that he renounced his right to receive a commission for arranging the sale did not discharge his right to claim the commission, as it was not supported by any consideration. That is, his clients did not agree to assume any additional obligation or to renounce any right in return therefor. Engle's right to receive a commission from any sale

7/ Williston refers here to the following type of situation: Where an employer waives his right to have his employee work on December 20, he cannot revoke the waiver on December 25 and demand that his employee make up for the lost day, as work on these 2 days is essentially different.

In contrast, payment for real property "is regarded as substantially the same thing whenever the performance is rendered," so that a waiver of a right to be paid for real property may be rescinded indefinitely (absent reliance on the waiver). Williston on Contracts, Third Edition § 690 (1961). The present situation falls in this latter category.

of any lease won by appellants over 5 years, which he purportedly renounced, has not yet come due and is not such that it will become essentially different from that which his clients originally bargained to render. Thus, Engle may properly rescind his purported waiver and sue to claim a share of the proceeds of any sale of appellants' lease rights. Nor could Engle be estopped from retracting his disclaimer, because his clients obviously could not have relied on his making the disclaimer, as he did not notify them that he had made it. At the times of the filing of the offers and the drawings which followed, Engle had not communicated his "Amendment and Disclaimer" to his clients, but only to the local BLM office. The disclaimer was not made under seal, so that it is not enforceable even in jurisdictions recognizing statements as binding if made under seal. We note further that, even if Engle's disclaimer were made under seal, there would be serious doubt as to its efficacy, owing to his failure to deliver it to his clients, as a contract under seal is not effective until it is delivered. 1A Corbin, Contracts § 244 (1963).

Under 43 CFR 3102.7, an offeror is required, under pain of rejection of his offer, to indicate on his offer card the existence of all parties having interests in the offer at the time it is filed. Here, each appellant indicated that he or she was the sole party in interest in his or her individual offer, when the offer was filed. ^{8/} Thus, if there was actually another party having an interest in the offers, appellants' cards must be rejected for failing to disclose this fact. 43 CFR 3102.7; Marty E. Sixt, supra; Alfred L. Easterday, supra; Sidney H. Schreter, supra. Under 43 CFR 3100.0-5(b), an "interest" is defined to include "[a]ny claim or any prospective or future claim to an advantage or benefit from a lease." We hold that, at the time appellants filed their offers, Engle had an "interest" in each of those offers, as he had a future claim to a commission from any sale of leases issued pursuant to these offers, notwithstanding his purported disclaimer of the sales agency provision of his agreement with appellants (of which they were wholly ignorant at the time), because he had the power to renew his claim by rescinding his disclaimer.

Appellants would have us hold that Engle's unilateral waiver, made without consideration and without notification to his clients until after their cards were drawn, effectively erased his interest in their offers. Were we to do so, we would establish a precedent which would allow open flaunting of the prohibition against multiple filings of 43 CFR 3112.5-2, as in this hypothetical situation: A leasing service enters into agreements with its clients giving it an absolute right to a percentage of the proceeds from any sales of any leases won by them and any royalties which may thereafter accrue. In

^{8/} Heinz and Ursula Lichtenstein stated that they were the sole parties in interest in their offer.

an attempt to avoid disqualification of its clients' offers under 43 CFR 3102.7, it purports to disclaim this interest unilaterally, without notifying its clients, and files offers in each of its clients' names on extremely valuable tracts. When one of its clients wins first priority, it then notifies him that it had disclaimed its right to percentage of the proceeds of any sale. BLM follows the rule urged by appellants and, holding the disclaimer efficacious, accepts the offer and issues the lease. The client, thinking that the service demands too high a commission, declines to renew his exclusive sales agency with the service, and instead sells the lease himself to a bona fide purchaser for a large return. The service rescinds its waiver of the sales agreement and sues its client, demanding its share of those proceeds, which, as discussed above, it would be legally entitled to recover. It is clear in this situation that, at the time of the drawing, the service has a prospective claim to an advantage from the lease it won by any of its clients and thus has an "interest" in each offer filed by them for the parcel. It therefore has an increased chance of gaining a portion of proceeds of the sale of the parcel, so that all of its clients' offers should be rejected. 43 CFR 3112.5-2. However, when the service finally vests this interest by revoking its disclaimer and demanding its commission, it is too late for the Department to take corrective action, as its ability to cancel the lease terminates when the lease is sold to the bona fide purchaser. 43 CFR 3102.1-2. Thus, the Department would be foreclosed from preventing a flagrant abuse of the lottery system by a leasing service.

In support of their contention that Engle's waiver was effective, appellants have cited several cases concerning unilateral waivers of rights to insist on the occurrence of a condition prior to undertaking contractual duties. This is not the situation here, and these cases are therefore of no comfort to appellants. In any event, the general rule concerning waivers of conditions is that they are retractable at will by the party making them or until the time for performance of the condition has already passed, unless and until there is detrimental reliance. Williston on Contracts, *supra*, § 689; 3A Corbin, Contracts § 752 (1960).

Moreover, in his purported waiver of his right to participate in the proceeds from any lease issued to his clients, Engle also attempted to excuse his own obligation to perform the services by which the contracting parties contemplated he would earn his share. As one of the intervenors rhetorically asks, "How could Mr. Engle unilaterally amend the Service Agreement by removing his own obligation (to act as a broker)? Suppose the Lichtensteins had wanted his obligation to act as broker, and would not have wished to enter into the Service Agreement without it?" Brief of Jenks, p. 5. It is noteworthy that although Engle asserts that his unilateral "Amendment and Disclaimer" releases his clients from their obligation to pay him part of the proceeds, he does not assert that he remains bound to serve as

their broker without such recompense. Presumably he is of the opinion that he has waived his own obligation to act for his clients, as when the lease is issued he requires them to execute a new brokerage contract if they desire him to do what he originally contracted to do in the Service Agreement. This is simply a unilateral breach of contract on Engle's part, and we cannot accord it any efficacy.

The instrument itself is aptly characterized by Jenks:

The Amendment and Disclaimer is a bizarre and vague document. Far from claiming to be absolute even on its face, it appears to contain both a condition precedent before it purports to take effect ("this disclaimer is being made in the event that a determination is made that the exclusive agency vests in me an interest in the lease"), and a condition subsequent which, if and after it might take effect, would serve to reverse and undo the effect ab initio ("in the event a determination is made . . . that said exclusive agency does not constitute an interest . . . then and in that event this Amendment and Disclaimer shall be null and void as if never executed.").

Nor are we persuaded by appellants' argument that their agreements with Engle gave him no interest because they were unenforceable as illegal and against public policy, in that they violated Departmental policy by creating a prohibited interest. This Board recently considered and rejected a similar argument in Marty E. Sixt, supra at 376. As we held in Sixt, the very existence at the time the offers were filed of agreements, enforceable or not, covering Engle's claim to a defined share of the profits derived from whatever leases his clients might win constituted an "interest" under 43 CFR 3100.0-5(b), the failure to disclose which compels rejection under 43 CFR 3102.7. The fact that an agreement existed between the parties at the time the offer was filed and was not disclosed establishes that the regulation was violated.

[3] Engle did communicate to the offerors his renunciation of any interests which he held in these offers, but only after the drawing had been held. This action came too late to validate their offers, even disregarding the lack of consideration to make the waiver binding. Under 43 CFR 3102.7, an offeror must state on his drawing entry card whether or not he is the sole party in interest and set forth the names of any other parties in interest at the time of filing, on pain of rejection. As discussed above, at the time these offers were filed, it was not true that the offerors were the sole parties in interest in the offers, because Engle still held an interest, having taken no action to communicate his renunciation of this interest to them or to make the renunciation enforceable by supporting it with consideration. The offerors falsely stated on their cards that they were the sole parties in interest, and their offers

were therefore defective. They could not have made these assertions on the basis of Engle's purported waiver, as they were unaware of it. A simultaneous noncompetitive drawing entry card oil and gas lease offer which is defective at the time it is filed may not be cured by later action. Ballard E. Spencer Trust, Inc., 18 IBLA 25, 28 (1974), aff'd B.E.S.T., Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976); Alfred L. Easterday, supra. Thus, Engle's attempt to validate the offers by communicating the waiver of his interest to his "winning" clients after the drawings could not cure their failure to have disclosed the existence of his interest at the time of filing.

[4] Appellants argue that notwithstanding the legal ineffectiveness of the disclaimer, the Department is estopped from rejecting their offers because the Wyoming State Office, BLM (Wyoming BLM), gave its approval to Engle's procedure of filing a disclaimer which was unsupported by consideration and of notifying clients of this disclaimer only after their cards were selected, in lieu of preparing new service agreements, and because Engle relied on this approval and did not prepare new agreements. Even disregarding 43 CFR 1810.3, which provides that the United States is not bound by the acts of its officers and agents, we have concluded that this matter is not appropriate for the extraordinary relief of equitable estoppel. A review of the circumstances as they developed is necessary to our holding in this regard. ^{9/}

In December 1976, a protest was lodged with Wyoming BLM against the issuance of leases to certain of Engle's clients, the protestant asserting that by virtue of their Contracts with Engle he had an interest in those offers which had not been disclosed, in violation of the pertinent regulations.

Upon studying the matter, personnel at Wyoming BLM perceived that protestant was correct, and informed Engle that he would have to revise his Contracts with his clients or face the possible rejection of his clients' offers in cases where Engle's interest was undisclosed. Engle refused to submit revised Contracts to his clients, contending that Wyoming BLM was in error in its finding that he had an interest in his clients' offers and leases issued pursuant thereto. He argued that it would be burdensome to contact each of his clients and get revised Contracts executed, and that it would be unfair to require this of him, particularly if it were ultimately held that Wyoming BLM was in error and the existing Contracts were perfectly proper.

^{9/} BLM has filed affidavits of John Erdmann, Glenna Lane, and Harold Stinchcomb, the Wyoming BLM officials who negotiated with Engle concerning the disclaimer. Appellants have requested that we strike this information from the record as its filing was belated. This request is denied. The Board has the authority to accept tardy or supplemental pleadings in appropriate circumstances. See Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969).

Instead, as an interim measure, he prevailed upon Wyoming BLM to accept his "Amendment and Disclaimer" pending a final determination of the question by this Board or, perhaps, by the courts. Although the personnel at Wyoming BLM (erroneously) allowed themselves to be persuaded to make this accommodation to Engle, contrary to their own holding in the matter, they expressly warned Engle and/or his attorney (1) that the use of the "Amendment and Disclaimer" would be "risky," but would avoid rejections by the Wyoming State Office until a final, authoritative decision could be made; (2) that they, as employees of the Wyoming State Office of BLM, could not commit the Department to acceptance of the "Amendment and Disclaimer," and could not anticipate what might happen at the appeal stages; (3) that other state offices of BLM might reject the offers filed by Engle's clients; and (4) that Engle was taking a risk in not immediately revising its "Service Agreement" with his clients. The only assurances given either to Engle or his attorney were that the Wyoming State Office would accept the "Amendment and Disclaimer" on an interim basis and refrain from rejecting the offers of his clients until the matter was finally resolved.

When this Board held that the service agreement then in use by Engle did invest him with an interest (Lola I. Doe, 31 IBLA 394 (1977); Sidney H. Schreter, 32 IBLA 148 (1977)), Wyoming BLM renewed its demand that Engle make appropriate revision of his client Contracts. However, Engle's attorney advised that he planned to seek judicial review of the Board's decisions. Wyoming BLM again agreed to continue to recognize the "Amendment and Disclaimer" during the pendency of the question, but when the 90-day limitation on the filing of suit for judicial review of the Board's decisions expired without any suit having been filed, Wyoming BLM once more insisted on a revision of Engle's service agreement with his clients. Eventually this was accomplished by Engle.

There is nothing in these events which could give rise to an equitable estoppel against the Government. The fact that certain employees in one BLM State office attempted to make some temporary accommodation in Engle's interest, while warning him that it would be risky, and that they were without power to determine what would be decided by the Department or other BLM offices, certainly was not a misrepresentation of any material fact, nor did it afford grounds for Engle's reliance, nor did it constitute "affirmative misconduct." ^{10/} Engle was fully informed of every aspect of the matter, and actually

^{10/} An analysis of the operation of estoppel against the Government is contained in the judicial opinions delivered in the cases of United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978); United States v. Wharton, 514 F.2d 406 (9th Cir. 1975); United States v. Lazy FC Ranch, 324 F.Supp. 698 (D. Idaho 1971), aff'd 481 F.2d 985 (9th Cir. 1973); and United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). Under these holdings, in order for estoppel to lie against the Government, inter alia, the individual asserting estoppel must have

was adamant in his refusal to take the one course urged upon him by Wyoming BLM which would have extricated him—and his clients—from the difficulty.

In any case, it is noteworthy that all of the offers with which this appeal is concerned were filed in the New Mexico State Office of BLM, and the personnel at the Wyoming State Office had expressly warned Engle that the forbearance of the Wyoming office could not influence the actions of other state offices. There is nothing in the case records or the pleadings to indicate that personnel of the New Mexico State Office ever gave Engle any assurances whatever concerning these offers.

Accordingly, we find that the Government is not estopped to reject these lease offers.

In view of our holding, it is unnecessary to have a hearing on this matter, and the requests to do so by various parties are therefore denied. It is also unnecessary to consider whether more than one of Engle's clients filed offers on these parcels and thus violated the prohibition against multiple filings. 43 CFR 31.12.5-2.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Edward W. Stuebing
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge

f.n. 10 (continued)

relied to his detriment on misinformation received on account of some affirmative misconduct by Government agents acting within the scope of their authority, on which misinformation the party had a reasonable right to rely. United States v. Joseph Larsen, 36 IBLA 130 (1978).

APPENDIX

		Service		
Docket	Case Name	Drawing	Agreement	
<u>Number</u>	<u>(Appellant)</u>	<u>Date</u>	<u>Parcel Serial No.</u>	<u>Date</u>
IBLA 78-371	<u>Frederick W. Lowey</u>	Feb. 1978	NM 370 NM 32860	Dec. 13, 1977

Geosearch, Inc., holder of a 25% interest in the offer of James R. McQuaid, whose drawing entry card was drawn with second priority, has intervened in this matter.

IBLA 78-372 J. E. Ham Feb. 1978 NM 362 NM 32852 Jan. 4, 1978

IBLA 78-373 Heinz & Ursula Jan. 1978 NM 262 NM 32587 Dec. 6, 1977 Lichtenstein

Daniel Ashley Jenks, whose drawing entry card was drawn with second priority, has intervened in this matter.

IBLA 78-379 Richard K. Vitek Dec. 1977 NM 166 NM 32937 July 15, 1977

IBLA 78-380 James M. Ross Dec. 1977 NM 180 NM 32411 Nov. 16, 1977

Eloise B. Miller, whose drawing entry card was drawn with second priority, has intervened in this matter.

IBLA 78-501 John A. Gallagher April 1978 NM 464 NM 33258 Jan. 16, 1976

Fred T. Leebrick, whose drawing entry card was drawn with second priority, has intervened in this matter.

