

MARK WOODS ET AL.

IBLA 80-839; 80-858; 81-351

Decided February 22, 1984

Appeals from decisions of the Wyoming State Office, Bureau of Land Management, sustaining in part protests against the issuance of oil and gas leases W 58917, W 60034, and W 60387, dismissing certain bona fide purchasers from the proceedings, determining other assignees not to be bona fide purchasers, declaring overriding royalties null and void, rejecting drawing entry cards drawn with second and third priority, denying requests for suspensions, and canceling in part W 60387.

1. Rules and Practice: Appeals: Generally

Where the Bureau of Land Management issues various decisions applying precedents of the Interior Board of Land Appeals, which precedents have subsequently been reversed on appeal to Federal court, the decisions of the Bureau must be reversed.

APPEARANCES: David B. Kern, Esq., Milwaukee, Wisconsin, for appellants Mark Woods, Andrew Freeland, Harold Oppen, and Resource Service Company, Inc.; Melvin E. Leslie, Esq., Salt Lake City, Utah, for Orelia Smith, Earl Medina, and Geosearch, Inc.; Harold J. Baer, Jr., Esq., Denver, Colorado, for the Bureau of Land Management; Robert C. Grable, Esq., Fort Worth, Texas, for Bass Enterprise Production Company; Steven F. Meadows, Esq., Tulsa, Oklahoma, for Gulf Oil Corporation; Morris R. Massey, Esq., Casper, Wyoming, for Cities Service Company.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The various appeals consolidated in this decision involve separate decisions of the Wyoming State Office, Bureau of Land Management, canceling, in part, retained royalty interests in oil and gas leases W 58917, W 60034, and W 60387, on the ground that when the offers to lease the lands involved were filed by the successful drawees under the simultaneous oil and gas leasing program then in effect, Fred Engle, d.b.a. Resource Service Company (RSC), held an undisclosed interest in each of the offers in violation of 43 CFR 3102.7 (1979). Two of these leases (W 60034 and W 60387) were the subject of an appeal brought by Geosearch, Inc. (Geosearch), from a decision of the Wyoming State Office denying its protest to the validity of oil and gas leases issued in response to a number of offers. In a decision styled Geosearch, Inc., 41 IBLA 291 (1979), we vacated the State Office's decision as it related to these two leases, among others, and remanded the case for a

determination as to whether or not the underlying offers involved in these leases had been defective and to determine whether the present holders were bona fide purchasers for value whose interest could not be canceled for a defect in the offer. See 30 U.S.C. § 184(h)(2) (1976). On remand, the State Office, in two separate decisions dated July 16, 1980 (W 60034), and January 14, 1981 (W 60387), determined that the underlying offers had been defective, canceled overriding interests held by the original applicants as well as overriding interests assigned to RSC, and determined that certain assignees were bona fide purchasers while others were not. Numerous parties adversely affected by these decisions thereupon appealed to the Board. 1/

The other lease involved in this decision, W 58917, was not directly the subject of the Board's decision in Geosearch, Inc., supra. However, after that decision issued, Geosearch filed a protest as to the validity of that lease. By decision of July 18, 1980, the State Office found the underlying offer to have been in violation of the applicable regulations, ordered cancellation of the override retained both by the applicant and RSC, and determined that the assignee of the lease was a bona fide purchaser. Here, too, a number of adversely affected parties have appealed. 2/

The nature of the undisclosed interest in the applications which RSC possessed has been the subject of numerous decisions of the Board. Briefly, RSC and its clients entered into an agreement whereby RSC retained the sole and exclusive authority to act as agent for its clients in the sale or assignment of any rights acquired through an offer filed by RSC on the client's behalf under the simultaneous leasing program. A detailed schedule of compensation was provided, which, in effect, granted RSC 16 percent of any compensation obtained for the sale of the lease. This exclusive agency was for a period of 5 years.

In Lola I. Doe, 31 IBLA 394 (1977), the Board reviewed the nature of the agreement and held that this provision clearly gave RSC an interest, within the meaning of 43 CFR 3100.0-5(b) (1977), in any offer of its clients filed pursuant to such an agreement. Since such an interest had not been disclosed, the offer violated 43 CFR 3102.7 (1977). Id. at 397-98. In addition, the Board pointed out that had more than one offer on the same parcel been filed by RSC for different clients those filings would also constitute a violation of the prohibition against multiple filings, 43 CFR 3112.5-2 (1977), since RSC would have an interest in more than one offer. Id. at 399. This decision was subsequently reaffirmed in Sidney Schreter, 32 IBLA 148 (1977). No review of this substantive ruling was ever sought.

1/ Mark Woods, first drawee for lease W 60034, Andrew Freeland, first drawee for lease W 60378, Gulf Oil Company, assignee of Freeland, Cities Service Company and Apache Corporation, partial assignees of Gulf Oil Company, RSC, Geosearch, and the second drawees for the two leases, Orelia Smith and Earl Medina, have all appealed parts of those decisions to this Board. In addition, Bass Enterprises, who was deemed to be a bona fide purchaser of lease W 60034, has entered an appearance.

2/ Harold Oppen, first drawee for lease W 58917, RSC and Geosearch have appealed from this determination.

After the Wyoming State Office decision in Sidney Schreter was issued, but before the Board had rendered its decision in either Doe or Schreter, Engle submitted a conditional waiver of the exclusive agency, dated January 13, 1977, to the Wyoming State Office. ^{3/} This document, denominated as an "Amendment and Disclaimer," purported to waive "any exclusive agency which I may have" provided that the exclusive agency was eventually held to create an "interest" in the lease as defined in 43 CFR 3100.0-5(b) (1977). In the event that such exclusive agency was found not to constitute an "interest," the waiver provided that "then and in that event this Amendment and Disclaimer shall be null and void as if never executed." RSC did not notify all of its clients as to the existence of this waiver, but did undertake to inform all successful offerors after their drawing cards had been selected. As subsequent events showed, such notification of the "Amendment and Disclaimer" was invariably accompanied by another agreement establishing an exclusive agency which, since entered into after a drawing, would not constitute a prohibited interest. See, e.g., Ervin J. Powers, 45 IBLA 186, 189 (1980). In actual practice, the overwhelming majority of RSC's clients dutifully signed the new agreement.

The Board was first called upon to examine the purported "Amendment and Disclaimer" in the appeal of Alfred L. Easterday, 34 IBLA 195 (1978). Appellant in that case had protested issuance of a lease to one Donald W. Coyer, a client of RSC, on the grounds that RSC held an undisclosed interest in Coyer's offer in violation of 43 CFR 3102.7 (1977), and that, inasmuch as some 200 other clients of RSC were filed on the same parcel, the exclusive agency agreement in these offers resulted in multiple filings insofar as the interests of RSC were concerned thereby violating 43 CFR 3112.5-2 (1977). The Wyoming State Office dismissed the appeal, citing Engle's "Amendment and Disclaimer," and Easterday appealed to the Board.

After reviewing the substance of the "Amendment and Disclaimer" described above, the Board held that the purported disclaimer was without legal effect. The Board noted that the purported disclaimer was not submitted to any of RSC's clients until after an offer was drawn. Thus, there could be no agreement to the waiver by the client as he or she had no knowledge thereof. In addition, the Board held that there was no legally sufficient consideration tendered by the client to support Engle's forbearance from exercising his exclusive agency. Id. at 199-200. Thus, the Board reasoned, the exclusive agency was still in effect at the time the offer was tendered and the failure to disclose RSC's interest violated 43 CFR 3102.7 (1977). Additionally, with over 200 RSC clients participating in the same drawing we noted that Engle had clearly increased his probability of success in the drawing in violation of 43 CFR 3112.5-2 (1977). The Board noted that, under long-established principles, a simultaneous offer defective when filed cannot be cured by submission of further information after the drawing, and thus, Coyer's eventual notification by RSC of the existence of the "Amendment and Disclaimer" did not serve to render the offer acceptable. Id. Accordingly, the Board reversed the rejection of the protest by BLM and remanded the case files to the State Office for further action.

^{3/} The circumstances under which the Wyoming State Office "accepted" this waiver is set forth later in the text.

The rulings of the Board in Doe and Easterday led to a plethora of litigation both within the Department and the courts. This decision will not seek to review all of those cases. Rather, we will confine ourselves to two cases of particular note: Donald W. Coyer, 36 IBLA 181 (1978); (On Judicial Remand), 50 IBLA 306 (1980); and Frederick W. Lowey, 40 IBLA 381 (1979). The first of these cases, Coyer, involved a direct appeal by Coyer from the decision of the Wyoming State Office rejecting his offer in light of the Board's decision in Alfred L. Easterday, *supra*. In Coyer, the Board dismissed Coyer's appeal on the ground that it involved the identical issues, land and parties involved in Easterday, that appellant had been duly served with all pleadings and had apparently elected not to participate, and that appellant was therefore barred by considerations of administrative finality and res judicata from litigating those issues again.

A suit for judicial review was thereafter filed. However, inasmuch as BLM had misplaced the administrative record, the United States District Court for the District of Wyoming entered an order remanding the case to the Department for reconstruction of the record and directing that the Department provide the parties with an opportunity to present such evidence as they might deem relevant. A hearing was held before Administrative Law Judge Robert W. Mesch, who subsequently issued a recommended decision. In Donald W. Coyer (On Judicial Remand), *supra*, the Board adopted the recommended decision in full. This decision affirmed dismissal of Coyer's appeal and reaffirmed the Board's holdings that the exclusive agency provision of the filing service agreement gave RSC an "interest" in the lease and that the "Amendment and Disclaimer" was ineffective. In particular, the Board concurred in Judge Mesch's finding that:

* * * Engle had actual knowledge that the Wyoming State Office, BLM, could not speak for the Department. Thus, it is clear that Engle could not reasonably have relied in good faith on the finality of the arrangement made with the Wyoming State Office. Rather, Engle knew (and the regulation made clear) that BLM's decision to accept the disclaimer was subject to protest and review at the Secretarial level, which review might result in reversal of this decision. [Emphasis in original; footnote omitted.]

Id. at 314. A suit for judicial review from this decision was then filed in United States District Court for the District of Wyoming.

While the Coyer case was before the Department in compliance with the court remand, the Board reexamined the issues in another decision styled Frederick W. Lowey, *supra*. This opinion, dealing with six separate appeals from decisions of the New Mexico State Office, reaffirmed the Board's holding in Alfred L. Easterday, *supra*, and in particular, expanded on the rationale for the Department's refusal to recognize Engle's purported "Amendment and Disclaimer."

The Board noted that RSC was arguing that the waiver constituted a valid unilateral waiver of rights to insist on a condition precedent, but pointed out that under general contract law such a waiver is revocable at the option of the party making it unless or until the time for the performance of

the condition had already passed or detrimental reliance on the promise had occurred. Neither eventuality had come to pass in reference to the offers filed by RSC. ^{4/} The Board found that, in effect, the purported "Amendment and Disclaimer" was a unilateral abrogation by Engle of a contractual obligation to perform a service (i.e., attempt to market the leases) without any notice whatsoever to the other party to the contract. In addition, the Board noted that except for one offeror in the appeal, all of the offerors had signed the exclusive agency agreement after Engle had submitted the "Amendment and Disclaimer." The Board pointed out that, by the express terms of the "Amendment and Disclaimer," it was applicable only to exclusive agencies in existence when the "Amendment and Disclaimer" were filed. Moreover, while the ostensive justification for not notifying each client of the waiver was the difficulty and delay in contacting each one individually, this rationale clearly did not apply to contracts entered into after the initial filing of the "Amendment and Disclaimer" as the waiver could easily have been appended to the contract, itself, when it was signed by each client.

The Board also examined RSC's argument that the Government should be estopped to challenge the effectiveness of the "Amendment and Disclaimer" since the Wyoming State Office had given its approval to the procedure used and, therefore, RSC was justified in relying on this acceptance. The Board reviewed this contention at length and found, as a fact, that Engle was informed by the Wyoming State Office that it could not assure him that the "Amendment and Disclaimer" would be effective to remove the prohibited interests. Because of its importance to the subsequent history of this case, we shall set out the pertinent discussion in extenso. Thus, the Board noted:

In December 1976, a protest was lodged with Wyoming BLM against the issuance of leases to certain of Engle's clients, the protestant asserting that by virtue of their contracts with Engle he had an interest in those offers which had not been disclosed, in violation of the pertinent regulations.

Upon studying the matter, personnel at Wyoming BLM perceived that protestant was correct, and informed Engle that he would have to revise his contracts with his clients or face the possible rejection of his clients' offers in cases where Engle's interest was undisclosed. Engle refused to submit revised contracts to his clients, contending that Wyoming BLM was in error in its findings that he had an interest in his clients' offers and leases issued pursuant thereto. He argued that it would be burdensome to contact each of his clients and require this of him, particularly if it were ultimately held that Wyoming BLM was in error and the existing contracts were perfectly proper. [Emphasis supplied.]

^{4/} It was obvious that the actual oil and gas lease offerors could show no detrimental reliance on the effectiveness of the waiver to remove a possible defect in their applications since they were not informed of the waiver until after the drawing and, therefore, there was nothing upon which they could conceivably rely.

Instead, as an interim measure, he prevailed upon Wyoming BLM to accept his "Amendment and Disclaimer" pending a final determination of the question by this Board or, perhaps, by the courts. Although the personnel at Wyoming BLM (erroneously) allowed themselves to be persuaded to make this accommodation to Engle, contrary to their own holding in the matter, they expressly warned Engle and/or his attorney (1) that the use of the "Amendment and Disclaimer" would be "risky," but would avoid rejections by the Wyoming State Office until a final, authoritative decision could be made; (2) that they, as employees of the Wyoming State Office of BLM, could not commit the Department to acceptance of the "Amendment and Disclaimer," and could not anticipate what might happen at the appeal stages; (3) that other state offices of BLM might reject the offers filed by Engle's clients; and (4) that Engle was taking a risk in not immediately revising its "Service Agreement" with its clients. The only assurances given either to Engle or his attorney were that the Wyoming State Office would accept the "Amendment and Disclaimer" on an interim basis and refrain from rejecting the offers of his clients until the matter was finally resolved. [Emphasis in original.]

40 IBLA at 393-94. The Board, thus, expressly found that there was nothing upon which Engle could reasonably premise any reliance, which is a necessary element of any attempt to invoke estoppel. Accordingly, the Board rejected this estoppel argument. Judicial review of this decision was sought in the United States District Court for the District of Columbia.

On March 5, 1981, the Board's decisions in Alfred L. Easterday, *supra*, and Donald W. Coyer, *supra*, were affirmed by the United States District Court for Wyoming in an unpublished decision, Coyer v. Andrus, C78-104K (Mar. 5, 1981). Two months later, the Board's holding in Frederick W. Lowey, *supra*, was affirmed by the District Court for the District of Columbia in a decision styled Lowey v. Watt, 517 F. Supp. 137 (1981). As noted above, numerous decisions applying these precedents were issued both by BLM and this Board during this period. On July 2, 1982, however, the United States Court of Appeals for the District of Columbia reversed the district court and this Board in a decision styled Lowey v. Watt, 684 F.2d. 957 (1982).

The court of appeals held that "[t]he unilateral waiver procedure, which RSC had worked out with BLM officials, ^{5/} was a reasonable response to legal uncertainties surrounding RSC's standard contracts." 684 F.2d at 959. The essential premise of the court's decision was that the Department had erred in failing to adopt procedures by which a party creating an illegal interest could waive such an interest. Thus, in the absence of a specific

^{5/} This statement ignored the fact that those filings were made in the New Mexico State Office which had had no prior dealings with Engle in relation to his "Amendment and Disclaimer" and ignored, as well, the specific finding of both the Board and the district court that Engle had been warned that the "Amendment and Disclaimer" might be deemed to be ineffective.

mechanism to waive an interest violating the regulations, the court found the procedure utilized by RSC was effective to remove the standard provision from the contract. Id. at 960.

The court's decision was, to a large extent, premised on an analysis of a recent revision of section 89 of the Restatement (Second) of Contracts (1981), to the effect that: "A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made * * *."

The court recognized that this section was not strictly applicable, but limited its discussion on this point to the fact that the section is relevant only where the parties have not allocated the risk of unforeseen events occurring between parties. 684 F.2d at 969. Here, the court reasoned that, while RSC bore any risk of loss if its actions caused a client to lose a lease, the animating rationale of this section was even more properly invoked. As the court noted, "the party who bears the risk of loss may waive its own rights without affecting the other party's rights." Id. at 970. 6/ The court did not examine how this section applied where one party could, in fact, "anticipate" the circumstances compelling alteration when the contract was entered into, a point relevant since five of these contracts were signed after the filing of the "Amendment and Disclaimer," by which time RSC knew, as an absolute fact, that the exclusive agency provision might well invalidate all offers filed pursuant thereto. 7/ Nor did the court examine the question whether a promise, which is uncommunicated to the other contracting party, could be within the scope of the rule.

Nevertheless, the court, having decided that there need be no consideration for the waiver of the express agency agreement, next examined the problem of those contracts entered into between RSC and its clients after the filing of the "Amendment and Disclaimer" in the context of the parol evidence rule. The court pointed out that, under the parol evidence rule, a later integrated agreement discharges prior agreements to the extent it is inconsistent with them. The court, however, held that the service contracts which were signed after the "Amendment and Disclaimer" were not integrated agreements.

6/ The court did not explain whether this meant that Engle had waived his right to compensation while, at the same time, remaining obligated to market the lease. If this were the case, the new agreements entered into after the drawing providing compensation for Engle's "marketing efforts" would themselves be subject to a charge that there was no new consideration provided by Engle for the client's agreement to pay him, as Engle was already obligated to perform the services being offered.

7/ Nor did the court examine the question of whether the party which creates an illegal interest for his own behalf is properly charged, at the time he creates the interest, with the knowledge that this illegality may be discovered and invalidate any offers filed under the illegal arrangement.

[I]t smacks of absurdity to suggest that RSC and its clients intended agreements signed after the "Amendment and Disclaimer" to supplant it. [8/] First, that would imply that the "agreement" was an agreement to do nothing, since not only was the exclusive agency provision unlawful (and therefore unenforceable), but the BLM had been alerted to it and would make certain it was not enforced. Second, with respect to standardized agreements the law holds that no term is part of an agreement if the party who prepared the form has reason to believe that the other party would not have assented if it knew the form contained the term. See Restatement (Second) of Contracts § 211(3) (1981). RSC certainly had reason to believe that its prospective clients would not sign an agreement if they knew it contained a term that would render it impossible to accomplish the clients' purpose in signing the agreement. 9/ For its part, RSC conclusively demonstrated that it did not regard the later agreements as integrated. It scrupulously notified the BLM whenever applications filed on behalf of clients who signed later agreements were drawn first or second in a drawing, and it informed the clients that they were not bound by the exclusive agency provision.

Id. at 971. Thus, the court held that the "Amendment and Disclaimer" was effective to remove the exclusive agency agreement, even in those circumstances in which it constituted a unilateral anticipatory waiver of a provision in an agreement not yet entered into.

8/ Of course, it would be an absurdity to suggest that RSC's clients intended the service contract to supplant the "Amendment and Disclaimer," since there was absolutely no evidence that any of them had ever been informed that "Amendment and Disclaimer" even existed. The court's analysis, however, did not reach the factual question whether RSC's clients thought that both parties' rights and obligations were controlled by the service agreement actually signed, rather than by an ex parte disclaimer of which they were given no notice. 79 IBLA 136

9/ The court was clearly extending the scope of the rule found in section 211 to include a situation where the party using a standardized contract has reason to know that a provision is illegal, without regard to whether or not the other party was aware of the presence of the provision in the contract, since there was absolutely no evidence that RSC's clients were unaware of the existence of the provision. Moreover, the Board's decision in Lola I. Doe, supra, had issued on Aug. 19, 1977. Four of the contracts between RSC and its clients were entered into after that decision, one as late as Jan. 4, 1978. Decisions of the Board are published and indexed, and, therefore, members of the public are properly charged with constructive knowledge of them pursuant to 5 U.S.C. § 552(a)(2) (1976). Accordingly, insofar as these latter contracts were concerned, both parties would be charged with knowledge of the invalidity of the terms, and it is difficult to see how section 211 could be invoked since its premise is the lack of knowledge on one side of a bargain.

[1] In light of this decision, and recognizing that an appeal from the decision of the United States District Court for Wyoming in Coyer v. Andrus, *supra*, which had affirmed the Board's action, was pending before the Tenth Circuit Court of Appeals, the Board deferred all action in the instant cases until a decision was rendered by the Tenth Circuit. Sixteen months later, the Tenth Circuit decided Coyer v. Watt, 720 F.2d 626 (1983). In its decision, the Tenth Circuit followed the analysis of the D.C. Circuit in Lowey v. Watt, *supra*, and reversed the Board and the District Court. It is clear, therefore, that continued application of Board precedents to affirm cancellation of leases or retained interests in them on the ground that the "Amendment and Disclaimer" was ineffective can no longer be supported. We would point out, however, that nothing in either court of appeals' decision intimated that the Board erred in its initial determination that the exclusive agency gave Engle an interest in the offer subject to disclosure. That remains the law.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, we hereby reverse the decisions below insofar as they purported to cancel any interest retained either by RSC or its clients. Similarly, to the extent that the decision of January 15, 1981, purported to decide that certain assignees were not bona fide purchasers, that decision must be set aside as moot, since it is no longer relevant whether or not any assignee was on notice of the underlying deficiency in the offer. Finally, to the extent that the decisions affirmed the rejection of those offers filed by the various parties which were drawn with subsidiary priority and had never been rejected, these decisions are affirmed.

James L. Burski
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Will A. Irwin
Administrative Judge

