

GORDON J. LINDSAY
RESOURCE SERVICE CO., INC.

IBLA 80-898

Decided June 4, 1982

Appeal from decision of Wyoming State Office, Bureau of Land Management, denying a request for suspension of action regarding evaluation of circumstances of lease issuance and declaring overriding royalty interest null and void ab initio. W-61257.

Affirmed as modified.

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

When an individual files an oil and gas lease offer through a leasing service under an agreement whereby the leasing service is authorized to act as the sole and exclusive agent to negotiate for sublease, assignment, or sale of any rights obtained by the offeror; where the offeror is required to pay the leasing service according to a set schedule, even if the offeror negotiates the sale; and where such agency to negotiate is to be valid for 5 years, the leasing service has an enforceable right to share in the proceeds of any sale of the lease or any interest therein, and in any payments of overriding royalties retained. Such an agreement creates for the leasing service an "interest" in the lease offer which must be disclosed under 43 CFR 3102.7 (1979).

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

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

under an agreement with the service which has been determined to give the service an interest in the lease, and the service files a "waiver" of that interest with the BLM prior to a simultaneous drawing, without communicating such "waiver" to the client and without any contractual consideration running from the client to the leasing service, the "waiver" is without effect as a matter of law and both the successful drawee and the leasing service are required to make a showing as to their respective interests under 43 CFR 3102.7 (1979).

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

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

4. Oil and Gas Leases: Bona Fide Purchaser -- Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Overriding Royalties

An overriding royalty interest retained by a lessee after he has assigned the lease to a bona fide purchaser is voidable and subject to cancellation where it is revealed that the lessee's original lease offer failed to disclose the existence of another party in interest in the offer. Any overriding royalties which the lessee assigned to the other party in interest are also properly subject to cancellation as this party is not a bona fide purchaser thereof, having had actual knowledge of the defect in the lease.

APPEARANCES: William R. Hamm, Esq., and David B. Kern, Esq., Milwaukee, Wisconsin, for appellants; Harold Baer, Jr., Esq., Office of the Regional Solicitor, Denver, Colorado, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Gordon J. Lindsay and Resource Service Company, Inc. (RSC), have appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated August 1, 1980, which denied suspension of consideration by BLM of the circumstances involving lease W-61257 and declared their overriding royalty interests in the lease null and void ab initio.

The circumstances surrounding lease W-61257 have previously been before this Board on two separate occasions. The record shows that Gordon J. Lindsay's simultaneous oil and gas lease offer card was originally drawn with first priority in the September 1977 drawing for parcel WY 95 in the Wyoming State Office, BLM. The drawing entry card filed by Robert G. Race and Clyde N. Beggs was drawn with second priority. BLM issued oil and gas lease W-61257 to Lindsay on November 15, 1977, effective December 1, 1977.

On January 16, 1978, Lindsay, as lessee of oil and gas lease W-61257, assigned the lease to the Diamond Shamrock Corporation. BLM approved this assignment on January 30, 1978, effective February 1, 1978. ^{1/} Lindsay reserved 5 percent of 8/8 overriding royalty and assigned 16 percent of his overriding royalty on the first \$ 100,000 annually, and 12 percent on the excess to RSC as of June 29, 1978. On January 26, 1978, Race and Beggs filed a protest alleging that Lindsay's offer was improper in that he had used a common address and was not the sole party in interest in the offer, as RSC actually held an interest in the offer.

BLM dismissed this protest stating there had been bona fide purchasers of the lease, and Race and Beggs appealed. In Robert G. Race, 37 IBLA 162 (1978), we held that BLM properly denied the protest by Race and Beggs. We concluded that the Department was barred from canceling the lease by 30 U.S.C. § 184(h)(2) (1976), regardless of any defects in the underlying offer, as the lease had been assigned to a bona fide purchaser. No suit for judicial review of that decision was filed by Race within the 90-day period prescribed by 30 U.S.C. § 226-2 (1976).

The validity of this lease was raised again in 1979 when Geosearch, Inc. (Geosearch), filed a protest with BLM. Geosearch asserted that it had succeeded to the interests of Robert and Joyce Race in this lease, and that the original offer had violated the regulations. BLM's dismissal of this protest was affirmed by this Board by order of January 2, 1980, where we held that the interests of Robert Race had already been finally adjudicated by the Department and that the earlier determination was binding on Geosearch. Our ruling was ultimately upheld by the U.S. District Court for the District of Wyoming when that court granted summary judgment for the Department by order

^{1/} On Mar. 3, 1978, BLM approved an assignment of a 25 percent interest in this lease from the Diamond Shamrock Corp. to the Apache Corp.

of October 15, 1980, in Geosearch, Inc. v. Andrus, No. C80-084K (D.C. Wyo.). No appeal was taken from this decision.

The present review of lease W-61257 was initiated by BLM October 17, 1979. BLM requested Lindsay to provide further evidence regarding the filing of the drawing entry card by RSC (formerly Fred Engle, d.b.a. RSC). Lindsay was asked to submit the agency agreement signed with Engle at or before the time this card was filed in September 1977 so that BLM could determine if the offer was defective at the time of filing and whether the lease was issued in error.

Appellants responded November 11, 1979, submitting a copy of the agreement and requesting suspension of action on the matter pending resolution of an earlier case "Coyer v. Easterday." Appellants asserted that the validity of a similar service agreement was being considered in Coyer. BLM subsequently denied suspension in its August 1, 1980, decision, which also declared their overriding royalty interests null and void ab initio.

Appellants allege on appeal that the relevant facts are essentially the same as in the Coyer case and enclose a copy of proposed findings for that case regarding the same RSC service agreement as was used in this case. The original service agreement which was in use at that time by RSC with its clients shows that Lindsay had authorized RSC to be his exclusive agent for the marketing of his interest in the Federal oil and gas lease he hoped to acquire in the September 1977 simultaneous drawing. Their agreement, executed prior to the drawing in February 1977, required Lindsay to pay RSC commissions on all proceeds of the sale of the lease according to a set schedule. The commission extended to the reservation of overriding royalties as well as the initial consideration for sale of the lease. The commission applied to any sale, regardless of whether it was negotiated by RSC. This agency relationship was to last 5 years. The record also contains a copy of a disclaimer of these provisions executed January 13, 1977, by Fred Engle, d.b.a. RSC.

Appellants' statement of reasons relies primarily on the same line of arguments set forth in Coyer, essentially that RSC had no interest in the lease offer because the waiver of any such interest which Fred Engle, d.b.a. RSC, gave to BLM in January 1977 eliminated any such interest; that the Department is estopped from denying the effectiveness of the waiver, and that the decision finding the waiver ineffective was an improper retroactive adjudication of the issues.

[1] This Board fully considered and rejected the merits of appellants' arguments as to this same service agreement in Donald W. Coyer (On Judicial Remand), 50 IBLA 306, 312 (1980), *aff'd*, Coyer v. Andrus, Civ. No. C78-104K (D. Wyo. Mar. 5, 1981). Coyer, alone, is dispositive of these contentions. However, we have repeatedly reaffirmed this holding as to similar situations involving RSC and its clients and have consistently held that this service agreement gives RSC an "interest" in the lease offer which must be disclosed

under 43 CFR 3102.7 (1979), 2/ and that the failure to disclose this interest is a violation of the regulations requiring rejection of the offer or cancellation of the lease. Wilbur G. Desens, 54 IBLA 271 (1981); Inexco Oil Co., 54 IBLA 260 (1981); Home Petroleum Corp., 54 IBLA 182, 88 I.D. 479 (1981), aff'd sub nom. Geosearch, Inc. v. Watt, Civ. No. C81-266 (D. Wyo. Jan. 11, 1982); Estate of Glenn F. Coy, 52 IBLA 182, 88 I.D. 236 (1981); D. R. Weedon, Jr., 51 IBLA 378 (1980), aff'd, Weedon v. Watt, Civ. No. 81-0749 (D.D.C. Oct. 9, 1981); Frederick W. Lowey, 40 IBLA 381 (1979), aff'd, Lowey v. Watt, Civ. No. 79-3314 (D.D.C. May 28, 1981).

[2] The unilateral effort of RSC to disclaim the interest in the lease offer created by the agreement has been considered by the Board and held invalid for lack of communication of the waiver to the offeror or receipt of consideration to bind the contract. Floyd O. Lochner, 56 IBLA 271 (1981); Wilbur G. Desens, supra at 276. Further, as the disclaimer was dated January 13, 1977, it was superseded by the subsequent agreement of February 22, 1977, between Lindsay and RSC which created the interest in the subject lease offer, and the disclaimer would not apply to this case. Home Petroleum Corp., supra; Frederick W. Lowey, supra.

[3] In Coyer we also rejected the allegation that the Department is estopped from canceling the lease because RSC relied on BLM's approval of the disclaimer at the time it was made as a means of eliminating the interest in the lease offers. In considering the same disclaimer by RSC we held that RSC had constructive and actual knowledge that BLM state office employees are subordinate level personnel without power to bind the Department, that their decisions are subject to reversal on review by the Secretary or his delegates, and, therefore, the essential element of reasonable reliance is missing. Donald W. Coyer (On Judicial Remand), supra at 313-14. We adhere to this ruling. Cancellation of this lease is not at issue at this juncture due to the bona fide purchaser involved as originally discussed by the Board in Robert G. Race, supra.

We must point out that we disagree with BLM's holding that the retained overriding royalty interests were null and void ab initio and find instead, as discussed in Home Petroleum Corp., supra, that these interests were merely voidable. Ervin Staacke, 62 IBLA 278, 286 (1982). However, we hold that BLM properly canceled the overriding royalties retained by Lindsay and RSC for the reasons set out in Wilbur G. Desens, supra at 279-80; Inexco Oil Co., supra at 269-70; Wayne E. DeBord, 50 IBLA 216 n.1, 87 I.D. 465 n.1 (1981) (appeal pending).

2/ Substantial changes in the regulations governing oil and gas leasing in general, and simultaneous oil and gas lease offers in particular, were implemented by revised regulations effective June 16, 1980. 45 FR 35156-66 (May 23, 1980). Since the lease offer involved in this appeal was filed and the drawing was conducted prior to the effective date of the revised regulations, the prior regulations are controlling.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

