

MARCEANN KILLIAN

IBLA 83-840; IBLA 83-847; IBLA 83-978 Decided February 17, 1984

Appeal from decisions of the Montana and Wyoming State Offices, Bureau of Land Management, rejecting simultaneous oil and gas lease applications, M 58117, M 58138, M 58453, M 58514, M 58515, and W 85006, W 85213, and W 85259.

Affirmed.

1. Accounts: Fees and Commissions -- Oil and Gas Leases:  
Applications: Generally

Under 43 CFR 3112.2-2(c) (1982), BLM properly disqualifies simultaneous oil and gas lease applications submitted with uncollectible filing fees and requires payment of the debt as a condition of further participation in the simultaneous leasing program.

APPEARANCES: Omer L. Rains, Esq., and Robert M. Bramson, Esq., Sacramento, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Marceann Killian has appealed from various decisions of the Montana and Wyoming State Offices, Bureau of Land Management (BLM), rejecting simultaneous oil and gas lease applications that received first priority in the May 1983 simultaneous drawing. 1/ In each case, the application was disqualified pursuant to 43 CFR 3112.2-2(c) 2/ because the filing fee was paid with an uncollectible remittance. Each decision also informed appellant that she

1/ IBLA No. Application Date of Decision Parcel No.

83-840	W 85006	July 6, 1983	WY 290
"	W 85213	July 6, 1983	WY 497
	W 85259	July 6, 1983	WY 543
83-847	M 58117	June 20, 1983	MT 114
"	M 58138	June 20, 1983	MT 135
	83-978 M 58453	Aug. 8, 1983	MT 450
"	M 58514	Aug. 1, 1983	MT 511
"	M 58515	Aug. 1, 1983	MT 512

2/ The oil and gas leasing regulations were revised in their entirety effective Aug. 22, 1983. See 48 FR 33648 (July 22, 1983). The rule at issue in this case is found at 43 CFR 3112.2-2 of the revised regulations. For the purposes of this decision all references to the regulations are to those in the 1982 volume of Title 43 of the Code of Federal Regulations because those were the regulations in effect when the circumstances of this case arose.



would not be permitted to participate in any future selections until the debt due the United States was paid.

In her statement of reasons appellant explains that her applications for 465 parcels filed for the May simultaneous drawing were accompanied by six checks totaling \$34,875 covering the application fees of \$75 per parcel and that she had immediately available cash assets on the date the checks were written which were more than adequate to cover the checks. Much of the cash was in an account, held in joint tenancy with another person, from which it had to be transferred to her personal account. When she attempted to transfer the funds to cover the checks issued to BLM, the bank could not do so because the joint tenant had removed the funds without her knowledge. She was not informed of the problem until after the checks issued to BLM had been presented for collection. One check for \$7,575 was paid; the other five were returned for insufficient funds.

Following a demand letter from the Wyoming State Office, <sup>3/</sup> for the uncollected filing fees, appellant notified that office that she intended to pay the fees by June 30, 1982, and submitted \$50 to cover assessed service charges. The Wyoming State Office then issued what it considered to be its second demand letter informing appellant that "[t]he total amount due the Federal Government must be paid, not just the service charge, before any participation or selection for the simultaneous drawing can take place."

On June 20, 1983, the Montana State Office issued its decisions as to lease applications M 58117 and M 58138. Appellant reports that at this time in oral conversations with BLM officials she learned that payment of the uncollected fees would not cure the defect as to these applications but that she was expected to pay the total amount anyway.

Appellant also reports that the New Mexico State Office issued a decision announcing that her application for parcel NM 162 had received first priority, but no lease could issue until the uncollected fees were paid even though the filing fee for this application had been paid. Appellant paid the amount of the uncollected fees under protest on July 25, 1983, so that the lease for parcel NM 162 would issue.

Appellant argues that BLM's application of 43 CFR 3112.2-2(c) to her circumstances effectively results in the levying of a \$27,000 fine or a "double penalty" because her 350 applications were disqualified and she still had to pay the fees. She contends that such a result is inequitable and harsh when she in fact had the ability to pay the fees, the failure of the checks to be covered was unintentional, she was acting in good faith, and she informed BLM that she would pay the fees as soon as she knew of the problem and before learning whether she had received any first priorities. She urges that she should have been allowed to cure the insufficiency because although the checks were initially returned as uncollectible, they were not uncollectible in any real sense. In addition, she argues that no third party rights had intervened as BLM had not yet completed its drawings.

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<sup>3/</sup> Simultaneous oil and gas lease applications are filed with and the simultaneous selections are held at the Wyoming State Office, BLM. See 43 CFR 3112.2-1(g), 48 FR 33678 (July 22, 1983).

Alternatively, appellant suggests that the amount of the fees attributed to her disqualified filings less any actual costs to BLM should be returned to her because her situation is no different than the return of an application prior to selection for unacceptable remittance or insufficient fees under 43 CFR 3112.5(a).

[1] Departmental regulation 43 CFR 3112.2-2 governing filing fees for simultaneous oil and gas lease applications specifies that

(a) Each filing shall be accompanied by a \$75 filing fee.

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(c) An uncollectible remittance covering the filing fee(s) shall result in disqualification of all filings covered by it. In such a case, the amount of the remittance shall be a debt due to the United States which shall be paid before the applicant is permitted to participate in any future selection.

When a check is returned as uncollectible, the filings it relates to have not been accompanied by the required fee. Although the consequences of an uncollectible remittance as stated in paragraph (c) have only been stated in regulations since May of 1980 (see 45 FR 35164 (May 23, 1980)), it has long been the Department's practice to disqualify an offer or application or cancel a lease because the filing fee or rental remittance is uncollectible. See, e.g., Charles P. Ricci, 33 IBLA 288 (1978); Jonathan T. Ames, 33 IBLA 1 (1977); Charles F. Mullins, 6 IBLA 184 (1972). The only exception to this practice is where a bank's refusal to honor a check has been shown to be the result of bank error. Charles P. Ricci (On Reconsideration), 34 IBLA 186 (1978).

In the simultaneous oil and gas leasing program, the fee pays for entry and participation in a particular selection. When the amount of the remittance is insufficient to cover the number of filings submitted, BLM returns the application with the remittance; <sup>4/</sup> there is no entry and participation. Orderly administration of the program dictates that processing and priority selection not wait for thousands of filing fee checks to clear the banking system. Once a selection has taken place in which a filing covered by an uncollectible fee is included, a debt has accrued. The penalty provided by the regulations for submitting a payment that is uncollectible is disqualification of the filings it covered.

We have consistently stated that the requirements of the simultaneous oil and gas leasing program must be strictly complied with in order to ensure the integrity of each selection and protect the rights of all the applicants. Bonita L. Ferguson, 61 IBLA 178, 179 (1982); Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd, Ballard E. Spencer Trust, Inc. v. Morton, 554 F.2d 1067 (10th Cir. 1976). Only nonsubstantive errors may be excused. Amberex Corp., 78 IBLA 152 (1983). Failure to submit the proper accompanying remittances cannot be regarded as a nonsubstantive error, however. Although the results may appear harsh, if applicants were not required to submit a

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<sup>4/</sup> Currently, a copy of the application is returned. See 43 CFR 3112.3, 49 FR 2113 (Jan. 18, 1984).

collectible remittance at the outset, BLM could be continually faced with bad checks that are only paid if the applicant received priority on a desirable parcel. <sup>5/</sup> BLM is not required to take extra steps to protect those who do not carefully comply from the foreseeable consequences of their deficiencies. Federal Energy Corp., 51 IBLA 144 (1980). Although appellant claims to have had the available cash to pay the filing fees at issue, she admits that she wrote the checks for the fees on an account that did not have sufficient funds to cover them. It was appellant's responsibility to ensure that the checks were paid. In failing to do so in a timely fashion she must bear the consequences. BLM has properly applied the regulations.

Appellant argues that since she acted in good faith she should have been able to cure her deficiency or that the Board should do equity in her case. In cases involving the simultaneous leasing program, once a selection has been accomplished, the priorities of all applicants have been established and the rights of third parties thus have intervened. The Board decisions cited by appellant involve over-the-counter oil and gas lease offers where the offeror may be permitted to cure and is then granted priority for the lands sought as of the time of the cure. Cf. Gian R. Cassarino, 78 IBLA 242 (1984). The same is not possible in the simultaneous leasing program.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions of the Montana and Wyoming State Offices are affirmed.

Will A. Irwin  
Administrative Judge

I concur:

Anne Poindexter Lewis  
Administrative Judge

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<sup>5/</sup> When 43 CFR 3112.2-2 was proposed in its present form, filing fees were required to be paid by guaranteed remittance because of "the large amount of uncollectible payments which the Bureau of Land Management receives each month." 45 FR 35159 (May 23, 1980); see also 44 FR 56177 (Sept. 28, 1979). 43 CFR 3112.2 has been amended many times since it was adopted in 1980. See 47 FR 8545 (Feb. 26, 1982); 48 FR 33678 (July 22, 1983); and 49 FR 2113 (Jan. 18, 1984). Although the requirement for a guaranteed form of remittance has been deleted, the provisions concerning uncollectible remittances -- disqualification of the applicant and the remittance becoming a debt due to the United States -- have not been amended. We note that by memorandum dated February 10, 1984, and entitled Treatment of Simultaneous Oil and Gas (SOG) Applications with Uncollectible Filing Fees, the Director of BLM directs the Wyoming State Director to handle applications with uncollectible remittances under 43 CFR 3112.3(c), 48 FR 33679 (July 22, 1983), as though they had been received without any fee and states an intention to amend at a future date "the costly punitive [sic] procedures at 43 CFR 3112.2-2." Until the regulation is amended, however, we cannot ignore it. United States v. Nixon, 418 U.S. 683, 696 (1974).

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

Appellant in the instant case filed 6 separate application forms covering 465 parcels. Together with these applications she tendered six checks, aggregating \$34,875. Appellant alleges, and there is no reason to believe otherwise, that she had cash assets in excess of \$40,000 immediately available in another account which she held in joint tenancy with an unidentified party. She states that, when she attempted to transfer the funds from the joint tenancy account to the account on which the checks made payable to BLM were drawn, she was unable to do so because the joint tenant, without her knowledge or consent, had already removed "substantially all of her funds" (Statement of Reasons at 2) or, alternatively, "a substantial part" of her funds (Affidavit at 2). She states, however, that the bank did not inform her that her attempted transfer could not be consummated (Statement of Reasons at 2). She avers that she was not aware of the problem until after the bank had returned five of the six checks, totaling \$27,300, to BLM because of insufficient funds.

Appellant's statement of reasons and affidavit are not totally satisfactory on a number of key points. Nowhere does she state when she attempted to transfer the funds. Did she, in fact, attempt to transfer the funds before the checks were presented or after? This is a matter of no small moment. If, in point of fact, the attempted transfer occurred after presentment, any unauthorized removal of funds by the joint tenant would have had no effect on the ability of appellant's bank to pay the checks which had been drawn on it. Moreover, this factual omission makes it impossible to determine whether the failure to honor the checks was possibly occasioned by bank error. Appellant in the statement of reasons implies that she was told the transfer had been accomplished. It is arguable that if she could substantiate this conversation and if she could show both that this occurred prior to presentment and that she had available to her other funds to cover the checks given to BLM that she might be able to show that the failure of the bank to pay the checks might be deemed attributable to a bank error. I mention this not to imply that if such were the case appellant would automatically be entitled to some relief before this Board, but merely to emphasize that without the relevant documentation it is not even worthwhile to examine this question.

I will, therefore, assume for the sake of discussion that the failure to pay the filing fee was attributable to the imputed negligence of appellant rather than any bank error. (In this regard, I would note that appellant must bear the responsibility for reposing trust in an individual who proved untrustworthy.) The majority holds that in such a circumstance appellant properly forfeits all priority and is required to make good on \$27,300 still owed the Government. Appellant suggests that this is comparable to requiring an individual who has purchased a product with an uncollectible check to both return the purchase and make good on the purchase price. Alternatively she suggests that the requirement that she repay all of the filing fees is inconsistent with the treatment of others who have made errors in filing where

they are required to forfeit only \$75 per filing form rather than per application.

The majority rejects both arguments. Insofar as the rejection of the filings covered by an uncollectible remittance is concerned, the majority notes that this is clearly mandated by 43 CFR 3112.2-2. That regulation provides:

(a) Each filing shall be accompanied by a \$75 filing fee.

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(c) An uncollectible remittance covering the filing fee(s) shall result in disqualification of all filings covered by it. In such a case, the amount of the remittance shall be a debt due to the United States which shall be paid before the applicant is permitted to participate in any future selection.

Considering the explicit wording of that regulation, it is impossible to disagree with the majority's conclusion. Moreover, the regulation is equally plain in treating the uncollectible remittance as a debt due and owing the Government. Thus, on the basis of the regulatory language I find myself reluctantly forced to agree with the majority result. But, I am also of the view that appellant is clearly correct in her assertion that she is being treated in a manner dissonant with the treatment accorded other individuals who have failed to comply with different filing requirements.

If appellant had filed an insufficient remittance, the application would have been returned and she would have been assessed a total of \$75 for each application form. Thus, a mistake in computation would have resulted in a penalty of \$375 for all 5 forms rather than \$27,300 for 364 applications. Obviously, some types of mistakes are more costly than others. The reason for this dissimilar treatment, however, is not merely the regulatory prescription but an Act of Congress which requires this seemingly harsh result.

The key distinction resides in the fact that where there is an insufficient remittance, the application is returned without processing, while where there is an uncollectible remittance, the application is processed and then rejected. This distinction becomes critical when one examines the effect of section 1401(d) of the Omnibus Budget Reconciliation Act of 1981, 95 Stat. 748. That provision states:

Notwithstanding any other provision of law, effective October 1, 1981, all applications for noncompetitive oil and gas leases shall be accompanied by a filing fee of not less than \$25 for each application: Provided, That any increase in the filing fee above \$25 shall be established by regulation and subject to the provisions of the Act of August 31, 1951 (65 Stat. 290), the Act of October 20, 1976 (90 Stat. 2765) but not limited to actual costs. Such fees shall be retained as a service charge even

though the application or offer may be rejected or withdrawn in whole or in part. [Emphasis supplied.]

The filing fee was, of course, duly raised to \$75 per application. See 47 FR 2864 (Jan. 20, 1982). However, the statutory requirement that the filing fees be retained for either rejected or withdrawn applications has not been altered in any way. Therefore, where applications are rejected, the filing fees must be retained, and those filing fees which are retained need have no relation to the actual processing costs which the Government has incurred. Where an application has been properly processed through the simultaneous system, any subsequent action in derogation of the application represents a rejection of the application. The applications herein were correctly processed. Thus, rejection of an application rather than a return of the application form is involved, and appellant may not avail herself of the more liberal treatment accorded applicants whose errors prevent processing.

In the face of this clear congressional directive, the Department has no authority to authorize refunds for rejected filings, regardless of the severity of the result. Accordingly, I am constrained to concur with the majority disposition of the instant appeal.

James L. Burski  
Administrative Judge