

BERNARD KOSIK

IBLA 83-71

Decided February 4, 1983

Appeal from a decision of the Eastern States Office, Bureau of Land management, canceling lessee's interest in oil and gas lease, ES 20769.

Affirmed.

1. Oil and Gas Leases: Cancellation -- Oil and Gas Leases:
First-Qualified Applicant

Where a noncompetitive oil and gas lease has erroneously been issued to a party other than the first-qualified applicant, cancellation is mandatory.

2. Oil and Gas Leases: Bona Fide Purchaser

A bona fide purchaser must have acquired his interest in good faith, for valuable consideration, and without notice of a violation of Departmental regulation. The protection of a bona fide purchaser of an oil and gas lease applies only where consideration has been paid before notice of cancellation of the lease has been received by the lessor and has become part of BLM's records.

APPEARANCES: Bernard Kosik, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Bernard Kosik appeals a decision of the Eastern States Office, Bureau of Land Management (BLM), dated September 28, 1982, canceling his oil and gas lease, ES 20769, for the stated reason that he was not the first-qualified applicant and issuance to him of the lease was contrary to law.

Parcel ES-74 was offered under the simultaneous filing procedures for drawing in January 1981. James M. Shields was selected with first priority and given a notice dated May 21, 1981, that the first year's rental and lease offer forms were due within 30 days. The notice advised Shields that failure to timely pay the rental due would result in automatic disqualification.

Subsequently, without notifying Shields that it considered his offer disqualified for failure to timely pay the first year's rental, BLM sent a notice dated October 30, 1981, to Kosik, who had been selected with second priority, that he was entitled to the lease offer for parcel ES-74. BLM's accounting records, however, indicate that Shields' rental payment had been timely received on June 17, 1981.

Oil and gas lease, ES 27069, was issued to Kosik effective March 1, 1982. It was after the lease had been issued that BLM's error in disqualifying Shields, the first-qualified applicant, was discovered. BLM notified Kosik in a decision dated September 28, 1982, that the lease issued to him was canceled.

Appellant, in his statement of reasons, argues against cancellation of his interest in the lease based on his assertion that there is no provision of law permitting unilateral cancellation of an issued lease and that, due to the lapse of time since execution of the lease, any right to cancel has been waived. He also alleges that he was not notified that he was not the first-qualified applicant or that cancellation of his interest was being considered. Appellant urges against cancellation because he had entered into a "sublease" which he contends has substantially altered his position in relation to the lease.

[1] Appellant questions the authority of this Department to cancel his interest in the issued lease. Ultimate control of the disposition of public lands and resources belong to Congress, and the responsibility of the Department of the Interior is to administer them in accordance with the dictates of the legislative branch. 30 U.S.C. § 226(c) (1976), which governs oil and gas leasing on lands not on the geologic structures of a producing oil and gas field, dictates that the person first making application for the lease who is qualified shall be entitled to receive it. Thus, the Department is restrictively authorized to issue a noncompetitive oil and gas lease only to the first-qualified applicant. See Udall v. Tallman, 380 U.S. 1 (1965). Shields was the first person making application by virtue of the simultaneous filing procedure, 43 CFR Subpart 3112. There is nothing on record disputing his qualification to receive the lease.

It is clear that the Secretary generally has the authority to cancel any oil and gas lease for violations of the Mineral Leasing Act and regulations thereunder, as well as for administrative errors committed before the lease was issued. Boesche v. Udall, 373 U.S. 472 (1963). The granting of a lease will create a property right, unless it is void from its inception. Where it is issued in violation of statute or Departmental regulation, to the prejudice of the rights of others, cancellation of a noncompetitive oil and gas lease for Federal lands is mandatory. McKay v. Wahlenmaier, 226 F.2d 35 (1955).

Several of appellant's other arguments express concepts contrary to well-established rules of this Department. The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or by their laches, neglect of duty, failure to act, or delays in the performance of their duties, nor can reliance upon information or opinion of any officer, agent, or employee, or on

any records maintained by land offices, operate to vest any right not authorized by law. 43 CFR 1810.3(a), (c); Virgil V. Peterson, 66 IBLA 156 (1982). Due process does not require notice and a right to be heard prior to the initial decision in every case where an individual may be deprived of property so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final. Francis Skaw, 63 IBLA 235 (1982); Old Hundred Gold Mining Co., 63 IBLA 56 (1982).

[2] Appellant claims that a negotiated transaction with a third party has altered the circumstances. While the fact that a lessee for oil and gas on Federal lands has entered into an agreement transferring an interest in the lease may have significance under certain conditions, those circumstances will not exonerate appellant's interests. Under 30 U.S.C. § 184(h) (1976), the interests of a bona fide purchaser may be preserved from cancellation, but not those of the transferring or assigning party whose interests have been disqualified.

In view of the authority delegated by the Secretary to correct errors in decisions appealed from and given appellant's version of the facts, we deem it appropriate to consider whether a bona fide purchaser exists. See 43 CFR 4.1; 43 CFR 3108.3(c). To qualify for protection, a bona fide purchaser must have acquired his interest in good faith, for valuable consideration, and without notice of violation of law or Departmental regulation. Winkler v. Andrus, 614 F.2d 707, 711 (10th Cir. 1980); Southwestern Petroleum Corp. v. Udall, 361 F.2d 650 (10th Cir. 1966). Bona fide purchaser protection applies only where consideration has actually been paid prior to actual or constructive notice of an outstanding interest or defect in title. Richard W. Eckels (On Reconsideration), 65 IBLA 76 (1982).

By an order dated September 13, 1982, we requested appellant to submit information which would clarify the nature and extent of this arrangement. ^{1/} The information supplied in response was sketchy and incomplete. The decision to cancel appellant's lease was issued September 28, 1982, and was received by appellant October 1, 1982. Appellant's own information reflects that, as of October 1, appellant and the third party involved had not yet finalized a binding agreement, and that valuable consideration had not been paid. On September 25, 1982, appellant had received a copy of the proposed agreement to sign. He then added provisions to that agreement and returned it to the third party on October 1, 1982, for acceptance and subsequent payment of consideration. Furthermore, the negotiated transaction was not a purchase or an assignment, but was a "sublease" for only 3 years of the lease's 10 years duration.

^{1/} An order dated Dec. 13, 1982, was sent to appellant requesting "that he further elucidate the nature and extent of the transaction, the dates and parties involved, and other relevant and pertinent information." A copy of the agreement was requested, if it was available.

The order stated that compliance with 43 CFR 4.413 was required. We have not received verification that service of appellant's documents upon adverse parties was timely performed. We also note that appellant failed to comply with 43 CFR 4.401(c), service of documents, when he filed his notice of appeal and statement of reasons. However, despite this failure to comply with procedural requirements, we find it more convenient to adjudicate this appeal based on the substantive issues presented.

Assignees, and those who obtain other interests in an oil and gas lease, are deemed to have constructive knowledge of all BLM records pertaining to the lease at the time of the acquisition of the interest. David A. Reece, 65 IBLA 2 (1982). The decision to cancel appellant's interest in the lease was received by appellant and had become part of BLM's record which was available to the public before the transaction was accepted and finalized. A purchaser who has not paid consideration before notice of an adverse right is received cannot claim priority thereto as a bona fide purchaser. Richard W. Eckels (On Reconsideration), *supra*. According to the facts and evidence provided, the third party in appellant's alleged transfer of an interest in the lease has failed to qualify for protection as a bona fide purchaser from BLM's decision to cancel appellant's interest.

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.

Edward W. Stuebing
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

