

Editor's note: Reconsideration denied by Order dated April 8, 1983

JERRY M. PRITCHARD

IBLA 82-1104, 82-1189
82-1320, 82-1321
82-1322, 82-1329

Decided January 18, 1983

Appeal from decisions of the Oregon State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers in whole or in part. OR 34337, OR 34331, OR 34328, OR 34344, OR 34312, OR 34309.

Dismissed.

1. Oil and Gas Leases: Acreage Limitations -- Oil and Gas Leases:
Applications: Generally

The Mineral Leasing Act of 1920, as amended, establishes the maximum acreage a person may hold, own, or control at one time. If an offeror files a group of offers, any one of which causes him to exceed the acreage limitations, the entire group must be rejected, under 43 CFR 3101.1-5(c)(3)(ii).

2. Oil and Gas Leases: Acreage Limitations -- Oil and Gas Leases:
Applications: 640-acre Limitation

Offers for less than 640 acres are not null and void but remain pending until either BLM determines a proper showing under 43 CFR 3110.1-3(a) has been made or the offers are rejected for lack of an adequate showing. While such offers remain pending, the lands described therein are chargeable to the offeror's acreage account.

3. Oil and Gas Leases: Acreage Limitations -- Oil and Gas Leases:
Applications: Generally

Exceeding the maximum acreage limit of 43 CFR 3101.1-5 when filing an offer to lease is not a minor defect which may be cured.

4. Oil and Gas Leases: Acreage Limitations -- Oil and Gas Leases:
Lands Subject to

Where lease offers include lands which are in national parks and Indian reservations, or which are otherwise unavailable for leasing, the acreage described is chargeable to the offeror until such time as BLM makes its determination of the status and availability of the land and rejects the offers as to the lands not available.

5. Administrative Authority: Generally -- Administrative Procedure:
Administrative Review -- Appeals -- Rules of Practice: Appeals:
Dismissal

As a general rule an appeal is subject to dismissal where either the appeal or the application which is the subject of the appeal is withdrawn by appellant. An appeal is properly dismissed where the application upon which it is based is withdrawn and the only error in the decision below is a misapplication of the regulations which only the appellant has standing to appeal.

APPEARANCES: K. Douglas Perrin, Esq., Roswell, New Mexico, for appellant; Thomas A. Miller, Esq., Houston, Texas, for Shell Oil Company.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Jerry M. Pritchard (Pritchard) has appealed from decisions of the Oregon State Office, Bureau of Land Management (BLM), rejecting several noncompetitive oil and gas lease offers in whole or in part. Appellant asserts that BLM erroneously issued to Shell Oil Company (Shell) oil and gas leases covering public domain lands for which appellant claims to be the first-qualified applicant.

On April 30, 1981, Shell filed 54 noncompetitive oil and gas lease offers for certain lands in Oregon. The Shell offers, numbered OR 26502 through OR 26555, were stamped as being filed at precisely the same moment. Pritchard filed the subject noncompetitive oil and gas lease offers on March 10 and 11, 1982. BLM rejected all or part of each of his offers because the lands were included in leases issued pursuant to previous offers. The lands rejected in the Pritchard offers were leased to Shell and Van K. Bullock, effective June 1, July 1, and August 1, 1982. 1/

1/ See Appendix.

Appellant contends that BLM's decisions rejecting his offers were erroneous where Shell was deemed to be the first qualified applicant based upon its April 30, 1981, offers. He asserts that Shell's April 30 offers were not in "good standing" because Shell had exceeded the maximum acreage permitted to be held under 43 CFR 3101.1-5.

Before rejection of his offers, appellant, through an agent, inquired of BLM concerning Shell's acreage holdings in Oregon, contending that Shell had exceeded the limit by 4,281.08 acres. BLM's response, dated May 7, 1982, set out which acreage in Shell's offers was charged to Shell's acreage account. BLM took the position that Shell was chargeable for 245,478 acres after the April 30 filing. Excluded from BLM's calculation were offers rejected for nonconformity with 43 CFR 3110.1-3(a), the "640-acre rule." 2/ 43 CFR 3110.1-3(a) requires that all noncompetitive offers to lease must be for at least 640 acres in the absence of certain exceptions. Inclusion of those offers in Shell's chargeable allotment would result in excess acreage over the allowed maximum at the time Shell submitted the 54 offers on April 30, 1981.

BLM reasoned that "offers filed in violation of the 640-acre rule cannot mature to lease and are not chargeable." Appellant has argued that those offers later rejected as less than 640 acres must be included in the calculations of chargeable acreage while they were pending, and, if Shell exceeded its permissible chargeable limit by its group filing of April 30, every offer in that group should have been rejected. If all offers in Shell's group filing were rejected, the subject offers of this appeal would have received top priority and, as appellant has asserted, the rejections of his offers would have been erroneous.

In its reply to appellant's statement of reasons for appeal, Shell argues that its offers which violated the "640-acre rule" were not chargeable because those offers were null and void.

[1] The Mineral Leasing Act of 1920, 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, whether acquired directly from the Secretary under this chapter or otherwise, oil and gas leases (including options for such leases or interests therein) on land held under the provisions of this chapter exceeding in the aggregate two hundred forty-six thousand and eighty acres in any one state other than Alaska.

2/ BLM listed the following as later rejected under the 640-acre rule: OR 26511 - 120 acres; OR 26512 - 480 acres; OR 26518 - 80 acres; OR 26527 - 79.47 acres; total - 759.47 acres.

The implementing regulation, 43 CFR 3101.1-5, includes acreage in applications and offers for oil and gas leases in the total holdings calculated. ^{3/}

Departmental regulation further provides: "For tracts not subject to the simultaneous filing procedures of Subpart 3112, if he files a group of applications or options or offers or interests in options at the same time, any one of which causes him to exceed the acreage limitations, the entire group [of] applications, offers, options, or interests in options will be rejected." 43 CFR 3101.1-5(c)(3)(ii) (emphasis added). Thus, if any one of the offers on April 30, 1981, caused Shell to exceed the maximum limit for acreage holdings, the entire group should have been rejected. The first issue here, then, concerns whether Shell's acreage account should have been charged for acreage in offers later rejected under 43 CFR 3110.1-3(a), the 640-acre rule.

[2] 43 CFR 3110.1-3(a) reads in part: "No offer may be made for less than 640 acres except where the offer is accompanied by a showing * * *." Violation of the 640-acre rule results in rejection of the offer and loss of priority. See James M. Chudnow, 65 IBLA 64 (1982); Douglas R. Willson, 52 IBLA 246 (1981). The rule is applied when an offer is adjudicated. All else being regular, BLM must take action to accept the offer if it determines a proper showing has been made under section 3110.1-3(a), or to reject the offer if it determines the showing is insufficient. Thus the acreage of an offer is not the sole criterion against which the rule is applied. BLM must adjudicate such an offer with regard for the exceptions to the rule. ^{4/} Until a determination has been made, an offer is not simply null and void, but must be considered a pending offer.

In computing an offeror's chargeable acreage, it is necessary to include all pending offers filed over-the-counter for noncompetitive oil and gas leases. In an early Departmental decision where chargeable acreage was addressed, the amount was calculated, "on the assumption that no additional offers were filed, that no pending offers were rejected * * *." Albert C. Massa, 63 I.D. 279, 285 (1956) (emphasis added). An offer is "pending" from its inception until the rendering of a determination. See Black's Law Dictionary, 1291 (4th ed. 1968). Such a determination includes rejection, after which the rejected acreage is no longer chargeable.

The Department, at one time, considered all offers for noncompetitive oil and gas leases as chargeable to the holdings amounts. In Melvin A. Brown, 69 I.D. 131 (1962), the Department held that offers filed under the _____

^{3/} Inclusion of offers for over-the-counter noncompetitive oil and gas leases in acreage holdings computations is a well established practice of the Department. See Shell Oil Co., A-30575 (Oct. 31, 1966); Solicitor's Opinion, M-36670, 71 I.D. 337 (1964); 2 Rocky Mountain Mineral Law Foundation, Law of Federal Oil and Gas Leases, § 25.7 (Supp. 1980).

^{4/} BLM Manual, Vol. VI Minerals, 2.3A (1954) reads: "All lease offers for less than 640 acres, or the equivalent of a section, should be considered under the regulation * * * and if allowable, copies of the serial register should be sent to the Geological Survey for a structural report."

public drawings process were chargeable, even after the drawing had occurred and the offeror was unsuccessful. That decision was reversed in Brown v. Udall, 335 F.2d 706 (D.C. Cir. 1964). The court held that neither the statute nor the regulation justified the chargeability of an unsuccessful simultaneous offer before or after the public drawing.

The Department, however, has continued to hold that a "regular" lease offer, filed on an over-the-counter basis, is chargeable. The rationale for the distinction is that the offeror gains control over the acreage of an over-the-counter offer. Solicitor's Opinion, M-36670, 71 I.D. 337 (1964); Shell Oil Co., A-30575 (Oct. 31, 1966). 43 CFR 3101.1-5(a) reads in part: "No person, association, or corporation shall take hold, own, or control at one time oil and gas leases * * * or offers therefor * * * for more than 246,080 acres in any one State." (Emphasis added.) It is appropriate that land embraced in an offer for a noncompetitive oil and gas lease should be charged against the offeror when the lease is to be issued on a first come, first served basis. Although no lease has been issued, the offeror has a measure of control over the acreage embraced in his offer. By filing his offer he has obtained priority and has precluded anyone else from obtaining a lease until there has been some disposition of his own application. Solicitor's Opinion, M-36670, supra at 338. If no limitation were imposed on the acreage that could be included in offers, any offeror could file for more acreage than he could receive in leases and then pick and choose what acreage he wanted. Melvin A. Brown, supra at 133.

As pending offers, Shell's applications for leases of less than 640 acres remained fully chargeable to its holdings until such time as they were rejected under 43 CFR 3110.1-3(a). It is unfortunate that Shell's chargeable holdings were miscalculated. However, Shell, and not BLM, is responsible for the acreage amount for which it submits offers. Shell filed its offers because it believed they had value. Shell cannot argue the genuineness of its offers on the one hand and deny their effectiveness and value on the other. It is unlikely Shell would have refused the leases if BLM had issued them. If Shell had truly considered certain of its offers to be of no avail, it could have refrained from submitting them and avoided a lock on the land pending administrative determination of the offers.

We see no reason why confusion should result. An offeror knows, or certainly should know, how much acreage it applied for. It may at any time withdraw previous offers, but while it maintains any offer, it is chargeable with acreage included therein.

[3] The Department, until January 1959 (Circular 2009, 24 FR 281 (Jan. 13, 1959)), accorded offerors a grace period of 30 days within which to reduce their holdings in leases and lease offers upon a determination that they held excess acreage. 43 CFR 192.3(c) (1954). Because of abuses and administrative inconveniences, the grace period was eliminated. Melvin A. Brown, supra at 133. When Shell filed its offers together, causing it to exceed the maximum acreage for holdings, BLM was not permitted to afford it an opportunity to reduce its interests to conform to the limitation. BLM was required to reject in its entirety the group of offers which caused the excess. See Edwin G. Gibbs, 68 I.D. 325, 327 (1961). Thus, Shell was not qualified to maintain its offers when appellant filed his.

[4] Finally, Shell argues in its reply to appellant's statement of reasons that it did not exceed the maximum allowable acreage regardless of the interpretation of the 640-acre rule as applied to the acreage calculations. Shell explains that its offers included 733.02 acres within a National Park or Monument and 3 lots within an Indian Reservation. In addition, there were various offers filed for lands in which it now claims the United States had no title. Shell contends that these several offers were not chargeable to its acreage calculations and when all calculations are made, it did not exceed the acreage limits. As explained, the total acreage in an offer is considered chargeable acreage. The reasons for chargeability of an offer have been expressed above. Those reasons extend to Shell's argument here. Until BLM adjudicates the offers and officially ascertains that the lands are not available and its offers are rejected, Shell is chargeable for the acreage for which it has applied.

According to BLM's conclusions found in its May 7, 1982, letter, Shell was accountable for 245,478 acres in outstanding leases and offers. After adding to that figure the 759.47 acres BLM did not include because of the 640-acre rule, Shell had exceeded the maximum allowable acreage by its group filing of April 30, 1981. Moreover, this excess is increased by the acreage not charged to Shell by BLM because the land was not available. ^{5/}

Counsel for appellant herein has filed with the Board a withdrawal of these appeals on October 26, 1982. A copy of a withdrawal of appellant's oil and gas lease offers which were the subject of these appeals filed with BLM on October 22, 1982, has been forwarded by BLM to the Board.

[5] Shell's lease offers in conflict with those of appellant should have been rejected as Shell was not the first-qualified applicant therefor and, accordingly, appellant was entitled to appeal rejection of his offers and seek administrative cancellation of the leases erroneously issued to Shell. The Secretary of the Interior is bound by his regulations and a junior offeror is entitled to seek administrative cancellation of a lease issued to a senior offeror and to have the lease issued to itself where the lease issued to the senior offeror in violation of the regulations. Boesche v. Udall, 373 U.S. 472 (1963). However, withdrawal of appellant's lease offers removed his standing to seek this relief.

The general rule is well established that an appeal is subject to dismissal where either the appeal or the application which is the subject of

^{5/} It further appears that BLM did not charge Shell for the acreage of certain acquired lands included in the Apr. 30, 1981, filings. If those acquired lands were listed in offers filed pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1976), the acreage would not be chargeable. However, if the acquired lands were included in the Shell offers filed for public lands under the Mineral Leasing Act of 1920, that acreage would also be chargeable for so long as the offers for such lands remained pending. However, we need not resolve that question in order to decide this appeal.

the appeal is withdrawn by the appellant. We recognize that the authority of the Board to consider an appeal, in the exercise of the delegated authority of the Secretary to decide finally for the Department appeals from decisions involving the public lands and their resources, may be exercised to correct error even where the appeal is otherwise subject to dismissal. See A. W. Schunk, 16 IBLA 191, 197, 81 I.D. 401, 405 (1974) (Stuebing, A. J., concurring in part and dissenting in part). However, as the decision below indicates, certain of the Shell offers were defective and thus could not result in issued leases. There is nothing in the record before the Board to indicate that Shell actually has been issued leases in excess of its statutory acreage limitation. In the absence of any statutory violation and of any conflicting applicant whose rights have been adversely affected, the appeals are appropriately dismissed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeals are dismissed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

APPENDIX

<u>Docket No.</u>	<u>Application Offer No.</u>	<u>Filed</u>	<u>Offer Rejected</u>	<u>Acres in Rejection</u>
IBLA 82-1104	OR 34337	Mar. 11, 1982	July 6, 1982	2241.25
IBLA 82-1189	OR 34331	Mar. 11, 1982	July 16, 1982	2238.50 A
IBLA 82-1320	OR 34328	Mar. 10, 1982	July 22, 1982	5592.52 B
IBLA 82-1321	OR 34344	Mar. 11, 1982	July 22, 1982	2761.68 C,D
IBLA 82-1322	OR 34312	Mar. 10, 1982	July 16, 1982	2386.70
IBLA 82-1329	OR 34309	Mar. 10, 1982	Aug. 4, 1982	2722.75

<u>Offer No.</u>	<u>Shell's Lease Offer No.</u>	<u>Effective</u>	<u>Lease</u>	<u>Docket No.</u>
OR 34337	OR 26552	July 1, 1982	2241.25	IBLA 82-1104
OR 34331	OR 26547	June 1, 1982	2238.50	IBLA 82-1189
OR 34328	OR 26530	Aug. 1, 1982	5592.52	IBLA 82-1320
OR 34344	OR 26532	Aug. 1, 1982	2801.68	IBLA 82-1321
OR 34312	OR 26535	July 1, 1982	2386.70	IBLA 82-1322
OR 34309	OR 26549	July 1, 1982	2722.75	IBLA 82-1329

- A. Lease issued to Pritchard, effective August 1, 1982, 200 acres.
- B. Lease issued to Pritchard, effective August 1, 1982, 400 acres.
- C. Rejected in part: prior offer. Lease issued to Van Bullock,
OR 28665, effective June 1, 1982, 80 acres.
- D. Lease issued to Pritchard, effective August 1, 1982, 196.82 acres.

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the proposition that withdrawal of an appeal does not require the Board to dismiss the appeal I think that, under the facts presented herein, the appeal should clearly be dismissed. I think the majority has shown, beyond any doubt, that BLM should have rejected Shell's offers under 43 CFR 3101.1-5(c)(3)(ii). The fact remains, however, that BLM did not so act. Rather it caused certain leases to be issued to Shell despite the pendency of conflicting offers.

It is important to emphasize two facts: (1) The issuance of these leases adversely and improperly affected the priority rights of other offerors who had filed for the same land; (2) the leases, as issued, did not result in Shell owning or controlling lease acreage in excess of the statutory limitation. What has basically resulted, therefore, is a situation where there is no outstanding violation of either the statute or regulations but where there has been an injury to a third party which we are charged to redress. Pritchard, an aggrieved third-party, properly sought review of this matter before the Board to vindicate his rights. Pritchard, through his own volition, now seeks to withdraw his appeal. By doing so he has waived his right to seek redress of his injury before the Board and has acquiesced in the issuance of the leases in question to Shell. Were we faced with merely pending offers, I would agree with the dissent that we should not grant this withdrawal since Shell would still be in violation of 43 CFR 3101.1-5(c)(3)(ii). But we are, instead, faced with issued leases and the applicable regulation is not 43 CFR 3101.1-5(c)(3)(ii), but rather 43 CFR 3101.1-5(c)(2), which is directly concerned with presently existing excess acreage in issued leases. There has, however, been no violation of this regulation. 1/ There is, therefore, no public interest sufficient to justify denial of the withdrawal of the appeal and the concomitant cancellation of the leases at issue. See Christiansen Oil, Inc., 37 IBLA 52, 58-61 (1978) (Stuebing, A.J., dissenting).

Because I feel there is clearly no sufficient reason for this Board to maintain the instant appeal, I concur in its dismissal.

James L. Burski
Administrative Judge

1/ The very existence of this regulation, I might point out, presupposes that BLM has failed to adhere to the other regulatory requirements concerning excess acreage determinations, since those clearly require the rejection of any offer or assignment which would cause a party to exceed the acreage limitation and, thus, there should never be excess acreage under lease.

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

Although in complete accord with the discussion of the facts and applicable law recited in the majority opinion, I must dissent from the disposition of the case; i.e., the dismissal of the appeal on the ground that appellant desired that it be withdrawn.

The appeal had been fully reviewed and all issues resolved by the three administrative judges who constituted the original panel; they were in unanimous agreement that BLM had erred and that the subject Shell leases had been improperly issued in response to offers which should have been rejected; a draft opinion had been authored, typed, approved by the panel, circulated to the other administrative judges of the Board without eliciting comment, and the opinion had been placed in line for final execution when Pritchard withdrew his appeal. When a majority of the three-judge panel elected not to dismiss the appeal, the entire Board was convened and voted to consider the case en banc. Although the entire Board was unanimous in concurring with the findings of the original panel, a majority held for dismissal of the appeal based upon Pritchard's withdrawal.

The majority opinion acknowledges that, "We recognize that the authority of the Board to consider an appeal, in the exercise of the delegated authority of the Secretary to decide finally for the Department appeals from decisions involving the public lands and their resources, may be exercised to correct error even where the appeal is otherwise subject to dismissal." Notwithstanding that recognition, the majority elected to dismiss this case. In my view that action is inappropriate.

First, the attempted withdrawal of the appeal, being made after the case had progressed to that stage, was untimely. This is reason enough to refuse to dismiss. See Appeal of Triangle Construction Co., 71 I.D. 73 (1964).

More importantly however, the case has broader significance than the rejection of Pritchard's lease offers or portions thereof. The issuance of an unknown number of leases to Shell, in violation of statute and regulation, is a matter of concern in the general public interest, and has implications for other would-be lessees of the lands wrongly leased to Shell.

This Board has previously held that there must be a determination that no interest of the United States will be prejudiced thereby before relinquishing its jurisdiction of an appeal. Jewell S. Lloyd, 4 IBLA 327 (1972).

Similarly, where the appellant has requested dismissal, the Board has allowed dismissal only after finding that "no reason for maintaining the action is apparent." William L. Maddox, IBLA 82-1057 (Dismissed by Order, Dec. 22, 1982); Texaco Inc., 1 IBLA 477 (1971); Charles R. Jolley, 1 IBLA 475 (1971); Peter G.S. Mero, 1 IBLA 424 (1971). This is consistent with the appellate practice of other OHA boards of appeal. Estate of Daisy Joe Sam, 9 IBIA 66 (1981); Gambill and Drummond v. Acting Deputy Assistant Secretary -- Indian Affairs (Operations), 9 IBIA 195 (1982); The Pittston Company v. Office of Surface Mining Reclamation Enforcement, 4 IBSMA (1982); Nuway Coal Co. v. Office of Surface Mining Reclamation Enforcement, 3 IBSMA 366 (1981). Where

an interest of a third party might be prejudiced by the dismissal of an appeal it has been held that a "claimant does not have the absolute right to withdraw his appeal unilaterally." Joe Leon Williams II, 5 Teton 26 (1980), citing Rule 41(a) of the Federal Rules of Civil Procedure by way of illustration.

Finally, by allowing the appeal to be dismissed, the Board may have compromised the position of Pritchard and/or Shell. We have no way of knowing whether Pritchard's withdrawal was motivated by some arrangement with Shell, but it is apparent that by so doing, Pritchard intended that Shell retain the leases in question. A disposition of the appeal on its merits, rather than procedurally, would have been a cleaner, more definitive way for the Board to resolve the matter.

Edward W. Stuebing
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

