

ANNE B. AHRENS

IBLA 82-1339

Decided February 3, 1983

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application. ES 30160.

Reversed and remanded.

1. Oil and Gas Leases: Applications: Drawings

A simultaneous oil and gas lease drawing is considered fair only if each applicant has had an equal chance of winning. Where the Bureau of Land Management by its own error creates circumstances whereby the reselecion procedures of 43 CFR 3112.3-2 cannot be followed, an alternate reselecion that preserves the rights of all applicants under the circumstances will be upheld.

APPEARANCES: James W. McDade, Esq., and Jason R. Warran, Esq., Washington, D.C., for appellant; Robert J. Uram, Esq., Office of the Solicitor, Department of the Interior, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Anne B. Ahrens has appealed the decision of the Eastern States Office, Bureau of Land Management (BLM), dated July 30, 1982, rejecting her simultaneous oil and gas lease application for parcel ES-197 because the reselecion for the parcel, held during the September 1981 drawing after an error in procedures was discovered, was contrary to 43 CFR 3112.3-2.

The parties agree as to what happened at the September drawing held at the Eastern States Office on October 20, 1981. The application cards for parcel ES-197 were inadvertently divided into two separate lots, one of which was labeled ES-197 and one of which was labeled ES-198. The cards for parcels ES-198 and ES-199 were then erroneously labeled as ES-199 and ES-200. BLM proceeded to draw three cards from lot ES-197 and the erroneously labeled lot ES-198, as well as the lots labeled ES-199 and ES-200. BLM discovered its error before completing the entire drawing and corrected its announcement of winning applications for parcels ES-198 and ES-199. BLM then decided to have a reselecion of the applications for parcel ES-197 by combining the cards in the lot labeled ES-198 and omitted from the ES-197 drawing with the cards properly included in the ES-197 drawing. Appellant's application card

received first priority from this reselection. BLM then sent to her lease ES-30160 for execution and a request for rental that she timely submitted.

Upon further consideration BLM determined that its procedures in reselecting winners for parcel ES-197 were not consistent with 43 CFR 3112.3-2 governing reselections 1/ and concluded that a lease could not issue on a simultaneous application that is drawn improperly.

In her statement of reasons, appellant contends that 43 CFR 3112.3-2 pertains when a drawing is held from which one or more of the applications for a parcel are omitted but is inapplicable when the applications for a parcel are divided into separate groups, from each of which a drawing was held because no applications are actually omitted from a drawing. She urges that the drawing for one group of the ES-197 applications had no more legitimacy than did the drawing for the other group and BLM would have had no basis to choose which group would be considered omitted if it had attempted to follow the reselection procedures in 43 CFR 3112.3-2. She argues that the only course open to BLM was that which it followed -- recognizing the two drawings as nullities and starting over with all the applications in a new drawing. Appellant argues that the effect of BLM's decision will be to substitute a new set of applicants for the parcel when it is reposted. This she contends will be unfair to her and those who filed for the parcel the first time while benefitting anyone who had failed to file.

Counsel for BLM urges that the proper procedure for BLM to have followed was that in 43 CFR 3112.3-2 but BLM could not do so because it failed to note the names of the applicants whose cards were drawn from the lot of cards correctly identified as ES-197 and to make a list of the omitted cards. Thus, counsel urges that BLM should have voided the proceedings at that point because BLM is not free to disregard established selection procedures and set up an alternative procedure as it did here. Counsel concludes that BLM's decision to void the drawing is not unfair because rather than favoring one applicant over another, BLM is treating all applicants equally by returning their filing fee and letting them compete equally when the land is reoffered.

1/ 43 CFR 3112.3-2 states:

"§ 3112.3-2 Reselection procedures.

If a properly filed application is omitted from the selection process, a new selection shall be held. An omitted application may not be withdrawn by the applicant. The new selection shall consist of the omitted application(s) and the number of blank applications equal to the number of applications which were included in the first selection. Such selection shall be conducted in the same manner as the original selection. If the omitted application is not selected first, second or third priority in the new selection, the priority established in the original selection shall stand. However, if an omitted application is selected in the first, second or third priority, it shall displace the application selected with the same and lower priorities in the original selection. No applications chosen in the first selection shall be eliminated from priority as a result of the selection of an omitted application in the reselection. The number of priorities shall be increased as necessary."

[1] Fundamental to the simultaneous oil and gas filing system is the premise that a drawing is considered fair only if each appellant has had an equal chance of winning, and for that reason drawings have been canceled where a drawing card has been omitted. Milton D. Feinberg, 37 IBLA 39, 43, 45, 85 I.D. 380, 382, 383 (1978); Verna C. Bucy, 21 IBLA 155, 156 (1975). Thus, when BLM discovered its initial error in this case it was required to void the drawing for parcel ES-197 because all of the appropriate application cards had not been included and it should have followed the procedures for reselection set out in 43 CFR 3112.3-2. Having not done so, and further having created circumstances such that it is impossible to now do so, we find that BLM should not have voided its alternative drawing simply because it did not comport with 43 CFR 3112.3-2 but rather should have determined whether under the circumstances, its alternative procedure protected the rights of all the applicants to have an equal chance of winning. ^{2/} Once BLM failed to preserve a record of the winning applicants in the original ES-197 drawing, the best BLM could do was to afford those applicants the same chance again to compete equally with the remaining applicants. This, we find, BLM did. We agree with appellant that voiding the redrawing and reposting the parcel in these circumstances is not fair to the original applicants. Whereas all the applicants who file for the reposted parcel would have an equal chance at winning, not all of the original applicants may be able to participate or the pool might include more applicants, thus lessening the probability that the original applicants could win.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Eastern States Office is reversed and the case remanded for issuance of the lease to appellant, all else being regular.

Will A. Irwin
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge

^{2/} As counsel for BLM points out, BLM is not free to disregard established selection procedures. This is not the case, however, as in Milton D. Feinberg, supra; On Reconsideration, 40 IBLA 222, 86 I.D. 234 (1979), where BLM had instituted a change in procedure generally that was inconsistent with established Departmental policy and regulations and that the Board found to be arbitrary and capricious. This case must be viewed in its own circumstances; that is, since BLM, through its own error, was unable to follow the regulatory procedure, it must act in a way that is not arbitrary or capricious and that preserves the rights of the applicants.

