

S. H. PARTNERS

IBLA 83-292

Decided April 9, 1984

Appeal from a decision of the Montana State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers M-55422 Acq. and M-55428 Acq.

Affirmed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: First-Qualified Applicant--Oil and Gas Leases: Rentals

Where, in a drawing of simultaneously filed oil and gas lease applications, the first-drawn applicant fails to submit his first year's advance rental payment within 30 days after receipt of notice, as prescribed by 43 CFR 3112.4-1(a) (1982), his lease offer must be rejected.

2. Evidence: Presumptions--Oil and Leases: Applications: Filing--Oil and Gas Leases: Rentals

Where there is no evidence of receipt of a check in payment of the first year's advance rental pursuant to 43 CFR 3112.4-1(a) (1982), the presumption that BLM employees have properly discharged their duties and not lost or misplaced the check is not overcome by an affidavit executed by applicant which states that the check was enclosed in the same envelope with other documents received by BLM, which affidavit includes a copy of applicant's personal checkbook register showing a check was issued to BLM.

APPEARANCES: Edward J. Westlow, Esq., New York, New York, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

S. H. Partners has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated December 6, 1982, rejecting its noncompetitive oil and gas lease offers M-55422 Acq. and M-55428 Acq.

Appellant's simultaneous oil and gas lease applications were drawn with first priority for parcels MT-192 (M-55422 Acq.) and MT-198 (M-55428 Acq.)

in the May 1982 simultaneous oil and gas lease drawing. By notices dated September 24, 1982, and received by appellant on October 13, 1982, BLM required appellant to execute and return enclosed lease forms and to submit the first year's rental within 30 days of receipt of the notice. The BLM notice stated that if appellant failed to do so timely, "your application will be rejected." On October 22, 1982, BLM received the executed lease forms but not the first year's rental payment. In its December 1982 decision, BLM rejected appellant's lease offers because the first year's rental payment was not received timely.

In its statement of reasons for appeal appellant contends that checks for the appropriate rental amounts, along with the executed lease forms, were mailed to BLM by Edward J. Westlow, appellant's attorney, such that they would be received within the required 30-day period and that failure to properly credit these checks to appellant's account is the fault of BLM. Appellant submits the affidavit of Victor E. Stewart, one of appellant's general partners, dated February 4, 1983, in which he states that he wrote the first year's rental checks and gave them to his attorney for transmittal to BLM. Stewart supplies a photocopy of a portion of his check ledger (Exh. C), which indicates that he wrote two checks drawn on his personal account with Merrill Lynch Cash Management Account to "BLM-Montana" on October 12, presumably 1982. The notation in the ledger indicates that the checks were written with respect to lease offers M-55422 Acq. and M-55428 Acq. Appellant also submits the affidavit of Westlow, dated February 4, 1983, in which he states that he received Stewart's checks on October 17, 1982, and mailed them to BLM, certified mail, return receipt requested. Westlow supplies a photocopy of a return-receipt card indicating that the BLM State Office in Montana received an article on October 22, 1982, within the required 30-day period. Westlow further states that: "I have been informed by Elaine Kaufman, an attorney with the Branch of Adjudication, Bureau of Land Management, that the package was indeed received but no checks were contained therein."

[1] It is well established that where a simultaneous oil and gas lease applicant is notified that he may file a noncompetitive oil and gas lease offer, *i.e.*, an executed lease agreement and the first year's rental payment, such an offer must be filed with the proper BLM office "within 30 days from the date of receipt of notice" in accordance with 43 CFR 3112.4-1(a) (1982). ^{1/} Harold J. Norsoph, 78 IBLA 150 (1983). Failure to file timely properly results in rejection of the lease offer pursuant to 43 CFR 3112.6-1(d) (1982). ^{2/} Richard W. Kulis, 72 IBLA 251 (1983); *see also Dawson v. Andrus*, 612 F.2d 1280 (10th Cir. 1980). BLM has no authority to consider excuses for a late payment or to exercise discretion to accept a late payment under 43 CFR 1821.2-2(g), because of the intervening rights of the second and third-priority applicants. Beverly J. MacDowell, 71 IBLA 23 (1983), and cases cited therein.

^{1/} Under revised regulations published July 22, 1983, and effective Aug. 22, 1983, this requirement is currently codified at 43 CFR 3112.6-1(a). See 48 FR 33680 (July 22, 1983).

^{2/} 43 CFR 3112.6-1(d) (1982) provided that: "The application of the first-qualified applicant shall be rejected if an offer is not filed in accordance with § 3112.4-1 of this title."

[2] Appellant contends that it mailed checks for the appropriate rental amounts to BLM with its completed lease offer forms, which were received within the required time period. Appellant argues, in effect, that BLM must have lost or misplaced the checks. However, there is a legal presumption of regularity which supports the official acts of public officers in the proper discharge of their official duties. Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976). In this particular context, it is presumed that BLM employees have properly discharged their duties and not lost or misplaced documents filed with them. R. E. Frasch, 69 IBLA 66 (1982); H. S. Rademacher, 58 IBLA 152, 88 I.D. 873 (1981). The presumption is dictated by considerations of public policy. Bernard S. Storper, 60 IBLA 67 (1981), aff'd, Storper v. Watt, Civ. No. 82-0449 (D.D.C. Jan. 20, 1983).

The presumption of regularity may be rebutted by sufficient probative evidence that the particular document in contention was not only transmitted but actually received by BLM. Bernard S. Storper, supra. An uncorroborated statement, in the form of an affidavit, to the effect that a document was included in a mailing together with other documents that were received by BLM has long been held to be insufficient to overcome the inference, arising from the absence of the document from the file, that the document was not filed. LBS Associates, Inc., 74 IBLA 192 (1983); R. E. Frasch, supra, and cases cited therein. Moreover, the inference will not be overcome even where an appellant submits proof that a submission was made, e.g., a return-receipt card. John Walter Starks, 55 IBLA 266 (1981), appeal dismissed, Starks v. Watt, Civ. No. 81-0711 (C.D. Utah Mar. 2, 1982). The reason is that while it is not doubted that a submission was made, there is no evidence that the particular document was included where multiple documents are involved.

Appellant relies on a checkbook register to establish that checks for the appropriate amounts were made out to BLM near to the date its lease offers were mailed to BLM. In order to overcome the presumption of regularity, there must be convincing and uncontradicted evidence "which clearly and distinctly establishes a fact, so that reasonable minds can draw but one inference." (Emphasis added.) John Walter Starks, supra at 270, citing Falstaff Brewing Corp. v. Thompson, 101 F.2d 301 (8th Cir.), cert. denied, 302 U.S. 709 (1939). In the present case, two inferences can be drawn of equal weight, either the remittance was not included or it was lost by BLM. In Starks, we concluded that the presumption was not rebutted by an affidavit of the employee who made the relevant submission, stating that the required agency statement had been included in the mailing, and a couriers' invoice indicating receipt of the submission by a BLM employee, even where the appellant submitted a contemporaneous record, in the form of a "check list," which "indicates that all procedures [including submitting all required documents] were completed." John Walter Starks, supra at 268. These facts are closely analogous to the situation herein. See also Richard W. Kulis, supra. The record contains a document which apparently must be date stamped by a BLM clerk upon receipt of an executed lease agreement. The document is date stamped Oct. 22, 1982 and has an attached note which states: "No money enclosed." The note bears the initials, presumably, of a BLM employee and is dated "10-22-82." This contemporaneous record further buttresses the presumption that BLM did not lose or misplace appellant's checks. See Carl A. Peterson, 73 IBLA 347 (1983). BLM properly rejected appellant's noncompetitive oil and gas lease offers for failure to submit timely the first year's advance rental payments, in conformity to 43 CFR 3112.4-1(a) (1982).

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.

Franklin D. Arness
Administrative Judge

We concur:

James L. Burski
Administrative Judge

R. W. Mullen
Administrative Judge

