

Editor's note: appealed -- aff'd, Civ.No. 81-288 (D. Wyo. Feb. 3, 1982), aff'd in part, rev'd in part, 721 F.2d 694 (10th Cir. 1983), cert. denied, 104 S.Ct. 2347, 466 US 972 (May 14, 1984)

RICHARD E. McDONALD
RESOURCE SERVICE CO., INC.

IBLA 81-112

Decided June 30, 1981

Appeal from decision of the Wyoming State Office, Bureau of Land Management, rejecting simultaneously filed oil and gas lease offer W 63010.

Affirmed.

1. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases:
Applications: Sole Party in Interest -- Oil and Gas Leases:
First-Qualified Applicant

When an individual files an oil and gas lease offer through a leasing service under an 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 according to a set schedule, 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, and in any payments of overriding royalties retained. 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 -- Oil and Gas Leases:
First-Qualified Applicant

Where an individual files an oil and gas lease offer through a leasing service

under an agreement with the service which has been determined to create an interest in the lease for the service, and the service files a "waiver" of that interest with the BLM prior to a simultaneous drawing, without communicating such "waiver" to the client, and without any contractual consideration running from the client to the leasing service, the "waiver" is without effect as a matter of law and both the successful drawee and the leasing service are required to make a showing as to their respective interest under 43 CFR 3102.7.

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

The Department is not estopped from rejecting an oil and gas lease offer because the offeror allegedly relied on the acceptance by employees in a BLM state office of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that the BLM state office employees are subordinate personnel and that their decisions are subject to reversal on review at the secretarial level. Such reversal upon Departmental review does not constitute retrospective application of a new rule.

APPEARANCES: Thomas W. Ehrmann, Esq., Ross R. Kinney, Esq., Wayne E. Babler, Esq., and David B. Kern, Esq., Milwaukee, Wisconsin, for appellants; Harold J. Baer, Jr., Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Resource Service Company, Inc. (RSC), and its customer, Richard E. McDonald, have appealed from the October 6, 1980, decision of the Wyoming State Office, Bureau of Land Management (BLM), rejecting McDonald's simultaneously filed offer for oil and gas lease W 63101. The offer was rejected because the State Office had determined that RSC had an interest in McDonald's offer which was not disclosed at the time the offer was filed.

On December 30, 1977, McDonald signed an agreement with RSC to participate in the simultaneous drawings for oil and gas leases sponsored by BLM. This agreement authorized RSC to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by McDonald. The agreement obligated him to pay the leasing service according to a set schedule, even if he negotiated the sale of the lease. The agreement further provided that the agency to negotiate would be valid for 5 years.

Previously, on January 13, 1977, Fred Engle, d.b.a. Resource Service Company, Inc., had executed a document styled "amendment and disclaimer" which purported to waive RSC's interest under service agreements with other clients which contained the same provisions as the agreement signed by appellant. This amendment and disclaimer was filed with BLM, but its existence was not disclosed to McDonald when he signed his agreement with RSC almost a year later.

McDonald's card was drawn first for parcel No. WY 39 in the February 1978 drawing. After RSC notified him that he had won, he signed a new sales agreement, on March 21, 1978. As noted above, however, BLM rejected appellant's offer, holding that RSC had an undisclosed interest in the lease and that RSC's disclaimer of that interest was ineffective. We affirm.

[1, 2] In Donald W. Coyer, 50 IBLA 306 (1980), aff'd, Coyer v. Andrus, Nos. C78-104K, C80-370K, C80-372K (D. Wyo. filed Mar. 5, 1981), appeal docketed, No. 81-1415 (10th Cir. Apr. 6, 1981), we held that this agreement between RSC and its clients gives RSC an interest in an oil and gas lease offer as defined by 43 CFR 3100.0-5(b), because the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. In that case, we further held that Engle's attempt to waive this interest was without effect because the purported "waiver" was filed only with BLM without communicating such waiver to the client and without any contractual consideration running from the client to the leasing service. A court recently reviewed de novo our determination that Engle's disclaimer was without effect and reached the same conclusion because the disclaimer was neither under seal nor supported by consideration. Lowey v. Watt, Civ. Nos. 79-3314 through 79-3319 (D.D.C. May 29, 1981), aff'g Fredrick W. Lowey, 40 IBLA 381 (1979). The Board's decision in Lowey further noted that the disclaimer did not affect subsequently made service agreements such as McDonald's. Because RSC had an interest in the offer at the time it was filed, and because it was not disclosed at that time, the offer must be rejected. RSC's argument to the contrary is fully discussed in the Coyer decision and in other recent decisions by this Board involving the same or similar facts. E.g., Wilbur G. Desens, 54 IBLA 271 (1981); Inexco Oil Co., 54 IBLA 260 (1981); Home Petroleum Corp., 54 IBLA 194, 88 I.D. (1981).

[3] RSC further argues that the doctrine of equitable estoppel precludes the Department from holding the waiver ineffective because

two BLM employees had advised Engle that the waiver would be sufficient. In Coyer and in the other cases cited above, we expressly rejected this contention. We held that the Department is not estopped from rejecting an oil and gas lease offer, although the offeror allegedly relied on the acceptance by employees in a BLM state office of a plan designed by the offeror to remove a fatal defect in the offer, where the offeror had both constructive and actual knowledge that BLM state office employees are subordinate personnel and that their decisions are subject to reversal upon review at the Secretarial level. Wilbur G. Desens, supra; Inexco Oil Co., supra; Home Petroleum Corp., supra; Donald W. Coyer, supra. The fact that BLM continued to process offers filed by RSC does not constitute approval of RSC's service agreement.

In Lowey v. Watt, supra at 11-12, the court rejected RSC's claims that the Government should be estopped from declaring its disclosures ineffective:

Modern authorities indicate that estoppel may be invoked where (1) the traditional requirements are met * * * and (2) the government's actions constitute "affirmative misconduct." United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); Santiago v. Immigration & Naturalization Service, 526 F.2d 488 (9th Cir. 1975), cert. denied, 425 U.S. 971 (1976). cf. United States Immigration & Naturalization Service v. Hibi, 414 U.S. 5, 8 (1973) (implying that affirmative misconduct might give rise to estoppel against the government).

The BLM official's actions do not approach the requisite level of "affirmative misconduct." Although the officials erred in agreeing to accept RSC's disclaimer, they did so at RSC's request and to protect RSC's clients until RSC could put a revised service agreement into effect. Further, it would be a misstatement to assert that RSC is without blame. It had notice as early as December of 1976 that its exclusive agency provision was improper and was in clear violation of the regulations, yet it refused to change its service agreement for 15 months. RSC could have entered new service agreements with its existing clients but declined to do so. Plaintiffs have no entitlement to the leases for which they submitted offers, but a mere hope or expectation. Schraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1969); McDade v. Morton, 353 F. Supp. 1006, 1010 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974). Against these considerations we must balance * * * the public interest in fair administration of the noncompetitive lease program. All offerors are entitled to assurance that the Government will impartially enforce its regulations. Plaintiffs' claim of governmental estoppel is without merit. [Footnotes omitted.]

In Lowey v. Watt, supra, RSC's clients argued, as McDonald does here, that retrospective application of the invalidation of the disclaimer should not be permitted. The court rejected this argument as follows:

Plaintiffs argue that the IBLA's Easterday decision reversed the BLM's previous acceptance of RSC's disclaimer, and that such "retroactive" application of a "new rule" was arbitrary and capricious. We do not agree. RSC was notified as early as December 1976 that its service agreement did not comply with the Department's regulations. RSC persuaded the Wyoming BLM to accept its disclaimer until a new service agreement could be drafted. The issue is not whether a "new rule" was retroactively applied, but whether the Secretary is estopped from declaring the disclaimer invalid.

Lowey v. Watt, supra at 10. As indicated above, the court found RSC's estoppel argument "without merit." Id. at 12.

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.

Anne Poindexter Lewis
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge