

Editor's note: appealed -- aff'd, Civ.No. 82-0449 (D.D.C. Jan. 20, 1983)

BERNARD S. STORPER

IBLA 81-191

Decided November 19, 1981

Appeal from decision of the New Mexico State office, Bureau of Land Management, rejecting simultaneous oil and gas lease application, NM 42125.

Affirmed.

1. Evidence: Presumptions -- Oil and Gas Leases: Applications: Filing

The presumption of regularity which supports the official acts of public officers in the discharge of their duties must, for reasons of public policy and under burden of proof analysis, be accorded priority over the presumption that documents properly mailed are duly delivered. Thus, when Government files do not indicate that a document was received, an appellant must show not merely that the document was properly transmitted, but that it was, in fact, actually received.

2. Oil and Gas Leases: Generally -- Oil and Gas Leases: Applications: Filing

The provisions of 43 CFR 3102.6-2 must be strictly construed and where an oil and gas lease applicant or his agent fail to comply therewith, the application must be rejected.

APPEARANCES: Don M. Fedric, Esq., Roswell, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Bernard S. Storper appeals from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated November 7, 1980, rejecting his oil and gas lease application which was drawn with first priority for parcel NM 643 (NM 42125) in a simultaneous drawing held on

August 21, 1980. Subsequent to the drawing, BLM requested that appellant provide additional information concerning the formulation of his application, which he did on October 20, 1980.

In his response, appellant stated that while he did receive assistance from Federal Oil and Gas Leases, Inc., such assistance was limited to the provision of a list of recommended parcels. Storper stated that he "personally completed, signed and filed the lease application." He admitted, however, that he did not submit a signed copy of the agreement, apparently contending that it was unnecessary since "no service of any kind is to be performed on my behalf."

The provisions of 43 CFR 3102.2-6(a) state that:

Any applicant receiving the assistance of any other person or entity which is in the business of providing assistance to participants in a Federal oil and gas leasing program shall submit with the lease * * * application * * *, a personally signed statement as to any understanding, or a personally signed copy of any written agreement or contract under which any service related to Federal oil and gas leasing or leases is authorized to be performed on behalf of such applicant. Such agreement or understanding might include, but is not limited to: A power of attorney; a service agreement setting forth duties and obligations; or a brokerage agreement.

As regards the phrase "person or entity in the business of providing assistance to participants in a Federal oil and gas leasing program," the applicable regulation defines this term as meaning:

[T]hose offering services for consideration in connection with the acquisition of Federal oil and gas leases. Included in this definition are those enterprises, commonly known as filing services, which sign, formulate, prepare, offer advice on formulation or preparation, mail, deliver, receive mail or otherwise complete or file lease applications or offers for consideration. Excluded from the definition are those services which only tangentially relate to Federal oil and gas lease acquisition, such as general secretarial assistance, or general geologic advice which is not specifically related to Federal lease parcels or leasing.

43 CFR 3100.0-5(d). It seems clear to us from these regulations that even if a leasing service does no more than provide a list of recommended parcels for a drawing, and receives consideration for its recommendations, such action makes the service an agent, pursuant to 43 CFR 3102.2-6(a), for which the disclosure requirements apply.

It must be noted, however, that 43 CFR 3102.2-6(a) provides merely one mechanism by which an applicant can comply with the agency disclosure requirement. As we have held, 43 CFR 3102.2-6(b) provides

an independent method for making the necessary disclosures. Alvyn G. Novotny, 55 IBLA 196 (1981). The relevant portion of 43 CFR 3102.2-6(b) reads as follows:

Where a uniform agreement is entered into between several offerors or applicants and an agent, a single copy of the agreement and the statement of understanding may be filed with the proper office in lieu of the showing required in paragraph (a) of this section. A list setting forth the name and address of each such offeror or applicant participating under the agreement shall be filed with the proper Bureau of Land Management office not later than 15 days from each filing of offers, or applications if leasing is in accordance with Subpart 3112 of this title.

The decision of the New Mexico State Office stated that upon receipt of appellant Storper's statement, it checked its records and found that while Federal Oil and Gas Leases, Inc., had filed a list of its clients for the July filings, the list was defective in that it failed to include addresses for those clients. Accordingly, the State Office held that appellant had failed to meet the requirements of either 43 CFR 3102.2-6(a) or 43 CFR 3102.2-6(b) and therefore rejected the application.

[1] On appeal, there is no contention that appellant personally submitted a copy of the service agreement with his application as permitted by 43 CFR 3102.2-6(a). Rather, the entire focus is on whether the filing service complied with the provisions of 43 CFR 3102.2-6(b), and whether assuming, arguendo, that it failed to comply, the consequences for what is characterized as "technical noncompliance" should be rejection of the application.

First of all, appellant argues that the New Mexico State Office did, in fact, timely receive a listing of the names and addresses of clients of Federal Oil and Gas Leases, Inc., within 15 days of the filing of the applications as required by 43 CFR 3102.2-6(b). Appellant has submitted an affidavit of Judi Boston, dated December 27, 1980, which relates that the original submission by Federal Oil and Gas Leases, Inc., which was sent on July 21, 1980, to a number of BLM state offices, including the New Mexico State Office, provided the names of its clients but omitted their addresses. Subsequently, however, Boston was informed by an employee of the Wyoming State Office that the submission should have included the addresses of the various clients. Boston avers that, on July 28, 1980, she sent a list of the names and addresses of the clients to those state offices in which clients had filed during the July filing period. This included the New Mexico State Office. Boston states that all other State offices received this submission.

Appellant contends that this corrected filing must have arrived since the envelope was never returned by the United States Postal Service. He notes that the July 28, 1980, transmittal was addressed to Arthur W. Zimmerman, then the State Director of the New Mexico State Office, and suggests that since Zimmerman retired in early August the

filing may have been misplaced at this time. Appellant argues that Boston was clearly of a belief that the transmittal had been duly received and contends that the preponderance of the evidence indicates compliance with the regulation.

The Board has had numerous opportunities, particularly since the advent of the mining claim recordation requirements of section 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), to examine the various presumptions which come into play when an appellant alleges timely transmittal of a document, but the State Office involved has no record of receipt of the submission.

In the first instance there is a presumption of regularity which supports the official acts of public officers in the proper discharge of their duties. See, e.g., Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); Phillips Petroleum Co., 38 IBLA 344 (1978). On the other hand, we have recognized the existence of another presumption that mail properly addressed, stamped, and deposited in an appropriate receptacle is duly delivered. See generally Donald E. Jordan, 35 IBLA 290 (1978). When these two presumptions have come into conflict, we have traditionally accorded greater weight to the former. See David F. Owen, 31 IBLA 24 (1977). This choice has been predicated on considerations of public policy and supported by burden of proof analysis.

There is a strong public interest in presuming regularity in BLM's administration of the public lands and their mineral resources. The Department has long held that the availability of land for appropriation or lease must at least initially be determined by recourse to the public records of BLM. Thus, if the records indicate that land is not open to entry, even though the records are erroneous, such land may not be entered until the records are changed to correctly reflect the status of the land. See, e.g., State of Alaska v. Makepeace, 6 IBLA 58, 67, 79 I.D. 391, 395 (1972); Joyce A. Cabot, 63 I.D. 122, 123 (1956). For reasons of public policy, the Department has always recognized the importance of the public's right to rely on the records of BLM and thus, the presumption of regularity, in this context, is an essential component of land law adjudication.

Secondly, even if public policy considerations did not dictate that greater weight be given to the presumption of regularity over that accorded the presumption that mail, duly addressed and deposited, is delivered, we are of the belief that burden of proof analysis would necessitate the same choice.

As we have noted in the past, rebuttable presumptions are, in essence, procedural devices by which the burden of proof is shifted from one party to another. See generally United States v. Hess, 46 IBLA 1, 7-8 (1980). To invoke two opposing presumptions of equal weight would, of course, beg the question of where the original burden of proof reposed. In such a potential situation, we believe that the conflict can only be resolved by analyzing the practical and logical consequences that would flow from affording preference to either presumption.

If preference is granted to the presumption that mail properly addressed is delivered, the burden of proof would be on BLM to prove that it did not receive the document. In essence, this requires BLM to prove a negative, i.e., to prove that it did not receive a specific submission. It is difficult to perceive how this burden could ever be met. 1/

If, on the other hand, priority is accorded to the presumption of regularity, it would be appellant's obligation to show that the document was, indeed, received. We have had a number of cases in the past in which appellants have convinced this Board that documents were timely received when there was no office record of receipt. Thus, in L. E. Garrison, 52 IBLA 131 (1981), claimant's assertion that the document in issue had been filed with BLM was corroborated by an affidavit of a subsequent telephone conversation with a BLM employee who opened the mail during the conversation, and acknowledged that all of the required documents were there. The phone conversation was in turn documented by submission of a telephone bill reflecting the call. See also H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981).

Similarly, while the submission of a signed postal "return-receipt" card may be insufficient to prove actual receipt of one document when a number of documents are transmitted in the same envelope (see Lawrence E. Dye, 57 IBLA 360 (1981)), we believe that where only one document is transmitted in an envelope, submission of a properly signed return-receipt card may be sufficient to overcome the presumption of regularity.

Thus, since granting priority to the presumption of mailing would result in a virtually conclusive presumption whereas affording precedence to the presumption of regularity would be far easier to rebut, we are required to afford priority to the presumption of regularity and leave it to an appellant to submit evidence that might overcome this presumption.

Appellant's submissions do not overcome this presumption in the instant appeal. Rather, they consist primarily of affidavits noting that the documents were timely mailed. It is the receipt of the documents, however, which is critical. See 43 CFR 3102.6-2. We must admit that while mail properly addressed is normally delivered in due course, prompt delivery is not always the case. See Don Chris A. Coyne, 52 IBLA 1 (1981). While we do accept as true appellant's assertions of prompt mailing, this fact we find insufficient to overcome the presumption of regularity.

1/ Indeed, this burden would almost necessarily elevate a rebuttable presumption to the status of a conclusive presumption since under the situation postulated in the text (giving priority to the mailing-receipt presumption) the fact that the document was not in the case file would be insufficient to overcome the presumption of receipt. It would be ludicrous to expect that those who receive mail at BLM offices would be able to testify that they remember that any specific document was not received.

[2] We turn now to appellant's argument that, even if we hold that the addresses of Federal Oil and Gas Leases, Inc.'s clients were not timely received in the New Mexico State Office, he should not be denied priority for technical noncompliance which is, as appellant characterizes it, "trivial and inconsequential."

Appellant contends that inasmuch as his application contained his true address the failure of the filing source to submit the address was of no moment. Appellant, here, misinterprets the thrust of the regulation.

It is true that for many years filing services normally used their address as the address of the offeror. This practice opened the simultaneous system to possible abuses including allegations that individuals drawing first priority at times never even learned of this fact. See generally United States v. Allen, 554 F.2d 398 (10th Cir. 1977). In order to close this possible loophole, the new regulations expressly require that "the application shall include the applicant's personal or business address." 43 CFR 3112.2-1(d).

The reason that 43 CFR 3102.2-6(b) requires addresses to be submitted is totally different, however, from that animating 43 CFR 3112.2-1(d). The whole purpose of this regulation is to allow BLM to connect filing service companies and the agreements which they have entered into with the applicants who have filed in a drawing. Considering the number of applications which a State Office processes in any filing period (the Wyoming State Office had 383,094 filings for the November 1980 drawing alone) it is inevitable that a number of participants will have the same name. If the filing service only submits the names of its clients extensive delays in issuance of oil and gas leases will result as the State Office attempts to match the priority applicant with one, or even more, filing services. This action would be essential since only after the priority applicant is connected to a specified filing service will the State Office examine the nature of the arrangements to make sure that they do not violate any of the proscriptions relating to disclosures of other parties in interest (43 CFR 3102.2-7) and prohibition of multiple filings (43 CFR 3112.2-1(f)).

Appellant, in effect, asserts that since neither of the substantive proscriptions were violated, it is arbitrary to reject the application because of procedural deficiencies. But the whole purpose of requiring filing services to submit addresses with the names of the clients was to expedite issuance of the leases. There is no ambiguity in the regulation. Rather, appellant's agent failed to follow instructions with the end result being exactly that which the regulation was attempting to avoid -- increased delays in the issuance of leases. The sound and proper running of the simultaneous system necessitates that we require strict compliance with the provisions of 43 CFR 3102.2-6. Since appellant and his agent did not so comply, his application was properly rejected.

Accordingly, 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.

James L. Burski
Administrative Judge

I concur:

Bruce R. Harris
Administrative Judge

ADMINISTRATIVE JUDGE LEWIS CONCURRING:

Appellant in his affidavit dated December 9, 1980 (Exhibit 1), states:

4. My understanding with Federal Oil and Gas Leases, Inc. involved my [sic] participation as a "Plan C" client of such filing service, whereby they provided me with a list of recommended parcels for filing, and I chose from such list the parcel or parcels I desired to file upon. I made my own selections, signed and personally completed my drawing entry cards and personally transmitted my cards to the Bureau of Land Management. This was the exact procedure followed for Parcel NM 643 in connection with the drawing entry card I submitted for such parcel. I pay a fee to Federal Oil and Gas Leases, Inc. for the recommended list of parcels, and have no other written agreement or other understanding with them as to my filings or as to any leases won by me.

In applying 43 CFR 3102.2-6(a) to these facts, I agree that the arrangement described in the affidavit makes the leasing service an agent, for which the disclosure requirements apply. However, I would limit the conclusion to the facts herein.

Anne Poindexter Lewis
Administrative Judge

