

BRUCE A. BLAKEMORE ESTATE TRUST
AND
JAMES E. BLAKEMORE TRUST

IBLA 81-518
82-44

Decided March 24, 1982

Appeals from decisions of Colorado State Office and the New Mexico State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease applications. C 30500, C 30552, and NM 42060.

Affirmed.

1. Oil and Gas Leases: Applications: Drawings

The language in 43 CFR 3112.6-1(c)(4) which prohibits separate filings by a trustee on behalf of two or more beneficiaries on the same parcel is a per se prohibition, and it means that a trustee for two or more discrete trusts may file application on behalf of only one trust for any one parcel.

2. Oil and Gas Leases: Applications: Drawings

Where separate trusts are created for siblings, and the trust agreements provide for a contingent distribution of the assets from the estate of one or more trusts of decedents to the sibling survivors, each of the beneficiaries of the separate trusts has an "interest" in any oil and gas lease offer as that term is defined in 43 CFR 3100.0-5(b), and the simultaneous filing of lease applications by more than one such trust for the same parcel is therefore violative of 43 CFR 3112.6-1(c), which prohibits the filing of multiple offers.

APPEARANCES: Robert C. Bledsoe, Esq., Midland, Texas, for appellants;
Harold J. Baer, Jr., Esq., Office of the Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

The Bruce A. Blakemore Estate Trust, through its trustee, has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated March 3, 1981, rejecting its noncompetitive oil and gas lease applications, C 30500 and C 30552, because the applications were part of multiple filings in violation of 43 CFR 3112.6-1(c)(4).

Appellant's applications were drawn with first priority for parcels CO 280 and CO 333 at the July 1980, simultaneous oil and gas lease drawing. 1/ The BLM decision noted that appellant "as Trustee of the following trusts submitted applications on the same parcels: James M. Blakemore Estate Trust [,] Margene Blakemore Estate Trust [,] Virginia Blakemore Estate Trust [and] William B. Blakemore, Jr. Estate Trust." In rejecting the applications BLM concluded that 43 CFR 3112.6-1(c)(4) prohibited a trustee from making separate filings on behalf of two or more beneficiaries on the same parcel. The appeal from this decision was docketed IBLA 81-518.

Under similar circumstances the New Mexico State Office, BLM, by decision dated July 27, 1981, rejected the application (NM 42060) of the James M. Blakemore Trust selected with first priority in the August 1980 drawing for parcel NM 578. BLM concluded that the application violated 43 CFR 3112.6-1(c)(4) because the trustee for the James M. Blakemore Trust also submitted applications for four other trusts (Virginia Blakemore Estate Trust, Margene Blakemore Estate Trust, William B. Blakemore, Jr., Trust, and the Bruce A. Blakemore Estate Trust) for the same parcel (NM 578). The trustee filed an appeal on behalf of the trust. It was docketed IBLA 82-44. 2/

There are five trusts involved in these appeals. William B. Blakemore II and Marian W. Blakemore established the Bruce A. Blakemore Estate Trust on August 8, 1960, for their son Bruce. The Blakemores created two similar irrevocable trusts for their daughters, Margene and Virginia Blakemore on August 8, 1960, and December 23, 1968, respectively. The two remaining trusts were testamentary trusts created for the Blakemore's sons, James M. and William B. Blakemore, Jr., by the will of their grandfather, James M. West, Jr., dated March 28, 1957.

On appeal it is asserted by counsel for the trusts that "there is absolutely no evidence to support any allegation of agreement, scheme, plan or arrangement which would give any party or parties more than a single opportunity of successfully obtaining a lease or interest therein." He maintains that the matter concerns five "independent" trusts, and that there is no evidence that "there is any unauthorized or inappropriate sharing of interest as between the trusts or the Trustee." Counsel submits an affidavit, dated April 24, 1981, in which the trustee attests that he is the trustee of all five trusts, for which he receives a designated annual fee from each trust, and that "[n]one of the beneficiaries of the trusts have any interest in any of the other Trusts." Appellant also argues that an interpretation

1/ The BLM decision mistakenly referred to parcel CO 280 as CO 282. This mistake was corrected in a Mar. 11, 1981, decision by the BLM State Office. 2/ Because IBLA 81-518 and 82-44 involve the same issues and substantially similar facts they have been consolidated for purposes of decision.

of 43 CFR 3112.6-1(c)(4) as applying to separate filings by one trustee on behalf of two or more beneficiaries under different trusts would be inconsistent with regulations permitting filings by trusts and "will leave this regulation open to challenge before the courts as one without basis and discriminatory."

The question raised is whether BLM properly rejected the applications in question. Examination of this question must begin with an analysis of the language of the regulation cited by both BLM state offices as the basis for the rejections.

The pertinent parts of 43 CFR 3112.6-1(c) read as follows:

(c) Prohibited agreements, schemes, plans or arrangements. Any agreement, scheme, plan, or arrangement entered into prior to selection, which gives any party or parties more than a single opportunity of successfully obtaining a lease or interest therein is prohibited and any application made in accordance with such agreement, scheme, plan or arrangement shall be rejected. Specifically:

* * * * *

(4) Separate filings by a trustee or guardian in its own behalf and on behalf of one or more beneficiaries on the same parcel or separate filings by a trustee or guardian on behalf of two or more beneficiaries on the same parcel or, separate filings by the grantor or person with the power of revocation of a revocable trust and the trust, are prohibited.

The Department published this regulation in the Federal Register on May 23, 1980, with an effective date of June 16, 1980, 45 FR 35165 (May 23, 1980), as part of the Department's regulatory revision of the simultaneous oil and gas leasing system.

On June 4, 1979, the Secretary of the Interior announced that he would pursue regulatory changes to prevent abuses of the simultaneous oil and gas leasing system and to promote efficient exploration and development. On September 28, 1979, the Department issued proposed rules revising the simultaneous oil and gas leasing system. 45 FR 56176 (Sept. 28, 1979). As part of that rulemaking, the Department proposed to prohibit revocable trusts from participating in Federal oil and gas leasing. 44 FR 56178 (Sept. 28, 1979). It also proposed to prohibit "[s]eparate filings by a trustee or guardian on its own behalf and on behalf of one or more beneficiaries on the same parcel or, separate filings by a trustee or guardian on behalf of two or more beneficiaries on the same parcel." 43 CFR 3112.6-1(c)(5) (44 FR 56181 (Sept. 28, 1979)).

In its May 23, 1980, final rulemaking the Department eliminated the revocable trust provision and stated further in the preamble to the rulemaking that: "In order to highlight a potentially improper filing arrangement, however, language has been added to section 3112.6-1(c)(4) of the final rulemaking to specifically warn against the filing of applications by both the grantor or those with powers of revocation and the trust for the same parcel." This commentary relates only to the last clause added to 43 CFR

3112.6-1(c)(4). The language of proposed 43 CFR 3112.6-1(c)(5), quoted above, became part of 43 CFR 3112.6-1(c)(4) without change. There is no indication in the preamble of receipt of any comments specifically directed to the language in question in these cases, *i.e.*, "separate filings by a trustee or guardian on behalf of two or more beneficiaries on the same parcel."

Given the dearth of information to aid in construing the regulation, we are left with the language itself, knowing only that the Secretary was concerned about possible abuses of the simultaneous leasing system.

We will look initially at the first part of 43 CFR 3112.6-1(c)(4) which prohibits "[s]eparate filings by a trustee or guardian in its own behalf and on behalf of one or more beneficiaries on the same parcel." This prohibits a trustee from filing for the same parcel in its name and as trustee for a trust. For example, if John Smith were trustee for the XYZ Trust, he could not file an application in his own name, John Smith, and as John Smith, Trustee for XYZ Trust. This is a *per se* prohibition. Even if the terms of the trust agreement clearly allowed John Smith to file applications in his own name, 43 CFR 3112.6-1(c)(4) would require rejection if he filed in his own name for the same parcel for which he also filed an application on behalf of the trust. 3/

[1] The language critical to disposition of these cases is the second clause of 43 CFR 3112.6-1(c)(4) which prohibits "separate filings by the trustee or guardian on behalf of two or more beneficiaries on the same parcel." The regulations specifically allow a trustee or guardian to file applications on behalf of a beneficiary or ward. 43 CFR 3102.2-3. However,

3/ Significantly, this Board held before the existence of this regulation that "[f]iling by the cotrustee individually and also on behalf of the trust created a prohibited multiple filing under 43 CFR 3112.5-2 [1979], requiring rejection of such offers." Celeste C. Grynberg, 44 IBLA 197, 203 (1979). This case was affirmed by the United States District Court in June Oil & Gas, Inc. v. Andrus, 506 F. Supp. 1204 (D. Colo. 1981). Therein, the court stated at pages 1208-09:

"Plaintiff's contend that since the trust agreement, Art. 8, Sec. I(j), expressly authorizes the trustee to invest and reinvest in oil, gas, or other mineral interest, such conduct cannot be a breach of trust. This argument is likewise without merit. That a trustee may properly file a simultaneous drawing entry card in the name of a trust for a minor is well settled and not in dispute. Margo Panos Trust, 28 I.B.L.A. 1 (1976). The question, however, is whether the trustee can also file as an individual in the same drawing. Plaintiffs claim that since the grantor, Jack Grynberg, was regularly making oil and gas investments when the trust was formed, there would be no breach of the trustee's fiduciary duty by simultaneously filing as a trustee and as an individual. However, authorization for the trustee to invest in oil, gas, and mineral interest on behalf of the trust and on his own behalf is not authorization to compete for identical interests as trustee and as an individual. In addition, in this jurisdiction a trustee cannot compete with his beneficiary in the acquisition of property. Wootten v. Wootten, 151 F.2d at 147 [(10th Cir. 1945)]. Hence, in a breach of trust suit by the beneficiary of the trust, the beneficiaries would prevail, as in Wahlenmaier. [McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955).] Thus, the trustee would have gained an unfair advantage for the trust."

we must construe the second clause as a per se prohibition also -- a trustee for two or more discrete trusts may file on behalf of only one trust on any one parcel.

While one could argue that the language is directed to the same trust, *i.e.*, two or more beneficiaries of the same trust, such a construction makes no sense given the context within which a trustee files an application. A trustee files an application for the trust with the trustee signing its name as trustee. A trustee does not file an application in the name of a particular beneficiary or beneficiaries. ^{4/} In fact, if a trustee of a multiple party trust filed an application for one of the named parties, the trustee would not be filing as a trustee; the relationship would have to be that of an agent rather than a trustee. ^{5/} Therefore, despite the inartful drafting of the regulation, we must conclude that separate filings by a particular trustee on behalf of two or more trusts on the same parcel is prohibited by 43 CFR 3112.6-1(c)(4). The prohibition holds true regardless of the nature of the trust agreements themselves. Commonality of trustee is the key. Thus, if John Smith were trustee for both the XYZ Trust and the ABC Trust, he could file only one application, as trustee, for any particular parcel. Filing on the same parcel for both the XYZ Trust and ABC Trust would violate 43 CFR 3112.6-1(c)(4). In these cases Ed Magruder, as trustee for the various Blakemore trusts, filed an application for each of the trusts on each of the parcels. The regulation, 43 CFR 3112.6-1(c)(4), prohibits this and BLM properly rejected the applications.

Counsel for the trusts argues that this interpretation is inconsistent with the regulation permitting filing by trusts. We do not believe it is. There is no question that trusts may file. The limitation is that a trustee of multiple trusts may not file for more than one trust on the same parcel. Given the number of parcels offered at any one time in a given state office, such a trustee should be able to select desirable parcels for each trust without filing for more than one trust on the same parcel.

While our interpretation may be considered by some as unduly restrictive, we feel that the language of 43 CFR 3112.6-1(c)(4) is limited logically to this interpretation. In addition, the courts have recognized the authority of the Secretary to adopt per se rules in the administration of the simultaneous oil and gas leasing system. In *Brick v. Andrus*, 628 F.2d 213, 216 (D.C. Cir. 1980), Chief Judge J. Skelly Wright stated: "We recognize that the Secretary can properly adopt *per se* rules if he deems them useful in the administration of the program -- even rules the administration of which

^{4/} For example, if John Smith were the trustee for the Doe Trust, a trust established for four Doe children A. Doe, B. Doe, C. Doe, and D. Doe, Smith would sign the application for the Doe Trust as John Smith, Trustee. He would not file an application for C. Doe as John Smith, Trustee.

^{5/} While it is possible that a trust may provide that only some beneficiaries of a multiple party trust are to benefit from oil and gas leases acquired through the simultaneous leasing system, an application would be filed on behalf of the trust, not on behalf of any particular beneficiary. Using the same example as in n.4, *supra*, if only C. Doe were to benefit in such a way, Smith would not file as John Smith, Trustee, in the name of C. Doe. The filing would still be made in the name of the Doe Trust by John Smith, Trustee. The trust agreement would govern the distribution.

may at time yield results that appear unnecessarily harsh." 6/ (Emphasis in original.)

[2] However, even assuming the absence of the per se prohibition of 43 CFR 3112.6-1(c)(4), the applications in these cases would have to be rejected. The terms of the five trusts give a contingent remainder interest in each trust to the other Blakemore children. Once the beneficiary reaches the age of 21, that person is to receive a monthly sum from either the income or principal, until that person reaches the age of 30. Once the beneficiary reaches the age of 30, the remaining trust assets are to be paid to the beneficiary and the trust ceases. If, however, the beneficiary dies prior to trust termination, the remaining trust assets are to go to the beneficiary's children or, failing that, to the beneficiary's "brothers and sisters" (Article X, Declarations of Trust for Bruce A., Margene, and Virginia Blakemore; Article III(C)(2)(c)(iii), Last Will of James Marion West, Jr.). No reversion was retained by the donors.

In Farrell L. Lines, Trustee, 40 IBLA 91, 97 (1979), we concluded, in similar circumstances, that "[t]hese contingent remainder interests, established in each trust for other Grace children, constitute 'prospective or future claims to an advantage or benefit from a lease'" and were "interests"

6/ Judge Stuebing desires to note that trusts are commonly "tailored" to achieve objectives unique to the settlor's purpose, and are often created by very complex legal documents. Multiple trusts offer an opportunity to create mutual advantages which would enhance the mathematical chances of gaining an interest, and while that may not always be the purpose, we have encountered cases where it obviously was the purpose. Where there is some joining of relationship between multiple trusts, such as a familial relationship, a common trustee, a single settlor, etc., the filing of several applications by the interrelated entities for a single parcel, if permitted, would require an analysis of all of the trust agreements concerned by BLM personnel to assure that none of the applicants had any "interest," including "[a]ny claim to an advantage or benefit from [the] lease [or] any participation or any defined or undefined share in any increments, issues or profits which may be derived from or which may accrue in any manner from any agreement or understanding existing at the time when the application[s] * * * were filed." 43 CFR 3100.0-5(b). This analysis is an extremely difficult, onerous, time-consuming, administratively inconvenient task to impose on the BLM personnel concerned, many of whom are not lawyers and who have no ready access to attorneys of the Solicitor's office. It therefore appears to Judge Stuebing that the recent revision of the regulation, particularly 43 CFR 3112.6-1(c)(4), was designed to make such analysis unnecessary by precluding the multiple filings of applications by such entities altogether -- not because all such filings are inherently unacceptable as violative of the regulations, but because the Secretary has determined that it is in the public interest not to consider whether they are or are not on a case-by-case basis. The regulation, then, precludes such filings as malum prohibitum (wrong because they are forbidden), rather than malum in se (wrong because they are necessarily inherently evil, wicked, or immoral). The Department has simply chosen not to receive multiple applications for one tract from such interrelated trusts, much in the same way that it has chosen not to receive lease offers and applications from sole proprietorships.

within the definition of 43 CFR 3100.0-5(b) (1979). ^{7/} Accordingly, separate filings by more than one trust for the same parcel were held to be a multiple filing in violation of 43 CFR 3112.5-2 (1979). While that regulation was amended on May 23, 1980, effective June 16, 1980, 45 FR 35156 (May 23, 1980), the prohibition of multiple filings was carried over in 43 CFR 3112.6-1(c). What is prohibited is any agreement, scheme, plan, or arrangement entered into prior to selection, which gives any party or parties more than a single opportunity of successfully obtaining a lease or interest therein. 43 CFR 3112.6-1(c).

We must conclude that BLM properly rejected appellants' oil and gas lease applications. By virtue of the various trust instruments, the trusts in question had a greater chance of obtaining a lease or interest therein. Such an arrangement is inherently unfair whether or not there was collusion or intent to deceive the Department. Farrell L. Lines, Trustee, supra at 97; see also June Oil & Gas, Inc., 41 IBLA 394, 402, 86 I.D. 374, 379 (1979), aff'd, June Oil & Gas Inc. v. Andrus, supra. It was prohibited under the 1979 regulations and it is likewise prohibited under the present regulations.

Therefore, 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.

Bruce R. Harris
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Gail M. Frazier
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

James L. Burski
Administrative Judge

^{7/} 43 CFR 3100.0-5(b) (1979) was amended on May 23, 1980, effective June 16, 1980, but the definition of "interest" remains substantially unchanged. 45 FR 35160 (May 23, 1980). 43 CFR 3100.0-5(b) now reads in pertinent part:

"An 'interest' in the lease includes, * * * [a]ny claims or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the application or offer is filed, is deemed to constitute an 'interest' in such lease."

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I have indicated my complete concurrence in the majority decision, I feel compelled to write separately in order to comment upon a number of suppositions made and arguments advanced by the dissenting opinion. However, rather than attempt to respond point by point to the dissent's analysis, I wish to concentrate on four areas in which I believe the dissent has most egregiously gone awry: (1) The dissent argues that there is a historic relationship between the rights of minors to file for an oil and gas lease and the question of acreage chargeability in a community property state where no such relationship has ever existed; (2) the dissent fails to distinguish between the rationale behind the statutory acreage restrictions and the reason why multiple filings are prohibited; (3) the dissent confuses the disclosure requirement of the sole party in interest regulation, 43 CFR 3102.2-7, with the substantive provisions prohibiting multiple filings; and (4) in analyzing the majority's per se rule interpretation of 43 CFR 3112.6-1(c)(4), the dissent totally ignores that, in most cases, the rule is directed not against the beneficiaries but against the trustee. I will discuss these points seriatim.

"Historically," the dissent opines "whether minors could apply for leases seems to have been related to the question whether husbands and wives could both hold leases independently." Historically, in fact, the two questions have had no connection whatsoever. As Jean Alling, 52 L.D. 242 (1927), makes clear, "native-born citizens of the United States under 21 years of age are not qualified to take oil and gas [leases] for the reason that they are not capable of entering into binding contracts generally * * *." Id. at 244.

Moreover, there was never any question whether husbands and wives could hold leases independently. It was always admitted that they could. The question which troubled the Department for many years was whether, in a community property state, a husband and wife's holdings were required to be counted together in ascertaining compliance with the statutory acreage limitations.

The basis of the Solicitor's Opinion cited by the dissent is made manifest by its title, Applicability of State Community Property Laws to Federal Oil and Gas Leases With Respect to Acreage Limitations, 64 I.D. 44 (1957). That opinion not only assumed that there was no problem in a noncommunity property state, it expressly noted that the practice of the Department had been not to invoke community property laws in those states where they existed in computing acreage chargeability. The basis for affirming this practice had absolutely nothing to do with any perceived "interest" problem but, rather, was based on a Federal supremacy analysis as delineated by the United States Supreme Court decision in Utah Power and Light Co. v. United States, 243 U.S. 389 (1917). There is no discernible link between this analysis and the inability of a minor to make a binding contract.

Having adopted a clearly erroneous historical premise, the dissent then argues that "husbands and wives clearly have an interest in each other's filings in the same sense parents and children have such an interest." (Footnote omitted.) Standing by itself, this statement is merely curious. When read in conjunction with the footnote, which defines "interest" as "any claim or any prospective or future claim to an advantage or benefit from a lease," the statement borders either on the meaningless or on the ridiculous.

If by "claim" is meant a mere hope or expectation of future advantage grounded on a present relationship of amicability (see Blanche Chomicki, 51 IBLA 128 (1980)), the statement in the dissent that parents and children as well as husbands and wives have an "interest" is merely irrelevant to the issues before us. If, on the other hand, the dissent is postulating that a legally enforceable interest, a cognizable right in the property of another, exists by the mere fact of a conjugal or familial relationship, the dissent is positing rules of law that have no basis in experience or precedent. Moreover, the dissent cites no authority for its proposition. 1/ If, indeed, it is the view of the dissent that such a cognizable legally enforceable interest exists by the mere fact of familial relationship, it seems to me that the dissent should seek to overturn those decisions permitting husbands and wives to file separately rather than extend the mistake of these decisions yet further.

An equally fatal flaw running the course of the dissent is the failure to focus on the fact that most of the early cases which the dissent discusses did not deal with the question of multiple filings but rather with acreage chargeability. The acreage restrictions were designed to prevent the mineral wealth of the United States from being acquired by monopolies. See Acreage Charges Against Holders of Operating Agreements with Oil and Gas Leases, 59 I.D. 4 (1945). Section 27 of the Mineral Leasing Act, as amended, 30 U.S.C. § 184(d) (1976), provides that "No person, association or corporation * * * shall take, hold, own or control at one time * * * oil or gas leases (including options for such leases or interests therein) on land * * * exceeding in the aggregate two hundred forty-six thousand and eighty acres in any one State." The following section, 30 U.S.C. § 184(e) (1976), requires proration of acreage acquired by membership in an association or as a stockholder in a corporation holding, owning, or controlling leases, options, and permits. Thus, the purpose of the acreage restrictions is to control the aggregation of Federal mineral lands in the hands of a few. 2/

The prohibition against multiple filings, however, proceeds from an entirely separate analysis. By statute, the Secretary is charged with issuing a lease to the first qualified applicant. 3/ Prior to the advent of the simultaneous system, all available lands, excepting those within a known geologic structure of a producing oil or gas field, were generally available to leasing over the counter. It often transpired that lease offers for the

1/ The opinion of the Solicitor on community property laws would seem to me to lay this canard to rest insofar as it applies to husbands and wives. The basis of the opinion was that community property laws were not applicable to the Mineral Leasing Act, much as in the same way they were not applicable to homestead entries. See Wadkins v. Producers Oil Co., 227 U.S. 368 (1913), McCune v. Essig, 199 U.S. 382 (1905). Thus, even in a community property state there is no such enforceable interest in a lease which arises because of marital status.

2/ The fact that other devices exist such as unitization, whereby leased acreage no longer becomes chargeable, which limit the effectiveness of the acreage restriction, does not alter the essential thrust of the restriction.

3/ It goes without saying that the Secretary retains the authority to refuse to issue any lease at all. See Thor-Westcliff Development, Inc. v. Udall, 314 F.2d 257, 259 (D.C. Cir. 1963).

same available lands were filed at the same time. As early as 1924, the Department instructed that cancellation of an oil and gas permit would be made effective as of a future date. It was further provided that all offers filed between 9 a.m. and 10 a.m. of the day the cancellation was effective would be treated as filed at 10 a.m., and, in case of conflicting offers, a drawing would be held. Such drawing "should be conducted in such a manner that no valid criticism can or may be made as to its fairness." Instructions, 50 L.D. 387, 388 (1924).

Central to the concept of fairness in all such drawings, both prior and subsequent to the adoption of the formal simultaneous system, has been the concern that individuals or groups might attempt to increase their probability of success by entering multiple or collusive filings. By 1926, the Department had formally adopted procedures which required applicants to state whether they were filing in their own interests and, if not, to state the interest of all other parties in their offer. Instructions, 51 L.D. 504 (1926). Furthermore, it was directed:

Any applicant who fails to disclose any and all interests other than his own which shall tend to give an advantage in the drawing, will forfeit any claim to a return or repayment of moneys tendered with his application and subject the permit, in the event that one is awarded to him, to cancellation for fraud.

Id. at 505.

Decisions of the Department have long recognized the Secretary's responsibility to police the drawings to ensure their fairness. In Clifton Carpenter, A-22856 (Jan. 29, 1941), then Assistant Secretary Chapman affirmed the rejection of 11 offers filed by applicants who, he determined, had made their applications at the behest of and for the benefit of one of the applicants. After analyzing the facts of that case, he held:

In conclusion, it may be stated that the Department will not give its approval to a practice which even tends to deprive any claimant of the right to fair and impartial treatment in matters over which it has control, and fair minds will agree that the protestant in this case was deprived of his right of equal opportunity to be the successful applicant for lease.

Id. All of the long line of Departmental decisions relating to multiple filings since Carpenter have been directly related to the Department's responsibility to police simultaneous drawings to assure fairness to all parties.

Because the dissent fails to distinguish between the differing purposes surrounding the policing of acreage restrictions and safeguarding the fairness of the simultaneous drawing system, it proceeds to draw a series of false analogies. Thus, the dissent makes much of the fact that 30 U.S.C. § 184(e) (1976), limits the necessary proration of acreage by providing that "no person shall be charged with his pro rata share of any acreage holdings of any association or corporation unless he is the beneficial owner of more

than 10 per centum of the stock or other instruments of ownership or control of such association or corporation." On the basis of this statutory language, the dissent argues that

[o]ne result of [Farrell L. Lines Trustee, 40 IBLA 91 (1979)], therefore, is that trusts, which (as we have seen) are non-business entities, are treated far more restrictively than corporations. For acreage to be charged to a corporate shareholder, he must own more than 10 percent of its stock (30 U.S.C. § 184(e) (1976)); whereas, to be charged with an interest in another trust, a child need have only a contingent remainder interest in it.

Farrell L. Lines, *supra*, had absolutely nothing to do with acreage restrictions. It was strictly limited to the questions (1) whether the appellant had disclosed all interests in offers held by others and (2) whether an unfair advantage was obtained in the simultaneous system by the filing, for a single parcel, by the parents of the holders of beneficial interests in five trusts, on their own behalf and the separate filings by the trusts, themselves. Neither issue relates to acreage limitations.

Moreover, to the extent that the dissent is contending that a 10 percent interest in a corporation is necessary before an "interest" within the meaning of the prohibition against multiple filings arises, the dissent may be perilously close to misleading future offerors.

The proviso excepting from the acreage reporting requirements those shareholders owning or controlling less than 10 percent of a corporation's stock was not enacted until the general revision of section 27 in 1960. See section 3 of the Act of September 2, 1960, 74 Stat. 785. Prior to that time, this section required proration of acreage holdings to any holder of stock in a corporation, no matter how minuscule. In enacting the proviso limiting proration to those who owned 10 percent or more, Congress noted that, as then written, a literal enforcement of the law

would create an administrative nightmare. A person's holding in an internationally integrated oil company such as, for example, Standard Oil Co. of New Jersey, would make him liable for his pro rata share of all of the lease acreage holdings of the Standard Oil Co. of New Jersey and its producing subsidiaries, a fact which might be difficult for him to ascertain. In practice, the Department of the Interior by regulation has not been enforcing this chargeability requirement unless a person, association, or corporation owns at least 20 percent of the stock. The committee's change in (e) (1) of the House bill exempts a person from such chargeability unless he is the beneficial owner of more than 10 percent of the stock of an association or corporation. The committee believes that this provision will give the Department of the Interior a realistic standard in its administration of this provision, at the same time leaving it in effective control of the possible manipulation of acreage limitations by corporate or association ownership.

S. Rep. No. 1549, 86th Cong., 2d Sess., reprinted in [1960] U.S. Code Cong. & Ad. News 3316.

The regulation cited in the Senate Report, 43 CFR 192.42(f) (1954), had existed at least as early as 1948. See 43 CFR 192.42(a)(2) (1948). That the Department considered this regulation to be limited only to the reporting of stock for proration purposes and did not control the question of multiple filings was made clear in Annie L. Hill, A-26150 (Aug. 13, 1951). This decision involved the beginning of the litigation which was to culminate in McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). The successful lease offer in the contested drawing was submitted by one E. A. Culbertson. Culbertson was the president of Culbertson & Irwin, Inc., a New Mexico corporation, and held 23.7 percent of the outstanding stock. The vice president of Culbertson & Irwin, Inc., was one Wallace W. Irwin, who owned 19.3 percent of the outstanding shares. In addition to the successful offer filed by Culbertson, both Irwin and the corporation had filed offers to lease the disputed lands.

In discussing the case, the Department noted that "[i]n effect, Mr. Culbertson had 1-1/4 chances, Mr. Irwin had 1-1/5 chances, and the combination of the two stockholders and the corporation had three chances to acquire the lease in the drawing, as compared with the single chance available to each applicant who was not a stockholder of the corporation." Such a result, the decision noted, "seems inherently unfair." Nevertheless, the decision refused to cancel the issued lease because there was no regulation prohibiting the submission of separate simultaneous applications by a corporation and its principal stockholders and that, in the absence of a statutory or regulatory breach, the Department was without statutory authority to cancel a lease. ^{4/} Thus, even though in 1951, the regulations clearly required a disclosure of Culbertson's interest in the corporation, this was not seen as effecting a prohibition against multiple filings where even more than a 20 percent interest in a corporation was held by a conflicting applicant.

When this decision was subjected to review in McKay v. Wahlenmaier, supra, the court of appeals treated the question of disclosure for acreage control purposes mandated by 43 CFR 192.42(a)(2), as totally discrete from the issue of whether a multiple filing, which gave Culbertson an unfair advantage, had occurred. Id. at 40-43. After first deciding that a violation of the disclosure regulation had occurred, the court went on to say:

Moreover, the inherently unfair situation which would have caused the rejection of Culbertson's application, had it been known, was sufficient to warrant cancellation after it was discovered, even though the situation had not been the result of violating a regulation, but had been brought about by collusive multiple filings which gave one applicant more than one chance in the drawing.

Id. at 42-43. The court held that the Secretary "was plainly wrong in refusing to cancel because Culbertson had unfairly and secretly obtained more than one chance in the drawing." Id.

^{4/} The decision did imply that had the Land Office Manager rejected Culbertson's offer prior to lease issuance, the rejection might well have been affirmed both by the Department and the courts.

Thus, there is no statutory or decisional authority to support a contention that the 10 percent reporting rule for acreage proration necessarily established a rule that less than a 10 percent ownership of stock in a corporation prohibits or more than 10 percent requires, a finding of multiple filing violation where the corporation and the stockholder file in competition for the same lease. Indeed, in Panra Corp., 27 IBLA 220 (1976), this Board expressly declined to decide whether mere ownership of 10 percent of shares of a competing corporation established a violation of the multiple filing prohibition. Id. at 222. Rather, in determining the existence of an interest sufficient to give a party an unfair advantage the totality of surrounding circumstances must be examined. The acreage allocation provisions are simply not germane. 5/

Doubtless, part of the blame for the erroneous conclusions reached in the dissent can be laid to "sole party in interest" regulations, 43 CFR 3100.0-5(b) and 43 CFR 3102.2-7(a). There are two possible bases for confusion. The first lies in the purpose of the disclosure requirement. As the definition makes clear the disclosure is required to aid in the ascertainment of acreage chargeability and to police the simultaneous procedures so as to insure equal opportunity of success for all applicants. But as shown above, while the same mechanism of acquiring information may be beneficial to two separate goals, it does not necessarily follow that those goals are the same.

Secondly, while it has normally been the case that where a violation of the prohibition against multiple filings has occurred there has also been a violation of the party in interest disclosure regulation, either may be violated without violating the other. Thus, the requirement that an offeror disclose other parties in interest is violated when such undisclosed parties exist, and it is irrelevant whether or not such other parties filed individual offers. Conversely, total disclosure of other interested parties does not insulate an offer when one or more of those parties file other offers under their own name or under other arrangements which, in effect, give such parties a greater chance of success in the drawing and thereby render it unfair. Failure to observe the disclosure requirement and the multiple filing prohibition are separate, independent (though often interrelated) grounds for rejection of an offer. 6/

5/ By way of example, if an individual files for an oil and gas lease, for which a number of corporations in which he owns 5 percent of the stock also file, at his instigation, such an offer could properly be rejected despite the fact that no acreage proration to the offeror would be necessary if one of the corporations won. By the same token, BLM has consistently held that individuals may not enter into separate associations, and then file the associations separately for the same parcel, even where there is full disclosure of the arrangements. See Henry S. Morgan, BLM-A 051463 (June 19, 1962).

6/ I would like to state my own view here that situations might arise in which an "interest," such as must be disclosed under 43 CFR 3102.2-7(a), would not necessarily result in a prohibited multiple filing, even when the "interested" party files in its own behalf. The question would be whether such an "interest," when viewed in the light of an interested party's individual offer, provided an advantage which would serve to undermine the fairness of the drawing to other participants. However, insofar as trusts are concerned, I agree with the majority that the new rule adopted makes certain actions a per se violation of the regulations.

This Board, in Farrell L. Lines, supra, found that the trusts therein, through the contingent remainder interest had an "interest" within the meaning of 43 CFR 3100.0-5(b) such as was required to be disclosed. This finding alone would have required rejection of the offers. In addition, the decision also found that the rule against multiple filings had been breached. That decision stated:

At the heart of BLM's contentions lies the allegation that the trusts for the Grace children are a legalistic ruse designed to evade the letter and spirit of the multiple filing prohibition. Appellant argues that the trustees did not collude with the parents because they acted in the interest of the child. However, multiple filings on individual lease parcels by various combinations of parents and their children's trustees gave the parents and the trusts greater mathematical chances to benefit from the results of the drawings. An interest which an oil and gas lease applicant has in the offer of another applicant for the same land in a drawing of simultaneously filed noncompetitive lease offers, and which effectively gives the first applicant greater chances of success in the drawing, is inherently unfair whether or not there has been collusion or intent to deceive the Department. [Citation omitted.]

40 IBLA at 97. This analysis is consistent with the entire history of adjudication relating to the multiple filing question and I find difficulty in ascertaining how the dissent can view it as "the demise of the trust."

Indeed, the dissent has mischaracterized that decision in so many ways that it becomes necessary to state what Farrell L. Lines did not hold. That decision did not hold that trustees could not file for oil and gas leases. What it did hold was that the Department would not permit the use of multiple trusts to effectively subvert the fairness of the simultaneous system.

Nor did that decision even purport to hold that the beneficiaries of a trust must all be and remain minors in order for a trust to file, as the dissent suggests a literal reading of the regulation would require. First, inasmuch as the substantive regulations on filings by trustees and guardians, 43 CFR 3102.2-3 and 43 CFR 3112.6-1(c)(4) do not once refer to the age of the beneficiary or ward, and Farrell L. Lines, supra, said absolutely nothing along these lines, I can only speculate as to the source of the dissent's concern. In any event, since only one of the beneficiaries herein is under 21, if the intent of the Board were to prohibit all filings by trustees and guardians unless the beneficiaries or wards were minors, the instant case would seem to provide a handy vehicle. The Board makes no such ruling.

Nor did anything in Farrell L. Lines disparage or criticize the use of trusts for conservation of assets or any of the thousand other reasons to which trusts can properly be put. The issue was not whether one is wise or foolish to establish trusts, but rather whether filings by trustees on behalf of multiple trusts, when occurring with filings by the parent of the beneficiaries under those trusts, violated the prohibition against multiple filings.

One may question whether or not the cross interest among beneficiaries shown in Farrell L. Lines, supra, was sufficient to undermine the basic fairness of the drawing. For myself, I think it clear that the use of trusts to file multiple offers for children, where the parents as guardians could clearly not do the same (cf. Solicitor's Opinion, 64 I.D. 51 (1957)), combined with the cross interest of the contingent remainder, created precisely that type of unfair advantage which we are charged to prevent. What I do find objectionable, however, is the almost total misstatement of what we held in Farrell L. Lines, supra, and what we are holding herein.

The Farrell L. Lines analysis, however, is merely one of two prongs to our holding herein. The first ground, fully explicated in our decision, is that the new regulation, 43 CFR 3112.6-1(c)(4), is designed to prohibit a multiple filing by a trustee for separate trusts, whether related or not. The dissent, of course, attacks this conclusion as well.

The dissent states that the second clause of 43 CFR 3112.6-1(c)(4) (which is relevant herein) is ambiguous and must be interpreted "reasonably rather than arbitrarily" and proceeds to assail the majority interpretation as one lacking in "history or precedent or common sense to support it."

The dissent commences its analysis of the majority rationale by misstating its holding. Thus, the dissent says "[t]he majority bases its construction of the second clause on the purely technical ground that a trustee does not file for an oil or gas lease; a trust does." (Emphasis in original.) In fact, the majority opinion states: "A trustee files an application for the trust with the trustee signing its name as trustee. A trustee does not file an application in the name of a particular beneficiary or beneficiaries." How this statement has become metamorphosed into a declaration that "the trustee does not file, the trust does," escapes me.

The most critical flaw in the dissent's analysis on this point is that it ignores the central purpose behind the regulation. In its long panegyric on trusts, the dissent failed to mention one crucial fact -- trustees are paid. And it is the method of payment which lies behind the adoption of the per se rule. As the Restatement (Second) of Trusts, notes: "Except [where a breach of trust occurs], the trustee is entitled to compensation out of the trust estate for his services as trustee, unless it is otherwise provided by the terms of the trust or unless he agrees to forego or waives compensation." Restatement (Second) of Trusts, (1957) section 242.

Thus, in the absence of express terms in the trust agreement relating to compensation, 7/ compensation will be determined by reference to the laws

7/ I would point out that the trust agreements involved herein merely provide that "any Trustee hereunder shall receive as compensation for services rendered in that capacity as are then customary and usual for payment in Houston, Texas * * *." See, e.g., Exhibit A, Article VII. Thus, the discussion in the text, infra, relating to the general rules for ascertaining reasonable compensation would seem particularly applicable. While the trustee states herein that he is paid a fixed fee for each of the trusts (see Affidavit of Ed Magruder), there is no indication how this form of compensation was agreed to.

of the particular state where the trust was formulated. The Reporter's note to this section points out that a number of states, by statute, have established definite rules for fixing the amount of compensation and that normally they provide that the compensation shall be based on certain percentages of the income and principal of the trust estate. Moreover, the Reporter notes that "in the absence of a statute providing a definite rule fixing the amount of the trustees' compensation, the usual practice is to allow the trustee a percentage of the amount of the annual gross income and a percentage of the principal." Id. note b.

Under such an arrangement for compensation, when a trustee files two separate nonrelated trusts, he has increased his likelihood of success by making, what is for him, a multiple filing. This method of compensation, I submit, gives the trustee an "interest" in the offer of the trust within the meaning of 43 CFR 3100.0-5(b). 8/ This multiple "interest" alone would be sufficient to reject the filings, even in the absence of the regulations herein involved.

Thus, there is a real concern for the fairness of the simultaneous system animating the regulatory provision under review here. The Secretary, as the court noted in Thor-Westcliffe Development, Inc. v. Udall, supra at 260, is required "to manage the crowd." Adoption of a rule made the filing rights of a single trustee for separate trusts dependent upon the law of the state where the trusts were established would be just as detrimental to the fair and proper administration of the simultaneous system, as would have been the recognition of community property laws in determining acreage limitations. By adopting the rules discussed herein, the Secretary has determined to avoid this chaos, and has also provided fair warning to participants. 9/ I see no basis for concluding that this action was beyond his authority and I think we are obliged to affirm the decision below. See generally June Oil & Gas, Inc. v. Andrus, 506 F. Supp. 1204, 1210 (D. Colo. 1981). 10/

James L. Burski
Administrative Judge

8/ Indeed, it is obvious that the Department has generally understood this to be the case, for absent such an "interest" there should be no requirement that the trustee submit with the offer a statement of his (not the trust's) other holdings. See 43 CFR 3102.2-3.

9/ Moreover, I fear that the dissent sees ambiguity where none exists. A regulation does not become ambiguous merely because you disagree with its substance.

10/ While I will not delve into it here, I would suggest that there also might be fiduciary problems where a trustee of separate trusts file them in competition with each other, quite apart of the trustee's "interest" in them. Concern over such problems might well serve as an equally plausible basis to support the regulation's per se proscriptions.

ADMINISTRATIVE JUDGE GRANT CONCURRING:

I must respectfully disagree with my colleagues on the majority to the extent that they hold that the revised regulation precludes separate filings by a trustee for the same parcel in the simultaneous filing procedure on behalf of more than one trust regardless of whether there is any relationship between the trusts which would create an improper multiple filing. Although a literal reading of the provision at 43 CFR 3112.6-1(c)(4) precluding "separate filings by a trustee or guardian on behalf of two or more beneficiaries on the same parcel" supports this result, I believe that this provision must properly be construed in the context of the regulation of which it is a part.

The regulation at 43 CFR 3112.6-1(c) is captioned "Prohibited agreements, schemes, plans or arrangements" and the initial paragraph of that regulation defines such proscribed arrangements as any arrangement which gives any party or parties "more than a single opportunity of successfully obtaining a lease or interest therein." The regulation goes on to describe in subparagraphs (1) through (4) various examples of improper multiple filings. It is in this context that separate filings by a trustee on behalf of two or more beneficiaries for the same parcel is cited as a prohibited practice. I believe this provision must be read as prohibiting filings by a trustee for the same parcel on behalf of two or more beneficiaries where there is a relationship between the trusts which gives rise to an interest of the beneficiary(ies) of one trust in the filing made on behalf of the beneficiary(ies) of another trust.

Reading this provision as a per se proscription of filings by a trustee on behalf of more than one beneficiary for the same parcel is inconsistent with the fundamental distinction between legal and beneficial or equitable interests upon which the law of trusts is predicated. See 1 A. Scott, Law of Trusts §§ 2.3 and 2.6 (3rd ed. 1967). Requiring rejection of simultaneous lease applications filed by a trustee for the same parcel on behalf of more than one trust, in the absence of any kind of interest of the beneficiary(ies) of one of the trusts in the filing of another which would create an improper multiple filing, would be discriminating without a basis rationally related to the statutory and regulatory requirement of issuing a noncompetitive oil and gas lease to the first qualified applicant. 1/ Where a regulation may be construed in more than one way, that construction should be adopted which is consistent with the terms and rationale of the statute and regulations upon which it is based.

1/ A noncompetitive oil and gas lease for Federal lands may be issued only to the first qualified applicant. 30 U.S.C. § 226(c) (1976); McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). Under the simultaneous filing procedure for lands to be leased noncompetitively, all lease applications for the same parcel are considered to have been filed simultaneously and the purpose of the drawing is to determine priority among the applicants. Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd, Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976). It is for this reason that arrangements which would give any otherwise qualified applicant an unfair advantage are prohibited, and applications made pursuant to such arrangements must be rejected. 43 CFR 3112.6-1(c).

Unlike the dissent in this case, I believe we are constrained to follow the precedent established by Farrell L. Lines, Trustee, 40 IBLA 91 (1979). In light of the very broad definition of "interest" in the regulation at 43 CFR 3100.0-5(b) which includes "any prospective or future claim to an advantage or benefit from a lease," I would affirm the BLM decisions on the basis that the contingent remainder interests created in the other children by each of the trusts constituted "interests" within the scope of the regulation. Farrell L. Lines, Trustee, *supra* at 97.

C. Randall Grant, Jr.,
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE PARRETTE DISSENTING:

Despite the fact that the case was considered by the entire Board, my disagreement with this decision could not be stronger. I note from former Judge Thompson's concurring opinions in Charles J. King, 40 IBLA 276 (1979), and Celeste C. Grynberg, 44 IBLA 197 (1979); and from the late Judge Fishman's dissent in Grynberg, *supra* at 205 (with which I agree completely), that I am not the first to believe that the majority has recently gone too far in its zealous policing of oil and gas filings by trustees for minor children. This case merely adds the final nail to the coffin.

The demise of the trust, in my view, came about in a single case, Farrell L. Lines, Trustee, 40 IBLA 91 (1979), 1/ in which, despite two regulations expressly permitting such filings, 2/ the Board held that the filing of oil and gas applications by separate, independent, unrelated trustees on behalf of five irrevocable, discretionary, support trusts, containing no reversions to the grantors, one for each of five minor children, violated the multiple filing prohibition of 43 CFR 3112.5-2 (1979), simply because the trusts' terms gave a "contingent remainder interest" to the surviving children if one or more of them died without issue. In addition, the case, held that, regardless of the possibility of a pour over into the siblings' trusts, since (1) the support of a minor child through a trust fulfills a parental obligation, to the consequent relief and benefit of the parents, and since (2) minor children always have a beneficial interest in the relative wealth or poverty of their parents, any filing by both parent(s) and trustee(s) would violate the Department's multiple filing and sole party in interest regulations.

The five irrevocable trusts involved in the present case are similar to those in Lines, except that all had the same nonparent trustee, and two of the trusts were testamentary trusts created for the children under their grandfather's will. According to appellant's statement of reasons (SOR) in connection with the James J. Blakemore Trust (NM 42060), such trusts

are customary and usual entities created so as to assist minor children to build an estate from early life. These trusts were not formed for the purpose of filing on federal oil and gas

1/ The only previous trust decision commonly cited, of those decided by the Board, is Margo Panos Trust, 28 IBLA 1 (1976), in which the Board remanded the case to BLM for further action because BLM had requested data from the trustee beyond that required by 43 CFR 3102.5-1 (1974), and beyond that necessary to determine whether there had been multiple filings in violation of 3112.5-2 (1974). The trustee had apparently filed both for himself and as trustee for two separate trusts for minor children. It is interesting that both Lines (40 IBLA at 95) and the majority in the present case (text, n.3) cite this case as authority for the proposition that trustees can file for minors in the name of the trust when, under the facts of that case, it is clear that after Lines the Panos trust would have been doomed.

2/ 43 CFR 3102.1-1(b) and 3102.5 (1979). Now there are four regulations that contemplate filings by trustees (43 CFR 3102.1(c), 3102.1-1(b), 3102.2-3, and 3112.6-1(c)(4)); but after Lines and the present decision, the question is, "Cui bono?"

leases and, in fact, have conducted business long before the matter of filing applications for federal oil and gas leases became a part of the business practice of the trusts.

SOR at 2.

In fact, appellant asserts, this very Board on July 23, 1975, remanded a case to the same New Mexico office for further consideration by that office after it had rejected an offer by the same trust on the ground that both the trust and the beneficiary's father had filed for the same parcel; but after a "substantial amount of documentation was furnished" to BLM to prove "that the trusts were independent of one another and independent of their father," the lease issued, and BLM raised no further question about the trusts until now. In summary, according to appellant, "there is absolutely no evidence [in this case] to support any allegation of agreement, scheme, plan or arrangement which would give any party or parties more than a single opportunity of successfully obtaining a lease or interest therein." *Ibid.* I see no reason to doubt these assertions.

Appellant then goes on to discuss 43 CFR 3112.6-1(c), which, as the majority points out, was adopted with minimal preamble on June 16, 1980, as part of a general regulatory revision to prevent abuses of the simultaneous oil and gas leasing system. Exactly what paragraph (4) of that regulation was intended to mean, I submit, depends in large measure on how trusts for minors have been customarily regarded by the Department over the years, and the extent to which BLM intended to write new policy.

I have found no indication that the right of guardians and trustees to file oil and gas lease applications on behalf of minors has not traditionally been given full recognition, once the regulations were changed to permit it. Prior to 1949, the Department permitted leasing by citizens, associations of citizens, United States corporations, and municipalities, without mention of minors. 43 CFR 191.3 (1949). On January 28, 1949, 14 FR 382, however, the section was amended to prohibit the issuance of mineral leases or permits to minors. Then, 3-1/2 years later, on June 20, 1952, 17 FR 5566, section 191.3 was changed to provide that "[a] mineral lease or permit will not be issued to a minor but oil and gas leases may be issued to legal guardians or trustees of minors in their behalf." ^{3/} The added language remains virtually unchanged today. 43 CFR 3102.1-1(b).

Historically, whether minors could apply for leases seems to have been related to the question whether husbands and wives could both hold leases independently. The considerations were the same, since husbands and wives clearly have an interest ^{4/} in each other's filings in the same sense that parents and children have such an interest. That question was presented to the Solicitor in 1957 in the context of community property laws. He concluded

^{3/} The only preamble to the change was the sentence: "In addition, certain minor changes are being made in Parts 191 and 192." *Id.* at 5516. Presumably, no pun was intended.

^{4/} "Interest" has, in essence, been consistently defined by the Department, from May 1964 on, to mean "any claim or any prospective or future claim to an advantage or benefit from a lease." 43 CFR 3100.0-5(b).

that if leases were issued to the husband and wife, each would be separately chargeable with his or her own acreage. If issued to both under joint offer, they would be treated as an association, "the authorized holdings of which in any State would be 46,080 acres. In the latter case each could hold in his (or her) own right 23,040 acres in addition to the acreage held by both together." Solicitor's Opinion, M-36416, 64 I.D. 44, 48 (Feb. 27, 1957). Thus, at least from 1957 on, husbands and wives were considered eligible to hold the maximum acreage permitted to two persons, in virtually any form of holding, regardless of their marital relationship.

In connection with M-36416, the Solicitor also issued M-36418, 64 I.D. 51 (Mar. 11, 1957), which decided that

neither a husband nor a wife holding the maximum allowable acreage in his (or her) own name may hold additional acreage as a trustee for his (or her) minor children. Where a husband and wife together hold the maximum acreage permitted to a single lessee, either may hold individually or as trustee or in part one and in part the other additional acreage up to one-half of the jointly held maximum.

Id. at 52. Thus, while trusts were considered separate entities in the same sense as associations, subject to the parents' maximum individual acreage limitations, the Department's focus was on the total acreage held by the two parents, and not on the possibility of contingent beneficial interests among the children at the time of the trustee's application.

This outlook was confirmed in three appeals 5/ decided by the Solicitor on April 2, 1964 (Duncan Miller, 71 I.D. 121), in connection with simultaneous oil and gas filings. Appellants specifically alleged that the filing by both husband and wife on the same parcel constituted a scheme for increasing their numerical chances for success in the drawing, resulting in an unfair advantage over other offerors. The relevant part of the Solicitor's reply is worth quoting:

The Department has previously considered similar charges that filing of simultaneous lease offers for the same land by husband and wife is collusive and contrary to the Department's regulations, and it has held that the relationship of husband and wife does not prevent the filing of competing oil and gas lease offers. Duncan Miller, A-29735 (September 17, 1963). McIntosh admits his familiarity with the Department's ruling but contends that the Department has directed its attention only to the qualifications of husband and wife as leaseholders and has failed to distinguish between qualified leaseholders and qualified applicants.

This contention is without merit. The Department has held that a husband and wife may each hold, in his or her own right, the maximum acreage in oil and gas leases authorized for an individual or association in any one State, regardless of State laws pertaining to property rights of husbands and wives.

5/ A-30071, A-30081, and A-30106.

Solicitor's Opinion, 64 I.D. 44 (1957). It must necessarily follow that if each may hold the maximum acreage independently of the other each is qualified to apply for a lease of the same tract of land in competition with the other or any other interested applicant, the offerors being qualified in all other respects. In short, nothing in the statutes or the regulations precludes a husband and wife from engaging in separate and independent oil and gas leasing operations. [Emphasis added.]

Id. at 122. The Department's regulations have not been substantially altered since Duncan Miller, supra. The "sole party in interest" language and the "multiple filings" language of 43 CFR 3100.0-5(b) and 3112.5-2 (1979), respectively, upon which Farrell L. Lines, Trustee, supra, relied so heavily, was first proposed on March 8, 1963, 28 FR 2283, and formally adopted on January 29, 1964, 29 FR 1437, under the headings "sole party in interest" (as in the present regulation) and "collusive filings." The collusive filing language was essentially the same as the multiple filing language is today; and both provisions were extant at the time of the Solicitor's April 2, 1964, opinion in Duncan Miller.

Thus, even after the simultaneous filing system was commenced, and the substance of the present regulations adopted, the Department continued to treat husbands and wives (and presumably minor children) in the same manner as it had previously. Moreover, it expressly held that one who is qualified to hold a lease is also qualified to apply for one.

The Board itself still resorts to the Solicitor's 1957 opinions when it wants to distinguish husband and wife multiple filings, which are permitted, from corporate multiple filings, which are not. In June Oil & Gas, Inc., 41 IBLA 394, 86 I.D. 374 (1979), it said, "Appellants are correct in their contention that a husband and wife may individually file for the same parcel of land in a simultaneous drawing without running afoul of either the sole party in interest requirement or the multiple filing prohibition," citing both M-36416 and M-36418, supra. 41 IBLA at 403, 86 I.D. at 379.

However, since the majority in the present case states that "even assuming the absence of the per se prohibition of 43 CFR 3112.6-1(c)(4), 6/ the applications in these cases would have to be rejected" on the basis of Farrell L. Lines, Trustee, supra (because of the contingent remainder interest that each trust contains), it is necessary to examine more closely the areas where Lines went astray. In my view, there are at least three such areas: First, the decision does not reflect a sufficient appreciation of the inherent differences between trusts and corporations. Second, it did not carefully analyze the precise language of the definition of "interest" in the regulations. And, third, it did not adequately consider the ramifications of its holding in light of the clear and continued eligibility of guardians and trustees, under the regulations, to file for oil and gas leases. Let us consider these issues.

6/ Black's Law Dictionary (rev. 4th ed. 1968) defines "per se" to mean, among other things, "in isolation; unconnected with other matters." I do not believe that it is necessary to attribute to BLM or the Secretary the lack of concern for the real world that the majority's interpretation of this regulation implies.

First, it is significant, in light of the Department's special treatment of trusts, to note that they are generally regarded as financial planning vehicles for family or charitable purposes, unlike corporations, which are primarily business entities. Put another way, trusts are most often used to divest the grantor of assets, for the benefit of someone or something else, unlike corporations, which are devices for sharing ownership and acquiring assets, usually in order to increase business profits, in which all will participate. Thus, corporations have a profit-making orientation; whereas, trusts are intended primarily for conservation, so that increasing their assets is usually secondary. The Internal Revenue Service (IRS) has summed up these concepts nicely as follows:

Generally speaking, an arrangement will be treated as a trust * * * if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.

26 CFR 301.7701-4(a). IRS lists, among others, two specific characteristics of corporations that are relevant to this discussion: (1) continuity of life; i.e., the organization is not dissolved because of the death, insanity, bankruptcy, retirement, resignation, or expulsion of a member, and (2) free transferability of assets; i.e., each of the members, without the consent of the others, has the power to substitute someone else for themselves in the organization without changing the nature of the interest being transferred. ^{7/} 26 CFR 301.7701-2(b) and (e). Neither of these characteristics is possessed by a trust for minors, which normally terminates upon a time or event certain, and whose beneficiaries, by definition, lack the legal capacity to transfer interests. Yet Lines, in noting that "[t]his Department has held many nonpossessory interests in oil and gas leases sufficient to fail before the multiple filings prohibition," cites as its sole authority four cases peculiarly related to the activities of business-oriented corporations, incorrectly stating that "[t]hese cases illustrate the broad application of the multiple filing regulation * * *." 40 IBLA at 93-94 (emphasis added). There is also no attempt to determine whether there might be any legitimate reason, based on long-standing Department precedent and on explicit statutory provisions relating to corporations, ^{8/} why trusts ought to be treated differently from corporations.

^{7/} As we shall see, this characteristic is particularly relevant to BLM's stated reason for adding 43 CFR 3112.6-1(c)(4) to the regulations.

^{8/} See 30 U.S.C. § 184 (1976), the statutory basis for the maximum acreage limitation, which, in 1952, charged an individual's entire interest in acreage held by an association or corporation against his personal maximum but which by 1976 (30 U.S.C. § 184(e) (1976)) provided that no person would be charged with their pro rata share of any association or corporation unless they were the beneficial owner of more than 10 percent of the entity. In fact, each of the appellants in the four cases cited by Lines were either corporate officers or held in excess of 20 percent of corporate stock -- hardly an insignificant interest! -- as contrasted with a minor's contingent remainder interest in his sibling's trust.

One result of Lines, therefore, is that trusts, which (as we have seen) are nonbusiness entities, are treated far more restrictively than corporations. For acreage to be charged to a corporate shareholder, he must own more than 10 percent of its stock (30 U.S.C. § 184(e) (1976)); whereas, to be charged with an interest in another trust, a child need have only a contingent remainder interest in it. Thus, Lines not only applied a questionable corporate analogy, but it accepted without quibble an unduly harsh dichotomy of result.

Second, in my view, the language of the "sole party in interest" regulation (43 CFR 3100.0-5(b)) did not require the Board in Lines to reach the result it did. Let us look again at the relevant language:

Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an interest in such lease.
[Emphasis in original.]

40 IBLA at 94. What the Board ignored is that a contingent remainder is not, in the strict sense, a claim, or even a prospective or future claim. As any dictionary makes clear, a "claim" implies a demand by right or title, or a demand for something as due, or an assertion of something as a fact. Even a "future" claim implies something actually due or owed at some definite or indefinite distant time. So does "prospective," which means "in prospect or expectation"; in other words, a future right, not a contingency. A "contingent" interest, on the other hand, is not an actual interest but a potential one, since "contingent" means "1. dependent for existence, occurrence, character, etc., on something not yet certain; conditional; 2. liable to happen or not; uncertain; possible." Random House, American College Dictionary, 1970. Something that is merely contingent, therefore, has no connotation of probability; it is purely conditional. Therefore, it is not a claim; and Lines was in error with respect to its contingent remainder doctrine.

Third, I am not yet convinced that the Board in Lines appreciated the full ramifications of its holding with respect to a trust's right to file for oil and gas leases. Any lawyer who has ever tried to draw a trust is soon aware that he cannot simply draft language to carry out the grantor's intentions without providing for all reasonable contingencies. Murphy's Law is too powerful a factor to ignore. Thus, no matter how insistent the grantor may be, the attorney must provide for the "what if's," in case they occur. Lines blithely says, "A trustee may properly file a simultaneous drawing entry card in the name of a trust for a minor. Margo Panos Trust, 28 IBLA 1 (1976). Therefore, we are not concerned with the propriety of a trustee of a single trust filing an offer to lease." 40 IBLA at 95 (emphasis added). But what if the grantor has more than one child? What if the children have totally different needs, or are in different areas? What if the grantor has children by a previous marriage? What if there are valid tax or other reasons, having nothing to do with oil and gas leasing, for creating more than one trust? What if something happens to cause the

grantor's plans to go awry? If the lawyer cannot provide for such contingencies, because the grantor wants the trust to be able to file for oil and gas leases as the regulations appear to permit, is the lawyer guilty of malpractice? Let us consider an example.

Assume H and W are husband and wife, who have two children, A and B. B is disabled in an accident and requires continuous care. H, in anticipation of a divorce, sets up a trust for B's care and support. If B dies, the remainder goes to W, to help care for A. If A predeceases W, the reversion goes to H. H then marries W-2, and they have two children, C and D. W, who has property of her own, also decides to remarry, so she sets up a trust for A. She then marries H-2, and they have two children, E and F. H sets up trusts for C and D, with contingent remainders to each other, and then to A and B, or their survivor, if C and D do not survive. W does the same for E and F. H-2 and W-2 also have children by their previous marriages, and have trusts entered into before their present marriages. The trusts provide that if these children do not survive, and die without issue, the remainders go to any children their parents may have by subsequent marriages. No two trusts have the same trustee. Question: Under Lines, who can file for an oil and gas lease on a particular parcel? Answer: Probably only one person out of the entire group. A better answer: BLM should not have to put up with such nonsense, and the Board should go back to the Solicitor's opinions that say the interests of minor children are chargeable to their parents or, presumably, to their legal guardians if there are no parents. But we should remember, in any event, that we are not talking about corporations; we are talking about minor children.

Which, of course, brings up another problem under Lines. Suppose a single support trust is set up for 12 children, born 18 months apart. There are no contingent remainders, and the grantors retain no reversions. The trust provides that as each child reaches legal age (assume age 21), it receives one-twelfth of the total amount of trust principal available when the first child reaches 21, the remainder being divided equitably among the survivors when the last child reaches age 21. Two conclusions are mathematically certain: (1) assuming the trust assets are earning income, there will be a remainder when the last child reaches age 21, and (2) the last child will not reach age 21 (assuming he survives) for some 16-1/2 years after the first one does. Therefore, the first child continues to have an interest in the trust, even though he's over age 21, and will not be able to file for oil and gas leases, no matter where he may live, without first ascertaining that the trust is not filing on the same parcel, or until final distribution is made under the trust (when he is age 37-1/2). Moreover, the parents cannot file during these years. Celeste C. Grynberg, supra. Thus, during the last 18 months of the trust, some 13 adults are prevented from filing unless there is total communication to assure that none of them files on the same parcel as the trust. Why? Because each one has an automatic contingent interest in the remainder share of each of the others: If any one does not survive, his share would go to those who do. Indeed, under the regulations, trusts as such are not eligible to file; only trustees for minor children may apply. Thus, it is entirely possible that once the first beneficiary reaches age 21 and is no longer a minor (but retains a residual interest), the Board would hold that the trust no longer qualifies to file at all, since not all of its beneficiaries are minors.

By contrast, the Board has held that there is nothing wrong with a grandmother, for example, filing an application on behalf of minor grandchildren, intending to transfer her interest to them when they reach legal age, since at most they have only a hope or expectation of future benefit from the lease. Blanche Chomicki, 51 IBLA 128 (1980). Carried to a logical conclusion, in these days of increased longevity, this principle could conceivably permit parents to fund applications by as many as 30 people (2 parents in their 20's, 4 grandparents in their 40's, 8 great grandparents in their 60's, and 16 great great grandparents in their 80's), all with the "hope or expectation" that their children will be benefited, inasmuch as the Board finds nothing wrong with funding an application by someone other than the applicant, provided the regulations are otherwise followed. Geosearch, Inc., 39 IBLA 49 (1979); D. E. Pack, 30 IBLA 230 (1977). Since family interests and not business interests are similarly involved in trusts for minors, why should they not be treated in the same way? 9/ And, if not, then why should trusts be permitted to file at all?

Let us now look at the effect on trusts of the 1980 general regulatory changes, which the majority says contain a "per se" 10/ prohibition against multiple filings by the same trustee. It concludes that the prohibition must be a per se prohibition because it finds a dearth of information to aid in construing the regulation and is "left with the language itself, knowing only that the Secretary was concerned about possible abuses of the simultaneous leasing system."

Actually, the Secretary provided us with a great deal of information about his concerns. Nearly a full page of the two-page preamble to the proposed general changes is devoted to exactly what abuses the Department had in mind; namely, abuses by filing services. 44 FR 56176 (Sept. 28, 1979). Another one-third page is devoted to the need to increase the maximum acreage of noncompetitive leases. The remainder of the page comments on eight paragraphs of miscellaneous changes, of which the only express concern pertaining to trusts (set forth in paragraph (4)) was similar to concerns with respect to filing services, namely, self-dealing. But in this case, the self-dealing had to do with revocable trusts where the trust was terminated and the leases transferred to the grantor or a third person without BLM's knowledge or consent, which is required by law. Thus, BLM proposed to prohibit revocable trusts from participating in simultaneous oil and gas leasing. Id. at 56177. 11/

9/ On the basis of the first clause of 43 CFR 3112.6-1(c)(4) of the new regulations (discussed, infra), I recognize that the Department's policy is now otherwise. In theory, however, I see no reason why a disposition of family property by trust should be treated more harshly by the Board than a similar disposition by will. Contingent remainder interests in trusts for minors are essential, if for no other reason than the fact that, in most states, minors themselves cannot dispose of their property by will. For example, the Model Execution of Wills Act and the Uniform Probate Code both limit the execution of wills to persons 18 years of age or older. 79 Am. Jur. 2d, Wills § 56 (1975).

10/ See n.6.

11/ See n.7 and related text. There is obviously no share transferability problem with respect to irrevocable trusts, with which we are dealing in these cases.

As the majority notes, the only concern expressed by the Department when it adopted 43 CFR 3112.6-1(c)(4) on May 23, 1980, 45 FR 35157, again had to do with revocable trusts. However, precisely for that reason, it is reasonable to assume the Department did not intend to alter its previous policies with respect to guardians and trustees. An indication of its continued approbation of filings by guardians and trustees, in fact, can be found in 43 CFR 3102.2-3, in which, presumably because of problems such as arose in Charles J. King, *supra*, with respect to the legal documentation required of natural guardians, BLM now requires only a "court order, or other document, establishing the [guardian or trustee] relationship." (Emphasis indicates added language.)

So we are left with the question of how to construe the first and second clauses of paragraph 3112.6-1(c)(4), about which the preamble says nothing. The majority's interpretation of the first clause seems unassailable in light of the special deference the Department has always paid to McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955), 12/ cited by the majority in its footnote 3. However, the majority's argument that because the first clause is a per se prohibition, the second must be, too, is completely unconvincing. The fiduciary-duty principle underlying the first clause is hoary with age, and even though I might like to distinguish it, 13/ I cannot question the wisdom of the Secretary in adopting a uniform and unconditional rule on the subject. By contrast, if the majority's view of the second clause were that intended by the Secretary, it would surely constitute a "deus ex machina" on his part, for there is no history or precedent 14/ or common sense to support it, much less any preamble. Therefore, I continue to think that the second clause, which is ambiguous, should be construed reasonably rather than arbitrarily, and that it should be held to refer solely to filings by the same trust or guardianship, and not to filings where multiple trusts are involved.

The majority bases its construction of the second clause on the purely technical ground that a trustee does not file for an oil and gas lease; a trust does. The trustee merely signs his name as trustee. Thus, a trustee also would not file in the name of trust beneficiaries; he would simply file as a trust and make distribution (or whatever) according to the terms of the trust. Therefore, even though the regulation says that "separate filings by a trustee or guardian on behalf of two or more beneficiaries on the same parcel" are prohibited, what it means to say, according to the majority, is that "separate filings * * * on behalf of two or more trusts" are prohibited. Thus, under this construction, Bank of America, for example, if it found a particular parcel for which it had great expectations, would have to try to select just a single trust out of its thousands of trust portfolios on which

12/ See, e.g., Schermerhorn Oil Corp., 72 I.D. 486 (1965). Grynberg, *supra* at 203, takes the same view.

13/ See, e.g., Raymond J. Stipek, 74 I.D. 57 (1967).

14/ The issue of a single trustee filing on the same parcel on behalf of more than one trust did not arise in Lines. It did arise in Grynberg, but that case was decided on other grounds. Moreover, Grynberg was decided on Nov. 30, 1979, 2 months after the new regulations were proposed.

to make a single filing. I find it difficult to believe that such a result is fair, reasonable (both in light of the regulations permitting trustees to file and in light of the monetary benefits to the public in having as many persons as possible file on a particular parcel), or required by the literal language of the regulation.

As for the majority's argument that a trustee does not file for beneficiaries as such, there are two simple answers: First, a trustee can do whatever the trust instrument permits him to do, as long as what he does is not unlawful or contrary to public policy. ^{15/} Second, the regulations, as we have shown, have traditionally referred to "legal guardians or trustees of minors" (43 CFR 3102.1(c) and 3102.1-1(b)) and have never attempted to distinguish between guardians, who do file in behalf of their wards or beneficiaries personally, and trustees, who usually do not. Like the previous regulations, paragraph 3112.6-1(c)(4) groups the two indiscriminately. Thus, to attempt a distinction on the basis of the questionable technicality seized upon by the majority is to rely on a very thin reed, indeed. ^{16/}

In any event, the majority can scarcely argue that the language of section 3112.6-1(c) is clear, much less that paragraph (4) is so. Yet the Board has consistently held that the regulations governing the oil and gas leasing program should be sufficiently clear that there is no basis for an applicant's noncompliance with them. W. W. Priest, 55 IBLA 398 (1981), and cases cited therein. Thus, the new regulations should be interpreted in favor of the appellants.

Similarly, based on the rules of statutory construction, it could be argued that the appellant should prevail even if Lines were not overruled. For where a general proposition is specifically modified with respect to a particular application, as the language of section 3112.6-1(c) is specified by paragraph (4), the latter should govern; and (in this case) the contingent remainder interest doctrine of Lines, which is based simply on an ancient general definition that has not been changed, should give way. The principle, "Expressio unius, exclusio alterius," might also be urged here. But I would much prefer to see Lines overturned on the ground that it was wrong at the time it was decided. ^{17/}

^{15/} See, e.g., Scott on Trusts (3rd ed. 1967) § 164 and Restatement (2nd) of Trusts § 164.

^{16/} Since the intention of the first clause of paragraph (4) of section 3112.6-1(c) is clear -- namely, to protect and defend the fiduciary relationship from corruption -- it is immaterial whether that clause refers to the same or to different trusts.

^{17/} It may be necessary for the Department itself, or for the Board in a subsequent decision, to undo the mischief caused by Lines, since that decision was followed by Grynberg, and Grynberg was affirmed by the Colorado District Court (June Oil & Gas, Inc. v. Andrus, 506 F. Supp. 1204 (1981)) on the basis of Lines. In Grynberg, a two-Judge majority of the Board split on whether to apply Lines' parent/child mutual support/benefit doctrine or its contingent remainder doctrine. However, as the decision issued, the offers of the parents, of the parent-trustee, and of the trusts were all rejected on two grounds: (1) the benefit to the parents in the possibility of direct support payments for the child by the trust meant that the success of either

In summary, my concerns over the majority's decision in this case are the following: First, it generally departs from Department tradition in treating trusts for minors as if they were corporations, but without the "de minimis" protection of 30 U.S.C. § 184(e). Second, it effectively negates the regulatory right of trustees to file since, under Lines, trusts cannot file if parents file, regardless of their lack of a reversionary interest. Third, like Lines, it misconstrues the regulatory definition of "interest" by considering contingent remainders to be interests. Fourth, by implication, it treats trusts as schemes or plans of a collusive nature, regardless of the trustee's evidence to the contrary. Fifth, it is based upon an unduly harsh interpretation of an unclear prohibition, in violation of the Department's own rules of oil and gas regulatory construction. And, sixth, it fails to distinguish generally between a legitimate use and a prohibited abuse by the public of the simultaneous filing system.

Consequently, I would reverse the BLM decision.

It remains only to acknowledge the two concurring opinions in this case. The longer, and more pedantic, is so simplistic in logic and so Draconian in result, that my temptation is to say only, "Q.E.D.," and be done with it; but some further comment is unfortunately required.

After discovering from a 1927 opinion that minors cannot hold leases because they lack the capacity to contract, the author ingenuously proclaims "Moreover, there was never any question whether husbands and wives could hold leases independently. It was always admitted that they could." Oh! That explains it. No wonder the author has no interest in such 1,000-year-old common law concepts as dower, curtesy, and primogeniture, not to mention the laws of inheritance generally, which rightfully treat the family as the basic property-holding unit of human society and clearly contain the "cognizable legally enforceable interest[s]" that the author has been unable to find. (How about Genesis 1:28-30 as authority?) However, I agree with him that if the mutual property interests of minor children in relation to parents and to each other are to be recognized, to the improbable extent of future contingent remainders in trusts, then the interrelated interests of husbands and wives should also be recognized -- as the late Judge Fishman pointed out in his dissent in Grynberg. 44 IBLA at 205.

would be advantageous to the other, in violation of 43 CFR 3100.0-5(b) and 3112.5-2 (1979), and (2) since one of the parents as cotrustee had a primary obligation to the trust (under McKay v. Wahlenmaier, supra), the filing by the cotrustee individually and on behalf of the trust created a prohibited multiple filing in violation of 43 CFR 3112.5-2 (1979). 44 IBLA at 202-03. We have discussed both of these contentions, supra. However, the District Court did not question the wisdom of either doctrine, stating that it was required to affirm an agency decision as long as it had rational basis, even though the court might disagree with the decision. 506 F. Supp. at 1207. Unfortunately, Lines itself, which should have been subjected to closer scrutiny, was never appealed to the courts.

The author discourses at length about historical differences between the maximum acreage limitation and the multiple filing prohibition, pointing out that most early cases dealt with the former. Yet he recognizes that as early as 1926 the Department was really concerned with both, thereby implicitly admitting that the Solicitors' opinions I have quoted could not have been written with only the maximum acreage limitations in mind. He also makes much of differing purposes for the two policies, denying that they are even analogous. Yet he then points out the need in 1960 for a general revision of the acreage reporting requirements because "a literal enforcement of the law [requiring proration of all acreage holdings, no matter how minuscule] would create an administrative nightmare" (quoting from a Senate committee report). Where is the logic in recognizing that the Secretary was forced to seek relief from the Congress because of the impossibility of dealing with inconsequential corporate interests (i.e., anything less than a 10 percent stock interest) but then, by Board fiat, imposing a minuscule (e.g., a contingent remainder) interest test for multiple filings? Even in McKay v. Wahlenmaier, supra, which the author cites as the authority for (in fact, as compelling) treating maximum acreage limitations as totally discrete from multiple filing issues, the interests involved were not minuscule at all but were 20 percent and 25 percent, respectively. Thus, I continue to regard the two limitations as not only analogous but as involving entirely similar administrative considerations. 18/

Moreover, fairness requires clear rules. To illustrate the confusion that the Board itself can generate, I note that the concurring author, at the end of his treatise on multiple filings, and after distinguishing at length between acreage limitations and multiple filing prohibitions and concluding that "[t]he acreage allocation provisions are simply not germane," promptly cites (for what purpose is not clear) the 1957 Solicitor's Opinion (64 I.D. 51) dealing with acreage limitations on trusts, which says that parents can hold their leases under any form, trust or otherwise, so long as they do not exceed the maximum acreage limitation. That particularly lucid paragraph of the concurring opinion is perhaps worth quoting in full for the reader's objective analysis:

One may question whether or not the cross interest among beneficiaries shown in Farrell L. Lines, supra, was sufficient to undermine the basic fairness of the drawing. For myself, I think it clear that the use of trusts to file multiple offers for children, where the parents as guardians could clearly not do the same (cf. Solicitor's Opinion, 64 I.D. 51 (1957)), combined with the cross interest of the contingent remainder, created precisely that type of unfair advantage which we are charged to prevent. What I do find objectionable, however, is the almost total misstatement of what we held in Farrell L. Lines, supra, and what we are holding herein.

18/ If anything, the administrative problem with respect to detecting possible multiple filings by trusts (under Lines and under the present holding) is even greater than the problem of prorating acreage holdings, as is made clear in n.6 of the majority's opinion. But the Board, not the Congress or the Secretary, has created that problem.

It is surely also ironic, in light of his predilection for quoting the D.C. Circuit Court to the effect that the Secretary is required to manage the crowd, that the author has so little interest in notifying the crowd through clear and precise regulations of the constraints they are bound to observe. As I have pointed out (n. 2), the regulations in four distinct places explicitly recognize the right of a trustee to file. Nowhere, however, do they provide any clear indication that, on the basis of Lines, (1) if a parent files, his child's trust cannot file; (2) if the trust files, the parents cannot file; (3) if there are contingent remainders among the children's trusts, only one trust can file; and that now, based upon the majority's present decision, (4) if a corporate (or any) trustee files on behalf of one trust, it cannot file on behalf of any other trust. Yet, by contrast, we continue to pretend that husbands and wives have no interest in each other's property. As for the minors who are beneficiaries of trusts, what will be next? Will the Board suddenly discover that minors also have a contingent future property interest if they are mentioned in the Last Will of a parent or grandparent, and that, as a result, if one of the latter files, the child's unrelated trust cannot file? Why, indeed, should the Board's concern be limited solely to the contingent remainder clauses contained in trusts when a similar clause in a will produces the same result?

Only one comment is necessary with respect to the other concurring opinion; namely that, as I have noted, there is no way in which the majority's construction of the second clause of 43 CFR 3112.6-1(c)(4) can literally be called literal. The dictionary defines literal as "following the letter, or exact words, of the original." Random House, American College Dictionary, 1970. Literally, the regulation merely prohibits "separate filings by a trustee * * * on behalf of two or more beneficiaries." The majority has read this to mean "separate filings by a trustee * * * on behalf of two or more trusts." I respectfully submit that, whatever one might think of the result, the reading itself is not literal.

Bernard V. Parrette
Chief Administrative Judge

I concur with the dissent to the extent it concludes that the filings by the Blakemore trusts were not improper.

Douglas E. Henriques
Administrative Judge

