

RAY KAY, TECKLA PRODUCTIONS, INC.

IBLA 82-399

Decided April 29, 1982

Appeal from action of the New Mexico State Office, Bureau of Land Management, in issuing oil and gas lease NM 29598 to the offeror with first priority and rejecting the offer drawn with second priority.

Appeal dismissed.

1. Administrative Procedure: Administrative Review--Appeals--Res Judicata--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Dismissal

Where an individual, named as an adverse party in a proceeding before the Board of Land Appeals, is duly served with notice of that fact, and is given the opportunity to participate in the proceeding but fails to do so, the matter becomes res judicata upon the rendering of the Board's decision and the party may not subsequently challenge the decision in a new appeal before the Board from the Bureau of Land Management's ministerial action implementing the decision.

APPEARANCES: James E. Nesland, Esq., Denver, Colorado, for appellants; James W. McDade, Esq., Washington, D.C., and Craig R. Carver, Esq., Denver, Colorado, for George S. Matick; John H. Harrington, Esq., Office of the Field Solicitor, Department of the Interior, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Ray Kay and Teckla Productions, Inc., have appealed the decision of the New Mexico State Office, Bureau of Land Management (BLM), dated December 4, 1981, rejecting Kay's oil and gas lease drawing entry card (DEC) drawn with second priority for parcel NM-274 at the January 1977 simultaneous oil and gas drawing held by the New Mexico State Office because the lease, NM 29598, has been issued to the offeror with number one priority, George S. Matick. The BLM decision also denied approval of an assignment by Kay to Teckla Productions, Inc., of his entire interest in the lease.

On May 4, 1977, BLM issued a decision rejecting Matick's first-drawn DEC lease offer because the DEC had been prepared and filed by Stewart Capital Corporation (Stewart), a leasing service, under authority from Matick and the showings required by 43 CFR 3102.6-1 had not been made by either Stewart as agent, or by Matick as principal. Matick appealed the decision, but when no statement of reasons was filed within the required time period, this Board, by order dated August 1, 1977, dismissed the appeal pursuant to 43 CFR 4.402(a). Processing of appellant Kay's second priority offer was begun on August 9, 1977. Matick submitted a petition to vacate the August 1, 1977, order and to extend the time for filing the statement of reasons in support of his appeal. The Board declined to reconsider its dismissal and denied the petition by order of April 10, 1978.

Following the Matick appeal, but before its dismissal, Stewart had petitioned the Secretary of the Interior to take jurisdiction over a large number of appeals which had arisen in similar circumstances. The Matick appeal was listed on Stewart's petition to the Secretary, but, through inadvertence, no statement of reasons for the appeal was filed with the Board. The Secretary thereafter declined to take jurisdiction of the cases.

Following the Board's order of April 10, 1978, Stewart and Matick sued the Secretary in an action styled Stewart Capital Corp. and George S. Matick v. Andrus, Civ. No. 78-489C, in the United States District Court for the District of New Mexico. On December 19, 1980, the court issued a stipulated order of remand stating in part:

2. Issues raised by the merits of the underlying action have been recently dealt with by the District Courts in the Districts of Utah and Wyoming, Runnells v. Andrus, C-77-0268 (D. Utah 1980) and Stewart Capital Corporation, et al., v. Andrus, C-79-123K (D. Wyo. 1980).

3. The District Court in Runnells v. Andrus specifically enjoined the Department from rejecting lease applications filed prior to November 9, 1978, in a fashion similar to that used in the Runnells application. Such injunction may apply to the lease applications involved in the instant appeal and development of additional facts at the administrative level may be required to determine the applicability of such decision.

4. An additional, procedural issue raised by the instant appeal concerns the proper manner in which to apply the 90 day statute of limitations regarding time to file appeals to the district courts.

5. The recent decision of the District Court for the District of Columbia in Lowey et al., v. Andrus, C-79-3314 through 3319, (1980), has held that such statute of limitation is tolled during the time that an appellant's application for reconsideration by the IBLA is pending.

6. Each of the above-cited decisions has a direct bearing upon the proper resolution of the issues raised by this appeal. It is therefore appropriate for the department itself to review the issues presented by this appeal in light of such rulings.

7. Plaintiffs' counsel has been advised by counsel for the defendants that defendants do not oppose the remand sought by this motion, so long as notice of this proposal is forwarded to the persons who were drawn with second priority for each lease involved in this appeal and an opportunity is given to such parties to intervene or otherwise review and protect their interests, if any, in this litigation as they see fit.

Appellant Kay was duly notified.

Following remand, this Board requested the parties to submit a report recommending procedures to be followed by the Board in complying with the court's order. See 43 CFR 4.29. Response was received from counsel for Matick and counsel for BLM but no response was submitted by or on behalf of appellant Kay. The parties agreed that the issue on the merits of the Matick appeal were substantially identical to those involved in the decision, Killian L. Huger, Jr., 52 IBLA 174 (1981). The procedural question identified was whether Matick was in violation of the time limit for filing a statement of reasons with the Board, notwithstanding the petition then pending before the Secretary and, if the time for filing a statement of reasons had run, whether, under 43 CFR 4.402(a), the merits of the Matick appeal should nevertheless be considered due to the circumstances surrounding the appeal. The circumstances included some 70 other similar appeals then pending before the Board, the inclusion of most of those appeals in the then-pending petition to the Secretary, and the failure of the Board to dismiss two other similar appeals presenting the very same procedural question as the Matick appeal.

By order of April 15, 1981, the Board required briefs from the parties to be submitted by May 18, 1981, and reply briefs by June 18, 1981. Briefs were submitted by Matick and BLM, but again nothing was filed by appellant Kay. Both Matick and BLM urged the Board to rule in favor of Matick. In an order dated July 8, 1981, the Board held:

It is axiomatic that discretion must be exercised consistently in identical factual situations or its exercise shall be deemed arbitrary and capricious. In IBLA 77-391 and IBLA 77-394, notices of appeal were timely filed by Samuel A. Caccamise and Sol Singer respectively. Neither appellant, however, filed a statement of reasons within the period set forth in 43 CFR 4.412, and neither filed a request for extension of time within such period. Despite these defects, the appeals were heard by the Board in H. R. Delasco, Inc., 39 IBLA 194 (1979). On judicial review by the U. S. District Court for the District of Wyoming, Stewart Capital Corp. v. Andrus, No. C79-123 (D. Wyo, April 24,

1980), Judge Kerr affirmed the Department's interpretation of 43 CFR 3102.6-1, but held that it not be given retroactive effect. This action allowed Caccamise and Singer to receive the oil and gas lease sought, each lease being issued May 1, 1981. In fairness to appellant Matick whose actions were similar in all material respects, we hereby reinstate his appeals. [1/]

The substantive issues involved in Matick's appeals have been resolved in D. E. Pack, supra. Further discussion of the need for agency statements as required by the then applicable regulation, 43 CFR 3102.6-1, is unnecessary. Recent case law, however, requires that the rule in Pack be applied prospectively only and not be applied to reject the DEC's of appellant Matick filed prior to November 9, 1978. Stewart Capital Corp. v. Andrus, supra; Runnells v. Andrus, 484 F. Supp. 1234 (1980); Killian L. Huger, Jr., 52 IBLA 174 (1981). The decisions of BLM to reject the DEC's of Matick must be, and are hereby, vacated.

Oil and gas lease NM 29598 was thereafter issued to George Matick on December 3, 1981, and second drawee Kay and the third drawee were notified of that fact and the rejection of their offers.

In their statement of reasons now before the Board, appellants argue principally that the Board erred in overturning its previous rulings dismissing the Matick appeal because these rulings were based on established Departmental policies and to ignore the policies constitutes an arbitrary and capricious act. Appellants contend that the Board's action in dismissing the appeal was an administrative exercise of discretion entitled to a presumption of validity and that the circumstances of this case do not overcome that presumption. Furthermore, appellants suggest that because Kay assigned his rights to the lease to Teckla Productions, Inc., third party rights have intervened which should have prevented the Board from overturning its dismissal orders.

In response, counsel for BLM notes that neither of the appellants herein was named as an adverse party in the original Matick decision and appeal, that Matick agreed to serve notice on appellant Kay pursuant to the Federal district court's stipulated remand order in his case, and that appellant Kay was afforded the opportunity by this Board to participate in the administrative proceedings following remand but did not do so. Counsel argues that the right of appeal afforded appellant Kay in the BLM decision was in error, that he is now bound by the doctrine of administrative finality, and Teckla is also bound because its rights flow from Kay.

Counsel for Matick urge that the Board's July 8, 1981, order was proper and that appellants are prevented from collaterally attacking that decision now by the doctrines of res judicata and administrative finality.

1/ Matick had appealed the rejection of two leases. Kay was a priority offeror only with respect to lease NM 29598.

[1] We find that the substance of Kay's and Teckla's appeal is in effect an appeal of the same issues involving the same parties, events, and lease as examined by the Board in its order of July 8, 1981, following remand of the Matick appeals by the Federal district court. Although appellants may appeal from the action of the New Mexico State Office rejecting Kay's lease offer and subsequent assignment to Teckla, that action was merely ministerial implementation resulting from the Board's order. The decision of the Board on the merits was final for the Department, no further right of appeal exists within the Department, and we must conclude that Kay's and Teckla's appeal is barred by Kay's failure to participate in the proceedings on remand from the district court. Donald W. Coyer (On Judicial Remand), 50 IBLA 306 (1980). The court expressly directed that Kay be brought in as a party in order to allow him the opportunity to defend his interests. The record shows that he was served with notice of the Board's proceedings but did not participate. No explanation has been provided for the failure to do so. Having failed to participate in this Board's review of the Matick appeals on remand, Kay may not attack the results by filing a new appeal to this Board as the matter is res judicata. As we said in Donald W. Coyer (On Judicial Remand), *supra* at 312:

"When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." United States v. Utah Construction and Mining Co., 384 U.S. 394, 422 (1966). It is appropriate to apply res judicata to bar a suit for judicial review of an agency decision by the affected person, where he has been given an opportunity to challenge the decision within the agency's appellate framework but has elected not to exercise this opportunity by taking an appeal. A. Duda & Sons Cooperative Ass'n v. United States, 495 F.2d 193 (5th Cir. 1974); see Levinger v. Richardson, 443 F.2d 1338 (4th Cir. 1971).

The same principles apply herein. See also Donald W. Coyer, 36 IBLA 181 (1978).

We note as well that appellants' argument that the third party rights of Teckla have intervened in this situation and that equity would thus dictate issuance of the lease to Kay is unavailing. This is not a situation where the rights of those drawn with subsidiary priority intervene to prevent acceptance of supplemental filings to cure deficiencies in an offer by the first-drawn offeror as urged by appellants citing F. Peter Zoch, 60 IBLA 150 (1981). At the time that appellant Kay executed the assignment to appellant Teckla Productions, Inc., November 16, 1977, Kay at most had only an expectation or hope of being issued the lease in question as the rights of Matick had not been fully adjudicated at the time, and no lease had actually issued to Kay.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is hereby dismissed.

Douglas E. Henriques
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge

