

**Editor's note: Appealed -- reversed, Civ.No. NC-83-0097A (D.Utah Aug. 29, 1984); dismissed, No. 84-2528 (10th Cir. Jan. 14, 1985)**

NEIL HIRSCH

IBLA 82-577

Decided January 28, 1983

Appeal from decision of Utah State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application. U-49614.

Affirmed.

1. Evidence: Presumptions -- Oil and Gas Leases: Applications:  
Attorneys-in-Fact or Agents -- Oil and Gas Leases: Applications:  
Drawings

Where a simultaneous oil and gas lease application was rejected because BLM asserts that the applicant's filing service failed to provide a list of names and addresses of participating applicants for whom it served as agent, as required by 43 CFR 3102.2-6(b) (1981), the legal presumption of regularity which supports the official acts of Government officers will not be treated as rebutted upon presentation of insufficient evidence to show that the list probably was received by BLM.

APPEARANCES: Malcolm M. Lawrence, Esq., East Rochester, New York, for appellant; Deborah Norwood, Esq., Midland, Texas, for Nolan Hirsch, second-drawn applicant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Neil Hirsch has appealed from a decision of the Utah State Office, Bureau of Land Management (BLM), dated February 8, 1982, rejecting his simultaneous oil and gas lease application, U-49614.

Appellant's application was drawn with first priority for parcel UT-8 in the July 1981 simultaneous oil and gas lease drawing. By letter dated

October 19, 1981, BLM forwarded oil and gas lease forms to appellant for signing and required payment of the first year's advance rental. In addition, BLM stated:

If assistance has been received from, or an agreement has been made with, any person or entity in connection with this filing, a statement describing such assistance or agreement must be submitted. If a written contract exists, a copy must be submitted. If there has been no assistance, agreement or contract, a statement to that effect must be submitted.

On October 30, 1981, appellant submitted the signed lease forms and the first year's advance rental payment. By letter dated November 3, 1981, BLM reiterated its requirement that appellant submit evidence of an agreement with a person or entity which assisted in the simultaneous filing or a statement that no such agreement existed. On November 16, 1981, appellant submitted a copy of a "Subscription Agreement" with Eastern Investors Geological Services, Inc. (Eastern), dated December 1, 1980, under which Eastern agreed to assist appellant in connection with the Federal simultaneous oil and gas leasing program.

In its February 1982 decision, BLM rejected appellant's application because he had failed to comply with 43 CFR 3102.2-6 regarding disclosure of any agreement or understanding with an agent, where the applicant received the assistance of that agent in connection with the simultaneous filing and the agent is in the business of providing assistance. Departmental regulations provide three alternative methods of complying with this requirement of disclosure. Arthur H. Kuether, 65 IBLA 184 (1982). There seems to be no dispute that appellant has sought to comply with the second alternative, provided by 43 CFR 3102.2-6(b), which requires that an applicant submit with his lease application a copy of a "uniform agreement" entered into between several applicants and an agent. In addition, 43 CFR 3102.2-6(b) requires that:

A list setting forth the name and address of each such offeror or applicant participating under the agreement shall be filed with the proper Bureau of Land Management office not later than 15 days from each filing of offers, or applications if leasing is in accordance with subpart 3112 of this title.

The February 1982 BLM decision indicated that, while the State Office had timely received a copy of a "uniform agreement" between Eastern and its clients, this submission was not accompanied by a list of clients "participating under the agreement."

By letter dated February 18, 1982, appellant submitted a list of participating clients, contending that it had been "filed with the July, 1981 filings." On March 3, 1982, BLM responded that it had "thoroughly rechecked" the July 1981 simultaneous filings, but that the client list "was not located."

In his statement of reasons for appeal, appellant asserts that Eastern mailed a list of participating clients along with drawing entry cards, a

check for the entry fees, and a copy of the blank subscription agreement in connection with the July 1981 simultaneous filing. Appellant submits the affidavit of Diane Kazak, the "sole employee" of Eastern responsible for 43 CFR 3102.2-6(b) filings, dated April 2, 1982, in which she states that she mailed the above-described material to BLM "on or about July 15, 1981." Appellant contends that proof of mailing gives rise to a presumption of receipt and that "[t]he mere inability to locate a mailed document does not overcome the presumption that it was received, nor does it give rise to a presumption that it was not initially received" (Statement of Reasons at 3). Appellant cites Jones v. United States, 226 F.2d 24 (9th Cir. 1955), and In Re Nimz Transportation, Inc., 505 F.2d 177 (7th Cir. 1974), in support of his argument.

Appellant also recognizes that there is a presumption of regularity which supports the official acts of public officers in the proper discharge of their official duties. See United States v. Chemical Foundation, 272 U.S. 1 (1926); Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976); H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981). In accordance with that presumption, we have long held that in the absence of substantial corroborating evidence to the contrary, it will be presumed that the absence of a document from the case file establishes that the document was never filed, rather than that it was lost or misplaced by BLM. Elizabeth D. Anne, 66 IBLA 126 (1982); H. S. Rademacher, *supra*, and cases cited therein. Appellant argues that, even if we apply a presumption of regularity, he has overcome it. Appellant relies on the fact that proof of mailing was furnished by a "financially disinterested employee of Eastern," that BLM, on October 19, 1981, required appellant to execute the lease forms and submit the first year's advance rental in accordance with 43 CFR 3112.4-1(a) (applicable to the "first qualified applicant"), and that appellant was advised that his file was in proper order in a January 8, 1982, telephone conversation with a BLM employee.

We have noted, in a number of cases, that various presumptions of differing import may come into play when an appellant alleges timely transmittal of a document but BLM has no record of its receipt. On the one hand, there is the presumption of regularity. On the other hand, there is the presumption that mail properly addressed and with adequate postage affixed, and deposited in an appropriate receptacle, is duly delivered. In Bernard S. Storper, 60 IBLA 67 (1981), we adverted to these potentially conflicting presumptions and noted that the presumption of regularity must, for reasons both of public policy and burden of proof analysis, be accorded priority over the presumption that mail correctly addressed and deposited is timely received. See also H. S. Rademacher, *supra*.

In any event, however, the presumption that mail properly addressed is duly delivered is not involved in the instant case. This presumption is itself based on the presumption of regularity since "it is presumed that the officers of the government [in this case, postal workers] will do their duty and the usual course of business." Rosenthal v. Walker, 111 U.S. 185, 193-94 (1884) (quoting Huntley v. Whittier, 105 Mass. 391). But there is no question in the instant case that the properly addressed envelope was received. This is clearly admitted. Rather, the question is what the envelope contained, and, in this regard, the presumption of regular mail delivery simply

does not come into play. See R. E. Frasch, 69 IBLA 66 (1982). As the only presumption properly applicable herein is that which arises from the regularity attendant to the fulfillment by Government officers of their functions, it falls upon appellant to provide evidence to overcome this presumption.

While this poses a somewhat difficult burden, it is not impossible. Accordingly, we held, in Elizabeth D. Anne, *supra*, that the presumption of regularity was overcome where an appellant's statement that the list of participating clients was filed timely was corroborated by return receipt cards for three mailings in May 1981. In that case, while there was no evidence that the list was included in the mailings, we concluded that because there were a limited number of documents which the appellant's lease filing service had reason to file in May 1981, it was "more probable than not" that the list was among those deliveries. Elizabeth D. Anne, *supra* at 128. This was held sufficient to overcome the presumption of regularity. Similarly, in L. E. Garrison, 52 IBLA 131 (1981), an appellant's assertion that the necessary document had been filed with BLM was corroborated by an affidavit of a subsequent telephone conversation with a BLM employee who opened the mail during the conversation and acknowledged that all of the required documents were there. This phone conversation was, in turn, documented by submission of a telephone bill reflecting the call.

In the present case, appellant asserts that the required document was mailed timely, but presents no corroborating evidence that it was included in the July 1981 mailing and received by BLM. Eastern clearly mailed something in July 1981 since BLM received the uniform agreement. However, in view of the fact that 43 CFR 3102.2-6(b) allows an additional 15 days for submission of the list of participating clients, there would be no reason to assume that the list was included in the July 15, 1981, mailing. The uncorroborated statement of Eastern's employee that she placed the list with the other documents is not sufficient by itself, even where placed in affidavit form, to overcome the presumption of regularity. 1/ H. S. Rademacher, *supra*; John Walter Starks, 55 IBLA 266 (1981).

Nor can we accord any weight to the fact that BLM required appellant to execute lease forms and submit the first year's advance rental. Appellant's argument on this point obscures the fact that appellant was specifically required, in that notice, to state whether or not he had received any assistance from any other party. On November 3, 1981, appellant was advised that while he had submitted the rental payment and the signed lease forms, he had failed to submit the statement as to any outside assistance. By letter of November 11, 1981, appellant advised BLM of his arrangement with Eastern and provided a copy of his contract. Until this submission was received on November 16, 1981, however, in the absence of a list of clients from Eastern, BLM had absolutely no possibility of knowing that appellant had received the assistance of anyone. The act of eliciting this information clearly could not foreclose BLM from acting on it.

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1/ Contrary to appellant's assertions on appeal, Diane Kazak, the employee of Eastern who was charged with filing the requisite documents, can scarcely be deemed a "disinterested" individual.

Finally, appellant attempts to rely on the fact that a BLM employee assured appellant's secretary, Donna L. Weider, that his file was "in proper order on January 8, 1982" (Statement of Reasons at 6). However, this is not what appellant's secretary was told. In an affidavit, dated April 2, 1982, Ms. Weider states:

I telephoned BLM on January 8, 1982, and spoke with a BLM representative whom I recall to be one Dolly Willis. In that conversation with Ms. Willis, I asked why Hirsch's lease had not issued. I explained to her that Hirsch had received inquiries about the lease and that he was concerned about the failure to receive the actual lease. Ms. Willis assured me in that telephone conversation that the only reason that the actual lease had not issued was due to a clerical back up at BLM because of the holiday vacations during November and December, 1981. When I asked Ms. Willis if anything was wrong, she assured me that if anything was wrong, Hirsch would have heard about it earlier. [Emphasis added.]

We do not construe this statement as indicating that the BLM employee, after reviewing the case file, had determined that all the required documents had been filed timely. Rather, it was a supposition based on the nonoccurrence of an event. The statement simply does not corroborate appellant's assertion that BLM received the required document. We distinguish the case of L. E. Garrison, *supra*, where the appellant's assertion was corroborated by an affidavit of a subsequent telephone conversation with a BLM employee who opened the mailing and acknowledged timely receipt of all of the required documents.

On February 26, 1982, the Department published interim final rulemaking which revised 43 CFR Subpart 3102, effectively eliminating the requirement to file the agent qualifications found in 43 CFR 3102.2-6. See 47 FR 8544 (Feb. 26, 1982). Appellant recognizes that the Board may not apply an amended regulation to a pending matter, such as this, where there are the intervening rights of the second- and third-priority applicants. However, appellant argues that this is "an unusual fact situation" and he should have the benefit of the regulatory change. He notes that the preamble to the interim final rulemaking provides:

Pending applications and offers for which there are no junior conflicting applications or offers pending on this date will not be subject to rejection for any failure to comply with the rules in Subpart 3102 of Title 43 of the Code of Federal Regulations in effect at the time of filing.

Id. Appellant argues that the intent of the amended regulation, *i.e.*, to benefit "all pending applications," would be defeated if the change was not applicable to simultaneous oil and gas lease drawings which took place prior to the amendment, and that the next drawn applications have not been determined to be "junior conflicting applications," within the meaning of Ballard E. Spencer Trust, Inc., 18 IBLA 25, 27 (1974), *aff'd*, Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976) ("in acceptable form"). We disagree.

We have long held that where there are intervening rights, a first-drawn applicant may not have the benefit of an amended regulation. See, e.g., Arthur H. Kuether, supra. Therefore, where applications had been accorded priority as a result of a simultaneous drawing, the amended regulation could not be applied. In order to be considered "junior conflicting applications," the next-drawn applications in the July 1981 simultaneous drawing for parcel UT-8 only had to be accorded a lower priority than appellant's application. The language in the preamble to the interim final rulemaking would, therefore, be limited to those instances where no other simultaneous applications were filed for a particular parcel.

The decision in Ballard E. Spencer Trust, Inc., supra, does not compel a different result. The discussion in that case, cited by appellant, refers only to the manner in which a second- or third-priority applicant succeeds to the status of first-qualified applicant. <sup>2/</sup> The qualifications of the next-drawn applicants are not determined until after BLM has adjudicated the rights of the first-priority applicant. It is the right of the second-priority applicant to proceed to have his or her application adjudicated which prevents application of the regulatory change to the instant appeal.

In the absence of evidence of compliance with 43 CFR 3102.2-6, BLM properly rejected appellant's application. Patricia C. Alker, 67 IBLA 214 (1982).

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

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James L. Burski  
Administrative Judge

We concur:

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C. Randall Grant, Jr.  
Administrative Judge

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Will A. Irwin  
Administrative Judge

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<sup>2/</sup> The full discussion reads:

"Under the simultaneous filing procedure for lands to be leased noncompetitively, all offers for the same land are considered to have been filed simultaneously, and priorities are determined by a drawing. If the first-drawn offer is not acceptable by reason of some failure to comply with the regulation it cannot be accorded a priority as of the time it was officially filed. The next drawn offer in acceptable form earns priority as of the date and time of the simultaneous filing, and that offeror is first qualified as a matter of law to receive the lease."

Ballard E. Spencer Trust, Inc., supra at 27 (emphasis in original).

