

RAYMOND G. ALBRECHT

FRED L. ENGLE d/b/a RESOURCE SERVICE CO.

IBLA 80-867

Decided June 25, 1986

Appeal from decision of the Wyoming State Office, Bureau of Land Management, giving notice of intent to sue for cancellation of overriding oil and gas royalties. W-50394.

Affirmed.

1. Oil and Gas Leases: Applications: Sole Party in Interest -- Oil and Gas Leases: First-Qualified Applicant -- Oil and Gas Leases: Offers to Lease

The failure to disclose an interest in a lease offer as required by 43 CFR 3102.7 (1974), as well as any other substantive violation of the regulations governing lease offers, renders an offer defective and precludes the person or entity applying from being a qualified applicant as required by 30 U.S.C. § 226 (1982). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation.

2. Oil and Gas Leases: Applications: Sole Party in Interest

A filing service contract which includes a provision under which the filing service will sell its client's rights in oil and gas leases obtained by them is an agreement covering interests in oil and gas leases and itself constitutes an interest in oil and gas lease offers as defined at 43 CFR 3100.0-5(b) (1974).

3. Oil and Gas Leases: Applications: Sole Party in Interest

A filing service contract which grants the filing service a percentage of the sales price and royalties due on any leases obtained by the client and sold by the filing service, gives the filing service a prospective or future claim to benefit from its client's leases and a right to share in the profits accrued from such leases as defined at 43 CFR 3100.0-5(b) (1974).

4. Oil and Gas Leases: Applications: Sole Party in Interest

The regulatory definition of interests is not limited to the standard interests in oil and gas leases commonly recognized within the industry, but encompasses a broad range of methods of benefitting from a lease. It does not matter whether the benefit a filing service receives is enforceable against the lease itself, specific proceeds, or the client personally, or even if its claim could not ultimately be successfully enforced. Nor does it matter that it might not ultimately benefit because no lease is obtained, no buyer is found for a lease, or the lessee rejects all purchase offers.

APPEARANCES: Thomas W. Ehrman, Esq., et al., Milwaukee, Wisconsin, for appellant Fred L. Engle d.b.a. Resource Service Company; Gregory J. Smith, Esq., Denver, Colorado, for appellant Raymond G. Albrecht; Howard J. Baer, Jr., Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By a decision dated July 21, 1980, the Bureau of Land Management (BLM) gave appellants Raymond G. Albrecht and Fred L. Engle d.b.a. Resource Service Company (RSC) notice of intent to sue for cancellation of their interests in lease W-50394. <sup>1/</sup> The decision found, based on previous decisions of this

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<sup>1/</sup> Notice was sent to, and appeals were filed by, Raymond G. Albrecht and Resource Service Company, Inc. The records of the Wisconsin Secretary of

Board, that RSC's service contract with Norbert F. Albrecht, under which he had obtained services from RSC and filed his noncompetitive oil and gas lease offer, created an interest in RSC in his offer and the lease ultimately awarded to him, which, in violation of Departmental regulations, had not been disclosed at the time the offer was filed. Through separate counsel both parties filed timely notices of appeal.

While the relevant facts concerning BLM's decision and the issues before this Board are not complex, the factual history of the lease and the procedural events which have delayed our consideration of this appeal are extensive. We here address only those matters pertaining to our consideration of the appeal before us.

A simultaneous oil and gas drawing entry card (DEC) for Wyoming parcel 484, signed by Norbert F. Albrecht and bearing a stamped date of March 18, 1975, was submitted to BLM. In the drawing for the parcel, this card was selected with first priority from among 2,684 cards, and, in due course, Norbert Albrecht's lease offer was accepted by BLM and lease W-50394 was issued to him with an effective date of June 1, 1975. The lease embraced 779.19 acres of land in Campbell County, Wyoming. 2/

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fn.1 (continued)

State's office show that Resource Service Company, Inc., has been registered as a corporation since Mar. 30, 1978. Because, as described more fully in the opinion, the interests which would be subject to cancellation in the proposed judicial suit are shown by BLM records to be held by Raymond G. Albrecht and by Fred L. Engle d.b.a. Resource Service Company, we view the appellants as those indicated by the BLM record.

2/ The lease is for the SW 1/4 sec. 2; the SE 1/4 sec. 4; lots 1 and 2 and the SW 1/2 NE 1/4 and SE 1/4 sec. 5; and the N 1/2 S 1/2 sec. 11, all in T. 44 N., R. 75 W., sixth principal meridian.

By instrument dated June 2, 1975, Norbert Albrecht transferred his entire record title interest in W-50394 to J. S. Harrell, retaining a 5 percent overriding royalty. The transfer was approved by BLM, effective July 1, 1975. Norbert Albrecht died in 1979 and his retained royalty in W-50394 vested in his brother and sole legatee and devisee, Raymond G. Albrecht, one of the present appellants. All documentation necessary to change BLM records was filed with BLM by the attorney conducting ancillary probate of the Wyoming portion of the estate.

A series of partial conveyances of interests from J. S. Harrell resulted in various title interests, working interests, and royalty interests being vested in a number of companies and individuals. None of the interests held by these transferees is the subject of the BLM decision at issue in the present case. One subsequent transfer, however, is central to this appeal. Under cover letter dated October 18, 1977, signed by Fred L. Engle, an "Assignment of Royalty Payment" dated and signed by Norbert Albrecht June 14, 1977, was filed with BLM. Drafted by RSC's attorney, it stated in relevant part,

FURTHER WHEREAS, the undersigned has previously agreed to pay FRED L. ENGLE, d/b/a Resource Service Company, upon the successful negotiation of a sale, assignment or sub-lease of the undersigned's lease rights, a portion of any royalty payments to be received by the undersigned according to the following schedule:

16 % of the 5 % overriding royalty due the undersigned out of the first \$100,000.00 or any lesser amount due the undersigned annually.

12 % of the 5 % overriding royalty due the undersigned for all overriding royalty in excess of the 16% on the first \$100,000.00 annually referred to above.

NOW THEREFORE, the undersigned does hereby grant, assign, transfer and convey to FRED L. ENGLE, d/b/a Resource Service Company, his heirs, legal representatives or assigns, the unconditional right and privilege to receive in his own name royalty payments, due to the undersigned pursuant to the agreement between the undersigned and J. S. Harrell, dated June 2, 1975, to the extent of the following schedule:

16 % of the 5 % overriding royalty due the undersigned out of the first \$100,000.00 or any lesser amount due the undersigned annually.

12 % of the 5 % overriding royalty due the undersigned for all overriding royalty in excess of the 16% on the first \$100,000.00 annually referred to above.

An accompanying BLM form request for approval of assignment signed by Engle noted that the assignee was an individual. <sup>3/</sup> The asserted right to receive a percentage of royalties due to Norbert Albrecht, now due to Raymond Albrecht, is the subject of the proposed judicial suit by BLM and thereby is also at issue in this appeal.

The lease at issue, W-50394, had been the subject of two protests, both of which alleged that the lease had been obtained in violation of Departmental regulations requiring disclosure of interests. The first was filed January 25, 1979, by Alvin Abrams on behalf of Geosearch, Inc., claiming to represent individuals who had filed in the drawing for parcel 484. This protest was dismissed by BLM on several grounds, including that the subsequent transferees were bona fide purchasers and that production on the leased land meant the lease could be cancelled only by judicial action. BLM's

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<sup>3/</sup> Departmental regulations required that transfers of royalty interests be recorded with BLM, but, unlike transfers of other interests, no formal approval was issued. 43 CFR 3106.4 (1977).

decision was appealed to this Board and docketed as IBLA 79-270, but the appeal was subsequently dismissed under 43 CFR 4.402 when no statement of reasons was filed. On September 19, 1979, a second protest was filed by Alvin Abrams, this time as president of Naartex Consulting Corporation, claiming again to act on behalf of unsuccessful applicants. Referring to its previous decision, BLM dismissed this protest for the same reasons. An appeal was again taken to this Board and by decision dated June 9, 1980, we upheld the dismissal of the protest. Naartex Consulting Corp., 48 IBLA 166, 172 (1980).

An appeal from our decision was filed in the United States District Court for the District of Columbia. Pending its outcome, we suspended consideration of the present appeal. The suit was dismissed by the district court, and its dismissal was affirmed by the Court of Appeals for the District of Columbia. Naartex Consulting Corp. v. Watt, 722 F.2d 779 (1983), affg 542 F. Supp. 1196 (1982). Certiorari was denied by the United States Supreme Court. Naartex Consulting Corp. v. Clark, 467 U.S. 1210 (1984). In May 1985, the case files were returned to the Board. Subsequently, on June 28, 1985, and again on September 17, 1985, we issued an order permitting the parties, in light of the time elapsed since the issues were first briefed, to advise the Board how best to proceed. The time for their response has now elapsed and this case is ripe for decision.

Since its enactment in 1920, the Mineral Leasing Act has restricted the issuance of both competitive and noncompetitive leases to qualified applicants. Act of February 25, 1920, ch. 85, §§ 13, 17, 41 Stat. 437, 441, 443; see 30 U.S.C. § 226(b), (c), (1982). Similarly, the Act's broad grant of

authority to the Secretary of the Interior to "prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this chapter [Act] \* \* \*" has continued unchanged. 30 U.S.C. § 189 (1982).

[1] The regulations found at 43 CFR Part 3100, cited by BLM in its notice to appellants, were promulgated under this authority. <sup>4/</sup> See Thor-Westcliffe Development, Inc. v. Udall, 314 F.2d 257, 259 (D.C. Cir.), cert. denied, 373 U.S. 951 (1963). Included in these regulations was the requirement of 43 CFR 3102.7 (1974) to disclose the parties in interest to a lease offer. It required:

A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. All interested parties must furnish evidence of their qualifications to hold such lease interest. Such separate statement and written agreement, if any, must be filed not later than 15 days after the filing of the lease offer. Failure to file the statement and written agreement within the time allowed will result in the cancellation of any lease that may have been issued pursuant to the offer.

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<sup>4/</sup> Because all events relevant to the issuance of W-50394 occurred in March, April, and May of 1975, our decision is made under the regulations then in effect. Substantial changes in the regulations governing oil and gas leasing in general, and simultaneous oil and gas lease offers in particular, were implemented by revised regulations effective June 16, 1980. 45 FR 35156-66 (May 23, 1980). We note that BLM's notice to appellants cited the 1979 edition of the CFR. A comparison reveals that no substantive changes affecting the issues in this case were made.

For the purpose of the regulations, an "interest" in an oil and gas lease offer was also defined:

An "interest" in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such "interests." Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an "interest" in such lease.

43 CFR 3100.0-5(b) (1974).

Under applicable law, the failure to disclose an interest in a lease offer as required by the regulation, as well as any other substantive violation of the regulations governing lease offers, renders the offer defective and precludes the person or entity applying from being a qualified applicant as required by statute. McKay v. Wahlenmaier, 226 F.2d 35, 39-41 (D.C. Cir. 1955). See 43 CFR 3112.5-1 (1974). If a lease is issued pursuant to such an offer, it is voidable and subject to cancellation. See Home Petroleum Corp., 54 IBLA 194, 211, 88 I.D. 479, 488 (1981), aff'd sub nom. Geosearch, Inc. v. Watt, Civ. No. C81-0208 (D. Wyo. Aug. 7, 1981), rev'd on other grounds, 721 F.2d 694 (10th Cir. 1983). It may be cancelled by action of the Secretary of the Interior, unless the leased lands are "known to contain valuable deposits of oil or gas," in which case judicial action to cancel the lease is necessary. 43 CFR 3108.3 (1984). 5/

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5/ In Lee Oil Properties, Inc., 85 IBLA 287, 290 n.2 (1985), we noted that apart from this regulation it was arguable whether recourse to judicial proceedings to cancel a lease for lands known to be valuable for oil or gas was necessary when the cancellation was based on pre-lease errors. In the

In accordance with the requirements of 43 CFR 3102.7 (1974), the DEC submitted by Norbert Albrecht stated in part that the signer certifies that the "applicant is the sole party in interest in this offer and the lease if issued, or if not the sole party in interest, that the names and addresses of all other interested parties are set forth below." It further noted that other parties in interest "must furnish evidence of their qualifications to hold such lease interest," and it contained a space for supplying the names of "other parties in interest." Thus, by his signature and failure to indicate there were other parties in interest, Norbert Albrecht informed BLM that no other person or entity was a party in interest to his offer. The contract between Norbert Albrecht and RSC provided that:

If I am successful in a drawing, I hereby authorize you to act as my sole and exclusive agent to negotiate for me and on my behalf with any party, firm or corporation for sublease, assignment or sale of any rights I obtain by reason of being successful in a drawing for the best price obtainable by you. Any final negotiated price is subject to my approval. If you have successfully negotiated a sale, assignment or lease of my rights by reason of a successful drawing or if I do so during the term of this agency, I hereby agree to pay you for your services in accordance with the schedule detailed below. This agency to negotiate shall be valid for a period of five (5) years.

The payment to you shall forthwith upon closing of the sale or in the case of a Royalty Agreement, upon receipt of the royalty payment be as follows:

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fn. 5 (continued)

present case, BLM proposes to undertake judicial proceedings to cancel retained overriding royalty interests arising from assignment of the lease rather than a lease itself. Presumably its decision to act only in regard to these royalty interests was based on a determination that the present leaseholders are bona fide purchasers protected under 30 U.S.C. § 184(h)(2) (1982). Whether in such circumstances the agency was limited either by its regulation or as a matter of law to pursuing judicial action to cancel the royalty interests is not a question which is before us. We note that an answer to this question would, in part, require determining the scope of 30 U.S.C. § 184(h)(1) (1982) pertaining to the cancellation of "interests" in leases. See also 43 CFR 3112.5-3 (1984).

OUTRIGHT SALE OF OIL & GAS RIGHTS

\$ 1.00 to \$ 100,000.00	Service fee to R.S.C. 16%
Over \$ 100,000.00	Service fee to R.S.C. 12%

IN EVENT OF ROYALTY PAYMENTS

\$ 1.00 to \$ 100,000.00 Annually	Service fee to R.S.C. 16%
Over \$ 100,000.00 Annually	Service fee to R.S.C. 12%

(Emphasis in original.) This contract, in effect, granted RSC a sole and exclusive agency for the sale of any interest in such lease as might issue to Albrecht.

In Lola I. Doe, 31 IBLA 394 (1977), we examined whether the identical language in another RSC contract created an interest in RSC and found that it gave RSC an enforceable right "to share in the profits of any sublease, assignment or sale of a lease, whether such sublease, assignment or sale is negotiated by RSC or by the offeror." Id. at 398. In addition, we concluded that under 43 CFR 3100.0-5(b), RSC held "a prospective claim to a benefit from a lease" and "a defined share of any profits which may be derived from the lease pursuant to the agreement which was in existence at the time the offer was filed." Id. (emphasis in original). Consequently, we held in Doe that the contract created an interest in RSC in any lease issued to its client, that the applicant was not the sole party in interest to her offer, that the outstanding interest was not timely disclosed, and that failure to disclose required rejection of the offer for violation of 43 CFR 3102.7 (1974), thereby affirming BLM's decision.

A number of decisions were then issued rejecting other lease offers made by RSC clients. 6/ See, e.g., Frederick W. Lowey, 40 IBLA 381 (1979); 7/ Alfred L. Easterday, 34 IBLA 195 (1978); 8/ Sidney H. Schreter, 32 IBLA 148 (1977). We also followed Doe in affirming BLM's rejection of lease offers in which other filing services held similar undisclosed interests. E.g., Gertrude Galauner, 37 IBLA 266 (1978), Marty E. Sixt, 36 IBLA 374 (1978). In addition, since appellants originally submitted their briefs, we have affirmed our conclusions in numerous decisions concerning RSC clients. 9/

6/ Although the illegal language was present in numerous contracts made between RSC and its clients, not all clients of RSC signed identical contracts. See Lloyd Chemical Sales, Inc., 49 IBLA 392 (1980); Ervin J. Powers, 45 IBLA 186 (1980); Geosearch, Inc., 39 IBLA 49 (1979).

7/ Our decision in Lowey was reversed on the basis of an "amendment and disclaimer" to the RSC service contract filed by RSC with the BLM Wyoming State Office on Jan. 13, 1977. Lowey v. Watt, 684 F.2d 957 (D.C. Cir. 1982). Our holding that RSC's contract gave it an interest which was not disclosed in violation of the regulations was not appealed. Lowey v. Watt, 517 F. Supp. 137, 142 (D.D.C. 1981). Because the lease in the present case was issued effective July 1, 1975, neither the "amendment and disclaimer" nor the court's decision are relevant in deciding the present appeal. See also Mark Woods, 79 IBLA 129, 137 (1984).

8/ Our decision in Easterday was appealed to the Federal District Court for Wyoming which, due to problems with the record before it, ordered a hearing. Its order stated in part that "having fully and carefully reviewed the record on appeal, [the court] finds the following facts are not in dispute: plaintiff Coyer has an agreement with a leasing service known as Fred L. Engle, d/b/a Resource Service Company; the agreement creates an undisclosed interest violative of the regulations \* \* \*." Donald W. Coyer (On Judicial Remand), 50 IBLA 306, 340 (1980) (appendix to decision of Administrative Law Judge). The proposed findings and conclusions of the Administrative Law Judge who conducted the hearing were submitted to us and we adopted them in full. Id. Our decision was affirmed by the Federal district court but reversed by the Tenth Circuit Court of Appeals based on a prior holding as to the effect of an "amendment and disclaimer" filed by RSC with the Wyoming State Office. Coyer v. Watt, 720 F.2d 626 (10th Cir. 1983), cert. denied sub nom. Easterday v. Coyer, 466 U.S. 972 (1984). The court did not address our basic holding that the contract provision created an undisclosed interest in RSC in violation of the regulations. See note 7, supra.

9/ Michigan Wisconsin Pipeline Co., 64 IBLA 247 (1982); Robert Semanko, 58 IBLA 340 (1981); Floyd O. Lochner, 56 IBLA 271 (1981); David Burr, 56 IBLA 225 (1981); Jack Zuckerman, 56 IBLA 193 (1981); Nancy Stewart, 56 IBLA 122 (1981); Alex Sachen, 56 IBLA 116 (1981); Richard E. McDonald, 56 IBLA 12 (1981); Woods Petroleum Corp., 55 IBLA 348 (1981); Resource Service Co.,

Thus, short of reversing our findings in these cases, there is no basis on which we can do other than affirm BLM's decision and hold that it correctly determined that judicial action to cancel appellants' interests in lease W-50934 is appropriate. 10/

Neither appellant directly challenges our holding in Doe and the cases which followed it. 11/ Instead, RSC construes Doe as "holding for the first time that sales agency provisions in a service agreement between a service company such as RSC and its clients constituted an 'interest' in the lease [sic]" (RSC Statement of Reasons at 11). It then argues that the "Doe doctrine" should be given prospective effect only. Appellant Raymond Albrecht also argues against retroactive application of Doe and in addition argues that he is protected from cancellation of his royalty interest by the bona fide purchaser provision of 30 U.S.C. § 184(h)(2) (1982) and further protected by the 2 year inheritance protection provision of 30 U.S.C. § 184(g) (1982).

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fn.9 (continued)

55 IBLA 343 (1981); Robert E. Belknap, 55 IBLA 200 (1981); Wilbur G. Desens, 54 IBLA 271 (1981); Inexco Oil Co., 54 IBLA 260 (1981); Home Petroleum Corp., 54 IBLA 194, 88 I.D. 479 (1981); Estate of Glenn F. Coy, 52 IBLA 182, 88 I.D. 236 (1981); D. R. Weedon, Jr., 51 IBLA 378 (1980). Subsequent appeals of many of these decisions were consolidated and reached the Tenth Circuit Court of Appeals under the caption Geosearch, Inc. v. Watt, 721 F.2d 694 (10th Cir. 1983), cert. denied sub nom. Geosearch, Inc. v. Clark, 466 U.S. 972 (1984). The court reversed the outcomes based on its decision in Coyer, supra note 8, concerning the effect of the "amendment and disclaimer" filed by RSC.

10/ By this statement we do not intend to limit BLM's authority to pursuing judicial action only. See supra note 5. In addition, while the case file indicates that as of 1979 there were several producing wells on the leased land, we have no information as to its current status or whether it is still known to be valuable for oil and gas. Given the time which has elapsed, BLM may wish to assure itself that such continues to be the case. 11/ We also note that this case does not present any question as to the application of the "amendment and disclaimer" ultimately filed by RSC with the Wyoming State Office and ruled upon in Lowey v. Watt, supra note 7; Coyer v. Watt, supra note 8; and Geosearch, Inc. v. Watt, supra note 9.

While both appellants seek to characterize the central issue presented by the case as one of retroactive application of a "rule" created by this Board, we find no basis on which to conclude that such is the case. As described above, our finding in Doe, as well as in subsequent RSC cases, was that the sales and payment provisions of RSC's contract with its clients created, under the definition at 43 CFR 3100.0-5(b) (1974), an interest in RSC in its clients' lease offers and in any leases subsequently awarded to them. Applying the law, we held that such interests were required to be disclosed under 43 CFR 3102.7 (1974), and that failure to disclose disqualified the offerors. There is no question of retroactive application of a new legal rule because no new rule was created in Doe. Rather, the law requiring the disclosure of interests was applied to find that an interest created by RSC's contract was not disclosed. It does not matter whether that interest is termed a "sales commission," as RSC calls it in this appeal, or given some other name; the regulations required disclosure of interests in lease offers, and by the substantive provisions of its contract RSC held such an interest as defined in the previously promulgated regulations. Nor was there ever a rule, regulation, or other Departmental authority which sanctioned the failure to disclose the type of interest held by RSC under its contract with its clients. As we discuss infra, the failure to disclose the interest created by RSC's contract violated not only the regulations but also longstanding rules of this Department. Our finding in Doe, in short, did not entail the creation of a new legal rule.

Nevertheless, we will address the arguments appellants have presented to us. We turn initially to those made on behalf of RSC and will subsequently

address those additional points raised on behalf of Raymond Albrecht. Because RSC's arguments concerning retroactive application of rules assume that a new rule as to "sales commissions" was created in Doe, we first consider its arguments as to its "sales commission."

RSC's first argument is that "[i]t was reasonable for RSC's attorney to conclude at that juncture that a 'sales commission' did not fall within the definition of an 'interest' under 43 CFR 3100.0-5(b)" (RSC Statement of Reasons at 19). <sup>12/</sup> In support of its position, RSC notes that the regulations did not expressly mention "sales commissions," and it argues that the rule of construction of ejusdem generis applies to the regulation. In particular, RSC seeks to apply this rule of construction and distinguish its contract provision as follows:

The definition specified "record title interests, overriding royalty interests, working interests, operating rights or options . . . increments, issues, or profits, . . ." from the "lease" as those items which would constitute "interests" within the meaning of the regulation. Nowhere does the regulation address those

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<sup>12/</sup> Rather than directly attacking our holding in Doe, RSC frames many of its arguments in terms of the propriety of the conclusions allegedly reached by its attorney. We are not concerned with the reasonableness of the assumptions made by RSC in preparing its contract. Nor is the competency of RSC's attorney a matter for decision by this Board. Questions of competency and malpractice are within our jurisdiction only to the extent they pertain to the exercise of our authority to determine who may practice before us. See 43 CFR Part 1 (1984). We therefore treat all such arguments as being raised as to the contract itself. In doing so we do not overlook RSC's apparent attempt in framing its argument in this manner to portray its peculiar reading of the regulations and Departmental decisions as a reasonable and good faith "interpretation" of the law which it claims we changed by our opinion in Doe and which it argues should not be retroactively applied to its clients. We believe that the matters at issue are best dealt with as objective questions of law, and we address the matter of the reasonableness of RSC's position in considering the question of retroactivity subsequently in the text.

monetary benefits which can arise solely and entirely upon disposal of a lease and which are in no way taken from the "lease" itself; the regulation speaks only to benefits which come from the "lease" itself. On the other hand, the RSC sales commission (1) can only arise upon transfer or assignment of the lease, and then only if it occurs during the time period in which the sales agency exists and (2) nowise comes from the "lease" itself. [Emphasis in original.]

(RSC Statement of Reasons at 21).

[2] RSC's argument as to ejusdem generis is based on a strained reading of the regulation that ignores much of its substantive content. The first sentence of the definition of "interest" in 43 CFR 3100.0-5(b) (1974), quoted in part by RSC, does indeed list as interests a number of standard rights in oil and gas leases broadly recognized within the oil and gas industry. However, it also expressly includes "any agreements covering such 'interests.'" RSC's contract with its clients was an agreement by which it would sell its clients' rights in their oil and gas leases. Thus, RSC's contract provision was an agreement covering interests in oil and gas leases and, itself, constituted an interest as defined by the regulation. See Marty E. Sixt, supra at 376.

[3] Nor is the regulatory definition of interests limited to its first sentence. The regulation's next sentence goes on to define as an interest any "prospective or future claim to an advantage or benefit from a lease" as well as any participation or share "in any increments, issues, or profits" deriving or accruing from a lease when either is based upon an "agreement or understanding existing at the time when the offer is filed." As determined

in Doe and as a simple reading of the contract provision previously quoted makes clear, RSC would receive a percentage of the sales price and royalties due on any leases obtained and sold under its contracts with its clients. It is difficult to imagine how RSC's "sole and exclusive" right to negotiate for the assignment or sale of leases and to receive a percentage of both the sales price and royalties retained does not constitute, in the plain terms of the regulation, a prospective or future claim to benefit from its clients' leases and a right to a share in the profits its clients would accrue from their leases. Thus, whether or not a "sales commission" is mentioned in the first sentence of the regulatory definition, and whether or not the doctrine of ejusdem generis applies or includes or excludes a "sales commission" from the types of interests listed in the first sentence, is of no consequence. RSC's contract provision is clearly covered by the second sentence of the definition of "interests." Any question as to whether RSC held such a prospective claim in the present case was resolved by the fact of its filing, on the basis of its contract with Albrecht, the document previously quoted in which Fred L. Engle d.b.a. Resource Service Company asserted a right to be paid a percentage of royalties due under Albrecht's retained royalty.

[4] The other factors pointed to by RSC in support of its argument do not change the application of the regulation. In particular, in terming its income from its clients' leases a "sales commission," RSC claims that it is a payment for services which comes from the "disposal" of a lease, in contrast to the regulation which it claims "speaks only to benefits which come from the 'lease' itself." From this, RSC concludes that it "had no legally enforceable right to any portion of its clients' 'leases' nor to share in the proceeds

coming therefrom" (RSC Statement of Reasons at 22). <sup>13/</sup> Precisely what the distinction is between benefits arising from the disposal of a lease and those which come from the lease itself and its proceeds RSC does not explain. In any event, the distinction is irrelevant. As we have already discussed, the regulatory definition of interests is not limited to standard interests in oil and gas leases commonly recognized within the industry, but by its second sentence encompasses a broad range of methods of benefiting from a lease. That under its contract RSC is due money only upon the "disposal" of a client's lease within a 5-year period does not eliminate RSC's interest, but rather qualifies it under the regulation as a "prospective or future claim to an advantage or benefit from a lease" and a share in the profits "which may be derived from or which may accrue in any manner from the lease."

The same alleged distinction between "disposal" of a lease and benefits accruing from it is also the basis of RSC's denial of a legally enforceable right to share in the proceeds of its clients' leases. While we view this denial with skepticism, particularly since the document filed by Fred L. Engle d.b.a. Resource Service Company claims such a right, even if such is the case, it has no bearing on the application of the regulation. Just as the regulatory definition is not limited to standard leasehold interests, it is also not restricted to payment from any specific proceeds. See Joshua Basin Partnership, 87 IBLA 179, 185-87 (1985). Rather, it also addresses claims to an advantage or benefit from a lease or to share in profits

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<sup>13/</sup> RSC's assumption that its contract must give it a "legally enforceable right" to qualify as an interest under the regulation and its emphasis on the "proceeds" of a lease is apparently derived from John V. Steffens, 74 I.D. 46 (1967). We discuss this case and RSC's misconstruction of it, infra.

deriving or accruing from a lease. See H. J. Enevoldsen, 44 IBLA 70, 86 I.D. 643 (1979), aff'd, Enevoldsen v. Andrus, Civ. No. 80-0047B (D. Wyo. June 24, 1981). That, under its contract with Albrecht, RSC held a prospective right to benefit from the sale of leases obtained by its clients is sufficient for the regulation to apply. It does not matter whether RSC's benefit is derived from a claim enforceable against the lease itself, specific proceeds, or the client personally, or even if its claim could not ultimately be successfully enforced. See H. J. Enevoldsen, supra at 83-84, 86 I.D. at 649-50. Nor does the possibility that RSC might not ultimately benefit because no lease is obtained, no buyer is found for a lease, or the lessee rejects all purchase offers change the fact that RSC's potential benefits constitute an interest in the lease under the regulation. See Joshua Basin Partnership, supra; Rosita Trujillo, 60 IBLA 316 (1981); H. J. Enevoldsen, supra; Marty E. Sixt, supra. While the ultimate enforceability of the provision is a matter between RSC and its clients to be decided by a local court, for our purposes it is sufficient to find that, at the time Norbert Albrecht filed his lease offer under Departmental regulations, RSC held an interest which was not disclosed to BLM as required by 43 CFR 3102.7 (1974).

After contending that its "sales commission" is not an interest under the regulations, RSC goes on to argue that "[u]nder prior Departmental decisions, a sales commission could be reasonably deemed not to be an 'interest' within the meaning of the regulations" (RSC Statement of Reasons at 23). In support of this claim RSC discusses three Departmental decisions which it

believes were "the only Departmental decisions providing guidance as to whether these provisions in RSC's service agreement constituted an 'interest' in a 'lease'" (RSC Statement of Reasons at 25). <sup>14/</sup> In this, RSC is simply wrong. Both specific decisional authority and general principles established by Departmental precedent clearly encompass the arrangement in RSC's service contract. Before reviewing Departmental precedent, however, it is important to note the principles which have been the focal point of both Departmental regulations and adjudicatory pronouncements over the years.

Since early in the leasing act program, limitations have existed on the number of leased acres an individual may hold, and, in order to enforce these limitations and defeat schemes to circumvent them, the Department has required lease offerors to disclose their holdings. Likewise, since the advent of the use of drawings to select among applicants for a particular parcel, methods have been devised to increase the odds of obtaining a lease and to control or benefit from leases issued to others. Any review of Departmental decisions necessarily reveals a long history of schemes devised to obtain unfair and illegal advantage by persons seeking to enrich themselves and underscores the Department's consistent attempts to thwart such abuses.

The original sole-party-in-interest disclosure requirement was premised on such concerns. Inasmuch as lands held under an oil and gas permit were available to the first-qualified applicant after the permit's cancellation was noted in the tract books, see Circular No. 915, 50 L.D. 299 (1924),

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<sup>14/</sup> The three decisions are R. M. Barton, 4 IBLA 229 (1972); John V. Steffens, *supra*; and B. F. Sandoval, Jr., A-29975 (June 12, 1964). They are discussed infra.

complaints about the system soon led to the establishment of a drawing to select the new permittee, see Circular No. 929, 50 L.D. 387 (1924).

By 1926, the Department had formally adopted procedures which required applicants to state "that the applicant files the same in good faith for his or its own benefit, and not directly or indirectly in whole or in part in behalf of any other person or persons, association, or corporation," or, if another party held an interest, to fully disclose that fact and accompany the application with a showing of the qualifications of all interested parties. Circular No. 1084, 51 L.D. 504 (1926). The penalty provided was that any applicant failing to disclose any interest "which shall tend to give an advantage in the drawing" would forfeit any moneys tendered with his application and would "subject the permit, in the event that one is awarded to him, to cancellation for fraud." Id. at 505.

Cases decided within the Department have consistently held that any scheme designed to obtain an advantage in a drawing is a fraud upon the system. In Clifton Carpenter, A-22856 (Jan. 29, 1941), 14 applications had been filed for a parcel of land. Following a protest by an individual drawn with subsidiary priority, the Department conducted an investigation and found that 12 of the applications had been filed by persons employed by a real estate company engaged in the oil and gas leasing business and their relatives. All 12 denied that there was any agreement as to the disposition of the lease or that any arrangement existed for the real estate company to act as agent in its sale. The applications of all 12 had also contained the statement required by the 1926 Instruction Circular quoted above. Inquiring

whether the circumstances surrounding the filing of the applications at issue "constitute a plan designed to afford appellant an unfair advantage over other applicants and thus deprive them of the right to an equal opportunity to be successful in the drawing," Assistant Secretary Chapman concluded that there was no doubt that the real estate firm would handle the lease if one of the 12 were successful and that, consequently, the applications were not made in good faith for the sole benefit of the individual applicants. He also reiterated that "the Department will not give its approval to a practice which even tends to deprive any claimant of the right to fair and impartial treatment in matters over which it has control \* \* \*." Id. See also Victoria Cuccia, A-27074 (Apr. 5, 1955); Edward A. Kelly, A-22856 (Aug. 26, 1941).

In Annie L. Hill, A-26150 (Aug. 13, 1951), the Department considered the effect of competing applications by a corporation and its two major shareholders who were also its president and vice-president. The opinion reviewed the early Departmental circulars and the Clifton Carpenter decision and concluded that "it has long been the policy of the Department reflected in formal rulings, that each applicant should have an equal chance with every other applicant in the case of simultaneous applications for a noncompetitive oil and gas lease." Id. Although the opinion found that the multiple chances created by the multiple applications in the case were "unfair," it declined to cancel the lease because it found no clear violation of a statute or regulation. On appeal to Federal district court, the court ordered the decision set aside and the lease cancelled. The Court of Appeals for the District of Columbia affirmed, sub nom. McKay v. Wahlenmaier, supra. It found that three independent grounds justified cancellation of the lease:

failure to disclose an interest in violation of the regulations, the inherently unfair situation created by secretly obtaining more than one chance in the drawing, and the false statement in the application that it was made only on behalf of the applicant. Id. at 40-46. See also Schermerhorn Oil Corp., 72 I.D. 486 (1965).

In Antonio DiRocco, A-26434 (July 11, 1952), the Department reviewed a decision to cancel 15 noncompetitive leases and reject 8 lease applications. While the relationships among the parties involved were somewhat complex, in brief, the lease applicants were recruited by an association of "managers" (including two geologists) who, under powers of attorney, would have the right to assign or sell rights in any leases awarded. If the applicants obtained a lease, they would receive back any money advanced by them for filing and rental fees and also receive a one-half of one percent royalty. The opinion found "the nominal applicants were merely used as 'fronts' for the purpose of effectuating the arrangement that had been worked out in advance by the real parties in interest." It recognized "that an applicant may need the assistance of a geologist in determining what land to apply for, or he may desire other help in preparing or in prosecuting his application," but noted that "[s]uch assistance can be obtained and the applicant nevertheless remain the real party in interest." Based on principles enunciated in coal leasing cases, the Department found that "a plan or scheme as that involved in this proceeding is incompatible with the proper administration of the law, because it conceals from the Department the identity or identities of the real party or parties in interest." Because the facts were not disclosed to the Department, and, if disclosed, the leases would not have been

issued, it was held that the leases had been fraudulently obtained and were subject to cancellation.

In Evelyn R. Robertson, A-29251 (Mar. 21, 1963), the Department reviewed the rejection of seven noncompetitive oil and gas lease offers. A protest filed with the Department had led to an investigation which revealed that, in carrying out a scheme devised by an individual, the applicants had been solicited by a company which would act as agent in filing offers and selling any leases acquired. Under the terms of the applicants' agreements with the company, if a client obtained a lease, he would receive back any amounts paid for filing fees and the first year's rental and in addition receive half of any profits from the sale of the lease and half of any royalties retained in the sale. If the client obtained more than one lease, the company would pay the rental for the additional lease, and the client would receive his benefits from only the lease selling for the highest price, although a rider on most of the agreements extended the 50/50 sharing of profits and royalties to all leases obtained. The company filed 59 offers on behalf of its clients for each of 39 tracts. The opinion upheld the cancellation of the leases on the grounds that copies of the agency and agreement documents were not filed with BLM as required by regulation. It went on, however, to find that both the individual initiating the plan and the company involved were parties in interest to the offers and had violated the rule "that a party in interest can submit only one offer for participation in a drawing." Id. In a subsequent suit in Federal court the Department was granted summary judgment and this judgment was affirmed on review. Robertson v. Udall, 349 F.2d 195 (D.C. Cir. 1965).

In John V. Steffens, *supra*, two noncompetitive oil and gas lease applications filed through a corporation operating as a filing service had been rejected by the BLM because it found the corporation to be an undisclosed party in interest. In addition to selecting parcels and filing offers on behalf of its clients, the corporation's agreement with the applicants authorized it to advance funds for first year rentals. By separate agreements the corporation agreed to purchase leases from its clients, in one case by an agreement made after the lease offer had been filed but prior to the drawing for the parcel. On appeal, BLM's decision rejecting the offers was reversed. The opinion noted that in prior decisions:

[T]he Department found either an express agreement or an understanding among certain lease offerors or a business relationship or financial interest of one offeror in the offer of another offeror which, even in the absence of any agreement, precluded a finding that each offeror was, in fact, the sole party in interest in the lease offer which he filed, or it found that the interest which one offeror held in the offer of another offeror resulted in an improved likelihood that the first offeror would obtain an interest in a lease issued pursuant to a drawing of simultaneously filed offers.

Id. at 52. Due to the absence of a binding agreement between the filing service and its clients in the cases before it, the opinion found that although the filing service undoubtedly hoped to obtain an interest in or a share of the profits from leases obtained:

A hope or expectation of sharing in the profits of a lease issued to any one of a number of lease offerors . . . is not the same as the right to share in such a lease, and in this respect the present case differs from those cited, for in each of the former the interest which one party claimed in the lease offer of another was of such a nature as to be enforceable in law or in equity.

Thus, it was found that while the arrangement used by the filing service gave it a "practical advantage over competitors in securing an interest in the client's lease," there was "no basis upon which it could successfully assert a claim of interest in a lease in the event a client elected not to accept its offer to purchase the lease." Id. Consequently, the opinion declined to find that under the regulatory definition the filing service held an interest in its clients' lease offers.

Following Steffens, a series of cases was brought to this Board in which protests had been filed based on the successful offeror's use of a filing service. Based on Steffens, we refused to find that the use of a filing service was improper per se. For example, in Georgette B. Lee, 3 IBLA 272, 274 (1971), we stated:

There is nothing in the Department's regulations that specifically prevents an offeror from using a filing service. Contrary to appellants' implication, the fact that a filing service is involved in filing an oil and gas lease offer does not raise a presumption that some form of collusion exists between the offeror and the service. An offeror may properly participate in a simultaneous oil and gas drawing through a service if there is no scheme, plan or agreement between the parties wherein the service obtains an "interest" in the resultant lease as defined in 43 CFR 3100.0-5(b), and in the absence of any other demonstrable legal or regulatory impediment. John V. Steffens et al., 74 I.D. 46 (1967), and cases cited therein. [Footnote omitted.]

Similarly, in R. M. Barton, 7 IBLA 68, 70 (1972), we said:

This Department, in John V. Steffens et al., 74 I.D. 46 (1967), held that the use of a filing service company did not result in removal of the offeror's sole party status. This decision was reaffirmed in R. M. Barton, 4 IBLA 229 (1972), and

R. M. Barton, 5 IBLA 1 (1972). The rule remains that so long as there is no enforceable agreement entered into whereby the offeror is obligated to transfer any interest in the lease to the filing service, the offeror will not, on account of merely employing a filing service, be treated other than as the sole party in interest.

See also R. M. Barton, 9 IBLA 243 (1973), 9 IBLA 70 (1973).

Nevertheless, we continued to scrutinize the business arrangements established by filing services through their contracts with their clients for violations of the Department's regulations, including the creation of an interest in the filing service and the possibility that offers on behalf of more than one client had been filed for a parcel, creating multiple interests in the filing service in applications for the parcel.

BLM's review of simultaneous oil and gas lease applications also brought before this Board a variety of issues pertaining to the requirement to disclose parties in interest. While not all such cases are germane, one is of particular importance. In Thomas Connell, 7 IBLA 328 (1972), nine lease offers had been rejected by BLM for violation of 43 CFR 3102.7 (1972) relating to disclosure of interests. BLM's written decision, however, failed to specify in what respect the regulation had been violated. The agreement between the appellant and the individual providing filing assistance stated that the latter would select parcels and file offers and in return receive 25 percent of "all profit in bonuses or overriding royalty as might be obtained after deduction of rentals and expenses." Id. at 329. The lease offer forms for the parcels were marked to show that the applicant was not

the sole party in interest, and a copy of the agreement letter was submitted with each offer to show the additional interest. However, the individual providing the assistance failed to submit a separate statement establishing his qualifications to hold a lease.

On appeal to the Board, appellant argued that 43 CFR 3102.7 (1972) had not been violated because the individual who performed the filing services did not have an interest in the lease offer within the contemplation of the regulations. In reviewing the matter we found:

First, appellant declared on the offer forms that he was not the sole party in interest, which made mandatory his compliance with the regulation, a fact carefully explained by the form itself. Moreover, while the agreement made the realization of pecuniary benefit to Swanson dependent upon certain contingencies (the receipt of payments from bonuses from overriding royalties in amounts in excess of rentals and expenses), Swanson's right to receive such benefits had already vested by virtue of the agreement and the filing of the offers. This was sufficient to invest Swanson with a definite interest in the offers and any leases issued pursuant thereto, a fact which confirmed appellant's declaration that he was not the sole party in interest.

Id. at 330.

Thus, the policies and holdings of a long line of Departmental decisions require the rejection of all lease offers and cancellation of any leases obtained by RSC clients who did not disclose RSC's interests in their offers. The working structure created by RSC's contract differs only in degree and not kind from those condemned by the Department in Antonio DiRocco and Evelyn R. Robertson. In DiRocco the bulk of the value of the benefits of

leases went to the "managers" who devised the scheme and the parties who were awarded the leases received only their money back and a small percentage royalty. In Robertson the applicants fared better, splitting the profits from at least the first lease with those who had devised the scheme. The latter would, of course, benefit most because they would receive their portion if any of the 59 offers filed on each parcel was selected to receive a lease. In the present case, RSC exercised comparative restraint in receiving under its contract only 16 percent of the first one hundred thousand dollars and 12 percent thereafter of the sale and royalty income of its clients, though, of course, it would be so enriched by every lease obtained by its clients sold within five years. Such restraint, however, does not serve to redeem RSC's scheme any more than does the fact that the leases are sold to third parties rather than being purchased outright by RSC. Just as denominating its rights under its contract a "sales commission" does not change the application of the regulatory definition, so also the fact that RSC structured its contract to receive its benefits from its clients' leases as an undisclosed "sales commission" does not make that structure any less a plan or scheme which is "incompatible with the proper administration of the law, because it conceals from the Department the identity or identities of the real party or parties in interest." Antonio DiRocco, supra.

Any question whether the arrangement used by RSC constituted an interest under the regulations not settled by DiRocco and Robertson was resolved by the rule established in Steffens and our finding in Connell. In the latter, payment of a percentage of the profits from a lease was found to meet the regulatory definition of an interest. In Steffens, the distinction

between a hope or expectancy of sharing in a client's lease and the right to share in it was made on the basis of whether any agreement as to the disposition of the lease existed when the lease offer was filed. See 43 CFR 3100.0-5(b) (1974). In the present case, RSC's contract both existed when Albrecht's lease offer was filed and required payment of a percentage of the profits. Accordingly, on the basis of the regulation and the cases discussed, we find that RSC held an interest in the lease offer filed by Norbert Albrecht.

On appeal, RSC claims that the distinction made in Steffens applies to its contract because its sales agency provision "constituted a unilateral offer to act as sales agent for the client" which could be accepted by the client agreeing to sell the lease within the 5-year period, and that, therefore, RSC "had a mere hope or expectation to receive a sales commission" (RSC Statement of Reasons at 23-24). In addition to ignoring the plain language of its own contract by which RSC's client stated "I hereby authorize you to act as my sole and exclusive agent" and negating basic principles of contract law, this argument distorts the basis and application of the Steffens decision. As discussed above, in Steffens, since no enforceable agreement to sell a lease to the filing service existed at the time the lease offers were made, it was found that the filing service could have only a hope or expectancy of obtaining an interest in its clients' leases. In contrast, RSC's contract existed when Albrecht's lease offer was made. A client's right under the provision was not to accept or reject an offer by RSC to act as agent in soliciting lease offers, but to accept or reject an offer obtained by RSC. Thus, there can be no question as to whether RSC had only a hope or expectation, the only possible issue is whether the rights held by RSC constituted an interest as defined by the regulation.

Contrary to RSC's belief, the Board has never held that a pre-existing right to recoup rental payment from the proceeds of the lease does not constitute an interest which must be disclosed. In Joshua Basin Partnership, *supra*, we examined this contention in depth. *Id.* at 183-88. As was noted therein, there is a critical distinction between "a general right of repayment from funds not traceable to the proceeds of a lease" and repayment "to be made from those proceeds." *Id.* at 184. As we held, the latter clearly constitutes an "interest" in the lease within the purview of the regulations, and, as such, must be disclosed if it arises prior to the filing of the lease offer. *See also Wayne E. DeBord*, 50 IBLA 216, 87 I.D. 465 (1980), *aff'd sub nom. Landis v. Clark*, Civ. No. CV-81-74 BLG (D. Mont. May 10, 1984).

Finally, RSC compounds its confusion as to this Department's holdings by claiming that, in B. F. Sandoval, Jr., A-29975 (June 12, 1964), the Department "implicitly held that an exclusive sales agency agreement which would provide the agent with a sales commission did not constitute an 'interest' in the agent" (RSC Statement of Reasons at 25-26). The total lack of a basis for this description of the case should be apparent to anyone reading the opinion.

Sandoval had made an oil and gas lease offer under an agreement with a petroleum geologist who would select parcels, prepare lease offers, and sell any leases obtained in exchange for a 10 percent "broker's fee." The agreement was not in writing, and there was some question as to whether the sales arrangement was intended to be exclusive. BLM had cancelled the lease because it found that the geologist had acted as agent for the applicant and that the

agency was not disclosed as required by the regulations. On appeal, Sandoval attempted to extend the uncertainty as to whether or not there was a sales agency agreement creating an interest to generate uncertainty as to whether the geologist had acted as an agent in filing the lease offer. The opinion saw through the attempt and declared that the argument was "irrelevant and premised upon the false assumption that [the agency disclosure] regulation \* \* \* pertained only to that relation termed in law as an agency coupled with an interest rather than a straight agency relation" (citation omitted). Noting that the regulation required the disclosure of agency relationships whether or not coupled with an interest, it stated "an agency is no less an agency because it is not a specialized type coupled with an interest." Id. Thus, the issue in the case was the existence of an agency relationship, and the legal rule applied was that if one existed and was not disclosed, the lease was properly cancelled. There was no need to decide whether an interest in the lease existed because whether it did or not was irrelevant. RSC errs both in its reading of the issue on appeal in that case and in construing the absence of any condemnation of the interest as approval of such an interest.

As the foregoing discussion establishes, at the time Norbert Albrecht signed his contract with RSC and filed his lease offer, no prior decision or interpretation of the regulations sanctioned the arrangement devised by RSC. To the contrary, it is evident that under the holdings and policies of the cases, Thomas Connell in particular, such an arrangement created an interest in RSC that was not disclosed to BLM. RSC, like any filing service, was, of course, not barred from holding interests in its clients' lease offers. The

regulations, however, required disclosure of all interests in lease offers, and provided that leases would be cancelled when obtained without disclosure of such interests.

In addition, at the time Norbert Albrecht's offer was filed, 43 CFR 3112.5-2 (1974) prohibited filing multiple offers for the same parcel. For filing services, this prohibition posed practical problems. If they were to benefit from their clients' leases, only one client's offer could be filed for each parcel. On the other hand, they could service the most clients and avoid conflicting duties to clients in choosing which to file for the best parcels only by giving up the possibility of enriching themselves through their clients' lease offers. Only by violating both the regulation against multiple filings and the regulation requiring disclosure of interests could they hold interests in their clients' offers and also file on behalf of multiple clients for the same parcels. While the record in the present case has not preserved any information by which to determine whether other of the 2,684 DEC's filed for Wyoming parcel 484 were filed by RSC clients under the same contract as Norbert Albrecht, if such were the case, all of its clients' offers would be improper because of the interest in each held by RSC. To affirm BLM's decision to pursue cancellation of the retained royalty interests held by appellants, however, it is sufficient for us to find that RSC held an interest in the offer by Norbert Albrecht which was not disclosed as required by the regulations, without awaiting any further inquiry as to existence of multiple filings.

Based on its argument that under neither the regulations nor Departmental decisions was its "sales commission" an interest, RSC next argues that

"[u]nder general state common law principles relating to sales agency, RSC did not possess an 'interest' in its client's lease" (RSC Statement of Reasons at 26). RSC's first point in this regard is that "[i]t is a well settled principle of statutory construction that where a statute is ambiguous, it should be construed in harmony with the common law" and that the same should apply to federal regulations (Id. at 26-27).

RSC's chief error is to assume that the regulation is ambiguous. It does not point to any language in the regulation which is unclear, uncertain, or subject to more than one interpretation. Rather, RSC's only claim as to ambiguity is that "nowhere did the regulation address the question as to the type of 'interest,' if any, of an agent in the underlying property (i.e. lease) which would arise upon the granting of an exclusive sales agency" (RSC Statement of Reasons at 27).

That the regulation does not expressly address an "exclusive sales agency," or for that matter a "sales commission," does not render it ambiguous. The regulation, by its express terms, broadly covers any interest that a party may have in the application of another. Appellants are, of course, free to denominate the interests they have created as a "sales commission" or any neologism they desire. But, just as a rose by any other name would smell as sweet, so is an interest, by any other descriptive term identified, subject to disclosure.

RSC could have legitimately performed services for its clients in providing assistance in selecting parcels for which to file applications. It

could also, subsequent to the filing of a lease offer, have approached its client with an offer to represent him in selling or assigning the lease if awarded, and it would have been legitimately entitled to a fee for its services. See John V. Steffens, *supra* at 55. It could even have made such arrangements prior to its clients making any lease offers so long as the fact that RSC thereby held a prospective claim to benefit from a lease and a right to share in the profits derived from a lease was disclosed to the Department, and so long as only one client was filed on each parcel. 43 CFR 3100.0-5 (1974). Thus, the issue, if there is one, is whether the business arrangement established by RSC's contract with its clients created an "interest" under the regulatory definition. As found in Doe and in this opinion, it did. There was no ambiguity in the regulation's application to the RSC contract.

RSC, nevertheless, goes on to argue that under common law principles it did not have an interest in its clients' lease offers. It does so based on standard rules within the law of agency that an agency, or power, coupled with an interest in the subject matter of the agency makes the delegation irrevocable without the agent's consent, and that a sales agent receiving a commission on a sale does not have an interest in the property of the sale, quoting from 2A C.J.S. Agency §§ 114, 118 (1972). There is nothing wrong in RSC's statement of these rules. They apply to determine the circumstances in which a delegation of agency authority may be revoked by a principal. However, they are simply inapposite in determining the interests in oil and gas lease offers which must be disclosed to the Department under its regulations. The regulatory definition concerns potential rights to receive benefits or

profits from a lease when awarded, not the circumstances under which a delegation of agency authority is revocable. Because the regulations' concern is different, its definition of "interest" is broader than that used in agency law. Additionally, the rights held by RSC to benefit from its clients' leases arose from its contracts with them and not a simple delegation of agency authority. We therefore find no merit in RSC's argument.

Having considered RSC's arguments by which it construes its "sales commission" as falling outside of the regulation and prior Departmental decisions, we turn to its chief argument, that "[t]he Board's Doe decisional rule should not be given retroactive effect so as to divest innocent RSC clients, who acted reasonably and in good faith, of their interests" (RSC Statement of Reasons at 11). Initially, we note that regardless of any validity that this argument may have as to RSC's clients, it clearly is not applicable to the interests of Engle, who obtained the benefits of his undisclosed interests. This argument, moreover, is based upon the assumption that our decision in Lola I. Doe represents a new legal rule, and this assumption depends upon the contention that as a "sales commission" the benefit RSC would receive under its contracts with its clients was not within the regulatory definition of interests and also not governed by Departmental precedent. As we have discussed, this contention is demonstrably incorrect. What matters is the substance of the business arrangement established by RSC's contract, not the name RSC now chooses to apply to it. The descriptive language of the regulatory definition clearly encompasses the benefits RSC receives under its contract. Moreover, the arrangement used by RSC is similar to those condemned in Antonio DiRocco, supra, and Evelyn R. Robertson, supra, and even

more closely akin to the profits expressly found to constitute an interest in Thomas Connell, *supra*. In addition, longstanding Departmental policies require condemnation of any and all schemes devised by those who seek to enrich themselves through unfair advantage in the simultaneous oil and gas leasing system.

Because our decision in Doe required only the application of the language of a Departmental regulation to the facts of RSC's contract consistent with Departmental precedent, our opinion did not establish a new legal principle. Application of a statute or regulation to a set of facts for the first time does not entail the creation of a new legal rule. Any other conclusion would render the process of adjudication and appellate review meaningless and make it impossible for the Secretary of the Interior to carry out his duties and responsibilities regarding the public lands. Each initial violation of a statute or regulation would be protected, as would each subsequent violation occurring under an arguably different set of facts. As Judge Stuebing noted: "To hold that, upon a finding of violation, the Department must forego remedial action until a similar violation is discovered in the future would be to hold that a person may violate the regulations with impunity until discovered, but not thereafter." D. R. Weedon, Jr., 51 IBLA 378, 384 (1980).

Because no new rule was created in Doe, there is no legitimate question as to whether the application of our finding in Doe to RSC's contract with Norbert Albrecht in a judicial suit for cancellation of his retained royalty interest entails retroactive application of a new legal rule. We therefore

find no merit to appellants' arguments that we should not apply such a "rule" retroactively, but only prospectively. Even assuming, however, that there is an issue as to retroactivity, we nevertheless conclude that the matter presents no basis on which to preclude BLM from seeking judicial cancellation of the interests held by Raymond Albrecht and Fred L. Engle d.b.a. Resource Service Company.

In the still leading case on retroactive application of adjudicatory administrative decisions, Securities & Exchange Commission v. Chenery Corp., 332 U.S. 194, 203 (1947), the United States Supreme Court established the general rule governing retroactive application:

Every case of first impression has a retroactive effect, whether the new principle is announced by a court or by an administrative agency. But such retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles. If that mischief is greater than the ill effect of the retroactive application of a new standard, it is not the type of retroactivity which is condemned by law. See Addison v. Holly Hill Co., 322 U.S. 607, 620.

More precise criteria by which to weigh the ill effects of the retroactive application of a new legal rule against the harm of a result contrary to statutory design and equitable principles were established by the D.C. Circuit Court of Appeals in Retail, Wholesale & Department Store Union, AFL-CIO v. National Labor Relations Board, 466 F.2d 380, 390 (D.C. Cir. 1972) [hereinafter Retail, Wholesale]. The court stated:

Among the considerations that enter into a resolution of the problem are (1) whether the particular case is one of first impression,

2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

RSC does not argue directly from these decisions but from similar standards which have long been applied by this Department. In A. M. Shaffer, 73 I.D. 293, 298 (1966), the Department adopted the general rule that:

In considering whether regulations should be interpreted to the detriment of persons seeking oil and gas leases who would have a statutory preference to a lease, it is true, as appellants have contended, that the regulations should be so clear that there is no basis for the applicants' noncompliance, and if there is doubt as to their meaning and intent such doubt should be resolved favorably to the applicants. See William S. Kilroy et al., 70 I.D. 520 (1963); Donald C. Ingersoll, 63 I.D. 397 (1956).

RSC also points to the court's acknowledgement of Departmental policies in Safarik v. Udall, 304 F.2d 944, 949 (D.C. Cir. 1962), aff'g Franco Western Oil Co., 65 I.D. 316, (Supp.) 65 I.D. 427 (1958):

Where the Department of the Interior has decided that a statute should be given a different interpretation than that reflected by its earlier decisions and that such decisions should be overruled, it has been a rule in the Department since at least as far back as 1917 not to give its later decisions retroactive effect, especially when to do so would adversely affect actions taken and rights and interests acquired by private persons on the faith of the earlier decisions and would inure to the benefit of other private persons. [Footnote omitted, emphasis supplied.]

In discussing these cases RSC's reliance on these articulated principles is misplaced. As emphasized in the quotation from Safarik, the Departmental rule applies only when an earlier decision is being overruled and affects rights acquired "on the faith of the earlier decisions." Similar language in Retail Wholesale, speaks of abrupt departures from prior procedures and reliance on former rules. In the present case, of course, no prior rule or procedure could have been relied upon by RSC and none was overruled by Doe.

RSC claims that "there was a longstanding BLM practice by that date of awarding leases to RSC clients which [sic] had entered into RSC service agreements containing such provisions" (RSC Statement of Reasons at 18). The reality behind this assertion, however, is that while BLM issued leases to RSC's clients between its commencement of business in November 1973 and the rejection of Lola Doe's lease offer, drawn in November 1976, their issuance was not based upon any approval of RSC's contract. Rather, the DEC cards submitted by RSC's clients, like those of Lola Doe and Norbert Albrecht, undoubtedly gave no indication that a filing service was involved in the offers, let alone that it held an interest in them. To the contrary, they asserted that the offeror was the sole party in interest. Only as the result of a protest filed with BLM was the fact of RSC's involvement and the terms of its contract brought to BLM's attention. BLM's ignorance of violations of its regulations cannot be distorted to constitute approval of them, let alone a practice on which the appellants in the present case can rely. As was noted in a different context: "Having failed to inform the Government of the totality of their arrangements, appellees cannot be heard to argue that the Government's failure to warn them of their illegality supports the invocation

of estoppel." United States v. Morris, 19 IBLA 350, 378, 82 I.D. 146, 159 (1975), aff'd, 593 F.2d 851 (9th Cir. 1978).

Similarly, the Department's statement in Shaffer assumes that the language of a regulation will be read in a fair and reasonable manner. In that case, it was determined that no regulation required an agent filing an offer in his own name and disclosing the name of the party who would hold full interest in a lease if awarded to also file a statement of agency authority. The regulation at issue expressly applied only to offers signed and filed by an agent in the name of his principal. Unlike that case, any fair reading of the regulatory definition of "interest" should have indicated to RSC that its contract provision was an agreement covering interests in oil and gas leases and that the payments it would receive were a prospective claim to an advantage or benefit from a lease as well as a share in the profits from a lease. Consequently, it should have been clear that casting its benefit as a right to receive a percentage of the money received by its client rather than an ownership interest in the lease would not be sufficient to avoid the regulatory proscription. Assuming that the regulation could have genuinely been found to be unclear as to a "sales commission," examination of DiRocco and Robertson and particularly Connell should have led RSC to the conclusion that the receipt of such percentages was included within the purview of the regulation by virtue of Departmental precedent. Only by the gambit of searching for a reference to a "sales commission" or "sales agency" within the regulatory definition and finding none does RSC claim that the regulation was lacking clarity. 15/

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15/ RSC points to the promulgation of 43 CFR 3112.6-1(c)(1) (1981), now 43 CFR 3112.5-1(b)(1) (1984), as finally providing the "express guidance

RSC also argues that the rationale of the court in Runnells v. Andrus, 484 F. Supp. 1234 (D. Utah 1980), "mandates prospective application of the Doe doctrine" (RSC Statement of Reasons at 18). Runnells concerned a filing service's use of rubber stamps to impress their clients' signatures on lease offers and whether such practices required submission of statements of agency authority. The court applied the standards set forth in Retail, Wholesale, supra. It noted that the decision being appealed had been one of first impression before the Board and that the BLM practice on which the appellant had relied was based on this Board's decision in Mary I. Arata, 4 IBLA 201, 78 I.D. 397 (1971), in which we had approved the use of stamped signatures by offerors when intended as their signature. Regarding the fourth criterion in Retail, Wholesale, the court stated that the burden imposed by the Board's decision being appealed amounted to a "penalty for failing to anticipate that the IBLA would overrule prior BLM practice." Id. at 1238. The court also distinguished the case before it from Robertson v. Udall, supra, on the basis that in Robertson "there was much more than technical non-compliance with

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fn. 15 (continued)

\* \* \* which would have justified retroactive application of the Doe doctrine" (RSC Statement of Reasons at 13). The entire regulation is a codification of numerous decisions of this Board pertaining to qualified applicants and multiple filings, although citations to specific decisions were not generally noted in the preambles when the proposed and final regulations were published. See 44 FR 56176 (Sept. 28, 1979); 45 FR 35156, 35160 (May 23, 1980). Given that the particular provision appears to be in part based on our decisions concerning RSC clients, RSC's point regarding the regulation begs the question. It essentially asserts that the decision in Doe could not be applied to any RSC client until promulgated in a regulation. The issue in Doe was whether the sales agency and commission provision of the RSC contract was within the language of the regulation then in effect. As we have discussed, the same issue is implicitly part of the present appeal. Any issue as to "clarity" concerns the language of that regulation. Just as we found in Doe that RSC held an interest in its client's oil and gas lease offer as that term was defined by a previously promulgated regulation, so also we have found that the same provision in RSC's contract with Norbert Albrecht gave it an interest in his lease offer.

lease offer regulations; there was an attempt to rig the public drawing for simultaneous lease offers with collusive filings." Id. at 1239. In contrast, the court noted, Runnells involved no allegation of bad faith, no dispute whether the signature had been affixed with the consent of the appellant, and no question whether he was the sole party in interest to his offer. Id.

The present case is quite different. Even assuming that Doe was a case of first impression in that a "sales commission" had not been previously ruled upon, the result was not an abrupt departure from, or overturning of, any prior rule, but rather the application of previous rules to cover the device created by RSC in establishing a business arrangement by which it received a share of its clients' income from their leases rather than an ownership interest in their leases. Under the guise of a fee for its services, RSC effectively obtained a chance to win a percentage of the value of leases awarded while using its clients' money for entry fees. If it entered several of its clients' names for the same parcel, it would increase its chance of ultimately receiving a "sales commission." Furthermore, the fact that a parcel, such as the present one, was highly desirable and would receive numerous offers because of the likelihood of striking oil or gas encouraged the filing of as many clients' names as possible, each entry increasing RSC's chances of benefiting while necessarily decreasing those of the individual clients. Such a system of benefits was precisely the purpose of the schemes discussed earlier, only in those cases the aim was to acquire ownership of the lease itself so that profit could be more directly derived from its sale.

Nor, as already discussed, was there any practice, procedure, rule, or decision on which RSC could have relied. RSC, nevertheless, now seeks to

portray itself as having operated under a reasonable and good faith interpretation of the regulations and Departmental decisions and, as previously noted, 16/ reasonable and good faith conclusions reached by its attorney. We have, of course, no way of knowing the research or thought processes engaged in by RSC's attorney, or what advice he gave his client, or whether it was followed. Nor is it relevant. It is not our concern whether RSC's contract was drafted and the decision made not to indicate RSC's interest on its clients' DEC cards based on an inaccurate, and perhaps naive, sincere opinion that the regulation and Departmental decisions did not apply, or out of a desire to enrich itself by circumventing Departmental controls to hide its interest in order to pursue the type of scheme at which others had failed. Questions of reasonableness and good faith must be dealt with in an objective manner in which we assume that the reasoning presented to us in arguing that RSC's contract provision was outside of the regulation and Departmental decisions was also its justification for acting as it did at the time. We have found these arguments to be woefully inadequate. Other than the fact that a "sales commission" or "sales agency" is not expressly mentioned in the regulatory definition, RSC has not pointed to any language in the regulation that is ambiguous or unclear or otherwise supports its claim that the benefits it received from its clients were not encompassed within the definition. Its presentation of Departmental decisions has ignored many of the relevant precedents, and it has distorted the holdings and analysis in the decisions it has discussed. Consequently, we can find no basis on which to conclude

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16/ See note 12, supra.

that RSC operated under a reasonable and good faith interpretation of the regulations.

Nor can RSC's clients be considered innocent parties who would be unfairly burdened by the judicial cancellation of their leases. RSC's clients, like all citizens, are chargeable with knowledge of duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). In addition, final Departmental decisions, including the decisions of this Board, are published and indexed and members of the public are properly charged with constructive notice of them. See 5 U.S.C. § 552(a)(2) (1982). RSC's clients knowingly and willingly executed a contract with RSC which created an interest in RSC in each lease obtained by them pursuant to an offer filed by RSC in their name. Each, in addition, signed or authorized RSC to sign on their behalf the statement on the DEC by which they asserted they were the sole party in interest in the offer and any resultant lease. Thus, each client, having created an interest in RSC, is chargeable with knowledge that the representation they certified to BLM was false, and they cannot disavow the consequences of their acts. See Antonio DiRocco, supra. If, in fact, they have been misled by representations made by RSC, they must look to RSC to make them whole and not expect the Department to be the guarantor of their private relationship.

The burden placed on RSC's and Raymond Albrecht's interests will, of course, be that, if a judicial suit is successful, their interests will be cancelled. However, this consequence will not be a judicially imposed burden,

but rather the consequence of knowing violations of the regulations requiring disclosure of interests. Appropriately, in this case the burden will fall upon only the interests of RSC and its client. Any bona fide purchaser of interests from Albrecht would be protected by application of 30 U.S.C. § 184(h)(2) (1982). Thus, claims by RSC as to the chaotic effect and uncertainty of clouds on titles of leases created by "retroactive" application of Doe are specious. Only RSC and its clients will be affected.

Equally specious are claims that, contrary to the language in Safarik, the result of a judicial suit to cancel interests will be the forfeiting of RSC's and its clients' interests to the benefit of other private parties. To the contrary, under the controlling statute, 30 U.S.C. § 184(h)(2) (1982), the cancelled interests must be competitively sold to the highest bidder. Since the winning bidder will presumably pay fair market value for the cancelled royalty interests, they will not receive a windfall. Rather, the real beneficiary will be the Federal Government from which the interests were fraudulently acquired in violation of the law.

Because we have determined that questions of retroactive application of legal rules provide no basis for restraining BLM from pursuing its proposed judicial action, we turn to the arguments presented on behalf of Raymond Albrecht that his interest should not be subject to cancellation. They are, first, that under 30 U.S.C. § 184(h)(2) (1982) he is a bona fide purchaser and, second, that even if not a bona fide purchaser, under 30 U.S.C. § 184(g) (1982), the interest he holds is not subject to cancellation for 2 years. Due to the 5-year delay caused by the protests and appeals described above,

any issue presented in regard to the latter statute is now moot. Therefore we will address only the issue of whether Raymond Albrecht is entitled to protection under the bona fide purchaser provision.

In relevant part, the statute provides that the Government's right to cancel or forfeit leases "shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease, [or] interest in a lease \* \* \* which \* \* \* was acquired and is held by a qualified person". (30 U.S.C. § 184(h)(2) (1982)). No definition is provided for determining who qualifies as a bona fide purchaser, but, in the controlling case on the statute, it was found that the legislative intent was "to apply the general common law definition of bona fide purchaser." Southwestern Petroleum Corp. v. Udall, 361 F.2d 650, 656 (10th Cir. 1966), aff'g Southwestern Petroleum Corp., 71 I.D. 206 (1964). Consequently, it was held that for a party to qualify as a bona fide purchaser under the statute "he must have acquired his interest in good faith, for valuable consideration, and without notice of the violation of the departmental regulations." Id. See Winkler v. Andrus, 614 F.2d 707 (10th Cir. 1980).

The chief issue regarding application of the bona fide purchaser statute to Raymond Albrecht is whether, because he inherited his current interest, he qualifies as a "purchaser." Appellant argues that the use of "acquired" in the above quotation from Southwestern Petroleum Corp. and in Winkler v. Andrus, supra, as well as in 43 CFR 3108.4 (1984), indicates that the application of the statute is not limited to those who purchase their interests. We do not find that the use of "acquired" in these contexts was

intended to expand the application of the statute. The standard rule is that heirs and devisees are not "purchasers" within the application of bona fide purchaser statutes but are "volunteers" to their interests. See Lykins v. McGrath, 184 U.S. 169, 173 (1902) (quoting Devlin on Deeds § 813); IV American Law of Property, § 17.10 at 563 (1952). Therefore, we find that the bona fide purchaser provision of 30 U.S.C. § 184(h)(2) (1982) does not apply to Raymond Albrecht. The interest presently held by Albrecht is properly subject to cancellation.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1 (1985), the decision appealed from is affirmed.

James L. Burski  
Administrative Judge

We concur:

Will A. Irwin  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge.

