

Appeal from a decision of the Nevada State Office, Bureau of Land Management, dismissing protest against the validity of first-drawn simultaneous oil and gas lease offer drawing entry card. N 33329.

Set aside and remanded.

1. Administrative Practice -- Evidence: Generally -- Oil and Gas Lease Applications: Generally

Where a protestant against the issuance of an oil and gas lease supports his allegations that the lease offer is not qualified with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed for failure of the protestant to make positive proof of his allegations. Instead, the protest should be adjudicated on its merits after all available information has been developed.

APPEARANCES: R. Hugo C. Cotter, Esq., Albuquerque, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The simultaneous noncompetitive drawing entry card (DEC) oil and gas lease application of Anne Macheel was drawn with first priority for parcel number N 33329. The DEC of Patricia C. Alker for this parcel was drawn with second priority. BLM issued the lease to Macheel on June 30, 1981.

On July 7, 1981, Alker filed a protest against the issuance of the lease to Macheel, alleging that the DEC was irregular in that Anne Macheel did not formulate, prepare, and execute her own application but that such was done for her by a lease filing service. Since no agency statement, as required by 43 CFR 3102.2-6(a), was submitted, and since the reverse of the DEC was not filled out in accordance with 43 CFR 3102.2-6(b), Alker contended that Macheel's application should not have been considered.

The Bureau of Land Management (BLM) dismissed Alker's protest in a decision issued on August 27, 1981, because BLM determined that the evidence submitted by Alker did not substantiate the allegation made.

In her statement of reasons for appealing BLM's decision, Patricia C. Alker states that to substantiate her Notice of Protest of the issuance of the lease to Anne Macheel, Patricia C. Alker provided the uncontroverted sworn statement of Henry A. Alker that he had spoken to Anne Macheel and that she stated that "a friend named Benny Moore had helped her in the preparation of her application, but that the basic documentation and parcel selection had been done by Metropolitan Marketing, a New Jersey lease filing agency." <sup>1/</sup> Since Anne Macheel had received the assistance of an entity which is in the business of providing assistance to participants in a Federal oil and gas leasing program, appellant contends that it was mandatory that she comply with the provisions of 43 CFR 3102.2-6(a) or (b); Anne Macheel did not comply with this regulation and her application was therefore fatally defective and the lease issued to her should have been cancelled.

[1] In Lee S. Bielski, 39 IBLA 211, 222 (1979), this Board held that:

Admittedly, the burden of a protestant in such cases has been poorly and imprecisely defined. But insofar as our research reveals, we have never gone so far as to hold a protestant must make "positive proof" of his allegation to avoid dismissal of his protest. We think the rule should be that where a protestant supports his contention with sufficient evidence to warrant further inquiry or investigation by BLM, the protest should not be summarily dismissed, but adjudicated on its merits after all available information has been developed.

Affidavits may be used for various purposes in both judicial proceedings and extrajudicial matters. The many uses which may be made of affidavits in judicial proceedings is illustrated by the statutory provisions of some of the states, which provide that an affidavit may be used to verify a pleading, to prove service of process, to obtain a provisional remedy, and in other cases permitted by law. In general practice, affidavits may be used to start in motion the process of the court and are generally received as evidence upon the hearing of motions, irrespective of the vital influence the latter may have upon the final outcome of the suit. Affidavits are not admissible as prima facie evidence of the facts they contain, however. 3 Am. Jur. 2d §§ 28, 29 (1962).

In the present situation, the affidavit of appellant, although not proof of the facts contained in the affidavit, constitutes sufficient evidence to warrant further inquiry or investigation by BLM and the protest should not have been summarily dismissed. Rather, an inquiry should have been begun by BLM to collect information from Anne Macheel so that BLM could determine whether the DEC should have been rejected because it did not conform to the requirements of 43 CFR 3102.2-6(a) and (b).

<sup>1/</sup> It may be noteworthy that the affidavit refers to assistance provided to Macheel by "Benny Moore" and the file contains an assignment of the lease from Macheel to "Barry Mohr." This assignment may not be approved by BLM until the protest is disposed with finality.

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 set aside and the matter is remanded to BLM for action consistent with this decision.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Anne Poindexter Lewis  
Administrative Judge

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Gail M. Frazier  
Administrative Judge

