

DAVID A. PROVINSE

IBLA 80-3

Decided October 6, 1980

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting appellant's noncompetitive acquired lands oil and gas lease offer, M 43934 (ND) Acquired.

Affirmed.

Oil and Gas Leases: Generally--Oil and Gas Leases: Applications:  
Generally--Oil and Gas Leases: First-Qualified Applicant--Oil and  
Gas Leases: Lands Subject to

When land has previously been included in a lease that has been canceled, it is available for subsequent leasing only in accordance with the provisions of the simultaneous filing system provided under 43 CFR 3112.

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

OPINION BY ADMINISTRATIVE JUDGE BURSKI

David A. Provinse appeals from a decision of the Montana State Office, Bureau of Land Management (BLM), rejecting his over-the-counter noncompetitive oil and gas lease offer M 43934 (ND) Acquired.

The lands in question, the SW 1/4 sec. 4, T. 144 N., R. 101 W., fifth principal meridian, were previously part of oil and gas lease M 13327 which issued effective September 1, 1969. The inclusion of the SW 1/4 sec. 4 was voided by a decision dated September 13, 1976, for the reason that the United States did not own the oil and gas rights as evidenced by a title opinion dated December 1, 1972.

Appellant filed his oil and gas lease offer M 43934 (ND) Acquired on July 9, 1979. The offer to lease was subsequently rejected by decision of July 18, 1979, for the reason that the oil and gas rights

were not owned by the United States. On July 26, 1979, additional evidence was submitted by appellant in support of his offer. The additional evidence was forwarded to the Office of the Field Solicitor for review. The Field Solicitor held that, upon review of the documents submitted, it appeared that 50 percent of all minerals located on the lands in question belonged to the United States and were available for leasing as acquired minerals. Appellant's lease offer was rejected again, however, on the ground that the lands were only available for leasing under the simultaneous procedures outlined in 43 CFR 3112.

Appellant argues that his over-the-counter offer should be allowed pursuant to 43 CFR 3111.1-1 which provides for the filing of regular offers for acquired lands "except as provided in subpart 3112." His contention is that Subpart 3111 provides the general rule as to leasing, subject only to such exceptions as are found in Subpart 3112. Appellant contends that 43 CFR 3112 applies only in four factual situations which are clearly enumerated therein. They are: (1) lands in a "canceled" lease, or (2) lands in a "relinquished" lease, or (3) lands in a lease which "terminates" by operation of law, or (4) lands in a lease which "expires" by operation of law at the end of its term. Oil and gas lease, M 13327, issued on September 1, 1969, appellant argues, does not fall within any of the four enumerated categories under 43 CFR 3112.1-1, and therefore his over-the-counter lease offer, M 43934 (ND) Acquired, should have been allowed under 43 CFR 3111.1-2.

By "Notice" of August 18, 1976, the lessees under M 13327 were notified by BLM that a reexamination of title records had shown that the United States held no mineral interest in the lands and that BLM was in error in leasing said lands. This notification was accompanied by a repayment application form. The lessees were advised that they could submit reasons why "lease M 13327 (ND) Acquired, should not be declared null and void." Lessees were also informed of their right to submit the repayment application form which would result in an earlier refund, but which would also constitute an acceptance of the State Office's rationale and a waiver of the right of appeal.

The repayment application was signed and sent to BLM by the prior lessees on August 23, 1976. On September 13, 1976, BLM declared oil and gas lease M 13327 null and void and authorized a refund of all rentals paid during the term of the lease.

Oil and gas lease, M 13327, was clearly not terminated by operation of law for nonpayment of rental, nor did it expire by operation of law at the end of its term. Appellant's contention that the prior lease was not canceled, however, cannot be accepted. Appellant's premise is that "canceled" within the context of 43 CFR 3112.1-1(a) is defined by 43 CFR 3108.2-3. This latter regulation provides:

§ 3108.2-3 Noncompliance with leasing act or lease terms.

Whenever the lessee fails otherwise to comply with any of the provisions of the act, of the regulations

issued thereunder, or of the lease, such lease may be canceled by the Secretary of the Interior if not known to contain valuable deposits of oil or gas after notice to lessee in accordance with section 31 of the act, if default continues for the period prescribed in that section after service of notice thereof.

Appellant contends that since none of the requirements for cancellation existed and there were no facts indicating that the lessee had failed to comply with the requirements of the law or the lease terms, the lease was not "canceled" within the ambit of 43 CFR 3112.1-1(a) and 3108.2-3. We disagree.

The Department has consistently held that where a Federal oil and gas lease has been issued covering lands in which the United States has no mineral interest, that lease must be "canceled." See, e.g., O. D. Presley, 21 IBLA 190 (1975); R. E. Puckett, 14 IBLA 128 (1973). Similarly, where non-competitive leases have issued for lands within a known geologic structure of a producing oil or gas field, such leases must be "canceled." William T. Alexander, 21 IBLA 56 (1975); Robert B. Ferguson, 9 IBLA 275 (1973). A lease issued in such circumstances is, by definition, issued in noncompliance with the Mineral Leasing Act, and is a nullity. A Departmental decision declaring it null and void "cancels" the lease ab initio. The fact that a "cancellation" may be erroneous does not change the nature of the decision. In the absence of a timely appeal the decision "canceling" the lease is final for the Department. We hold that lease M 13327 was canceled by the decision of September 13, 1976.

Since the prior lease was canceled, the lands in question are available for leasing only under the simultaneous procedure set forth in 43 CFR 3112.1-1. An over-the-counter lease offer filed for such lands is invalid and must be rejected. Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257 (D.C. Cir. 1963), cert. denied, 373 U.S. 951; Robert S. Bickel, 31 IBLA 201 (1977); John F. Brown, 22 IBLA 133 (1975). Thus, appellant's lease offer was properly rejected as to the land formerly embraced in canceled lease M 13327 (ND) Acquired. David A. Provinse, 35 IBLA 217 (1978). 1/

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1/ Appellant argues that the requirement that a lease in such a situation be leased only through the simultaneous system will work an injustice upon appellant and have long range detrimental effects on the Department itself. Appellant contends that but for his diligence and industry in developing certain facts, the Department would have continued in its erroneous view that it had no mineral interest in the lands covered by M 43934 (ND) Acquired. If, however, an individual gains no advantage for efforts to inform the Department of the proper land status, no one will, in the future, expend his or her time to establish Government ownership of disputed tracts.

Therefore, pursuant to the authority delegated to the Board of Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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James L. Burski  
Administrative Judge

I concur:

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Douglas E. Henriques  
Administrative Judge

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fn. 1 (continued)

We recognize that there is a certain validity to appellant's observations. Nevertheless, the applicable regulation clearly requires that the lands sought by appellant be first offered via the simultaneous system.

## ADMINISTRATIVE JUDGE STUEBING CONCURRING SPECIALLY:

My sympathies lie entirely with appellant in this matter. I share his frustration and resentment that, after having gone to the trouble and expense of proving to BLM that the United States owned a mineral estate which BLM had refused to acknowledge, and thus having performed a valuable public service, he is denied recognition as "the first person making application for the lease" under 30 U.S.C. § 226 (1976), notwithstanding that his application is, indeed, first in time.

The basis for BLM's decision, and the majority decision of this panel, is that because of oil and gas lease M-13327 which issued in 1969 and which was declared null and void in 1976, the BLM decision which declared M-13327 null and void "canceled" that lease "ab initio." Therefore, says BLM and my fellow judges of this panel, the land must be listed as available for the filing of simultaneous offers, with priority of consideration to be established by the luck of the draw.

I regard this as error, and were this the only reason for putting the land up for simultaneous filing, this would be a dissenting opinion. The previous lease, M-13327, was not "canceled," it was declared "null and void." As most lawyers understand it, something that is "null and void" is ineffectual, nugatory, of no legal force. A void contract is defined as, "One which never had any legal existence." Black's Law Dictionary (4th Ed.), pp. 1216, 1745. Although, Judge Burski advises me that it is his opinion that because the BLM was in error in its reason for declaring the lease null and void, it was a valid lease despite the Bureau's holding. My response is that it is the intent of the parties which control the efficacy of an agreement, and where, as here, both the lessee and the lessor agreed to treat lease M-13327 as a nullity ab initio and to restore the lessee to his prelease circumstance by refunding all of the money paid in consideration of the lease, the agreement of the parties to treat their contract as null and void makes it so, regardless of their reason. Clearly, a lease which the parties agree to treat as never having had any legal existence is not subject to "cancellation."

Unfortunately, that will not suffice to reverse BLM's decision in this case. Null and void lease M-13327 itself is the result of the land having been listed for simultaneous filing as the subject of another, even earlier, oil and gas lease. It appears that the land formerly was included in lease M-0365778, which issued on July 1, 1960, and "terminated" on July 1, 1969. The land was then listed that same month as available for the simultaneous filing which resulted in lease M-13327.

As I read the regulations, that scuttles appellant's chances. I wish it were not so. The equities are exclusively his. The mineral interest in question is not in fact "available" because a prior lease

was terminated, canceled, expired or was relinquished; it is "available" because his own efforts made it available by proving that BLM's contention that the interest was not Federally owned was false. Even so, I find no latitude in the regulations to reward his success by excepting this particular land from the requirement that priority to lease such interests must be established through the simultaneous filing procedure.

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Edward W. Stuebing  
Administrative Judge

