

LIBERTY PETROLEUM CORP.

IBLA 88-351, 88-352, 88-353

Decided March 7, 1991

Appeals from decisions of the Idaho State Office, Bureau of Land Management, requiring execution of special stipulations before issuance of oil and gas leases I-26268, I-25273, and I-25374.

Affirmed

1. Oil and Gas Leases: Stipulations--Rules of Practice: Appeals: Protests

Where a party executes stipulations to an oil and gas lease and yet challenges those stipulations stating that the lease will not be accepted if the stipulations are approved, such action is construed as an execution under protest.

2. Oil and Gas Leases: Stipulations--Rules of Practice: Appeals: Protests

Where initial action has not been taken to deny or sustain protests against execution of stipulations to an oil and gas lease but the record establishes reasons for establishing stipulations as required and it is clear the protests would be denied if remanded for further review, the appeals may be adjudicated on their merits despite the absence of a formal rejection of the protests.

3. Oil and Gas Leases: Stipulations--Regulations: Interpretation

After the effective date of the Federal Onshore Oil and Gas Leasing Reform Act of 1987, the Department lacks authority to reject lease stipulations recommended by the Secretary of Agriculture. For actions taken to require lease stipulations before the effective date of the Act, however, prior regulations require review of such stipulations by the Department.

4. Oil and Gas Leases: Stipulations--Rules of Practice: Appeals: Generally--Rules of Practice: Appeals: Board of Land Appeals

Where an oil and gas lessee fails to show error in decisions imposing stipulations to oil and gas leases the decisions are affirmed.

APPEARANCES: Gregor Klurfeld, New York, New York, for Liberty Petroleum Corporation; L.H. Ferguson, Idaho Falls, Idaho, for the Bureau of Land Management; J.S. Tixier, Ogden, Utah, for the United States Department of Agriculture, U.S. Forest Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Liberty Petroleum Corporation (Liberty) seeks review of protests against decisions by the Idaho State Office, Bureau of Land Management (BLM), requiring execution of special stipulations before issuance of oil and gas leases I-25268, I-25273, and I-25374, IBLA docket numbers 88-351 through 88-353. On September 28 and October 26, 1987, Liberty filed three noncompetitive oil and gas lease offers covering land in Caribou County, Idaho, all or parts of which lie in the Caribou National Forest. By separate decisions dated February 10, January 22, and February 4, 1988, BLM informed Liberty that issuance of the oil and gas leases depended upon execution by Liberty of proposed stipulations. The appeals in IBLA 88-351, 88-352, and 88-353 are consolidated for decision inasmuch as they share the same appellant and issue.

BLM conditioned issuance of the three leases on execution and return of stipulations within 30 days of receipt, stating that "[f]ailure to return the stipulations during this 30-day compliance period will result in the rejection of the offer upon the conclusion of this compliance period." During the period, BLM stated, "there is no right of appeal to the Interior Board of Land Appeals, and an appeal filed within the compliance period is subject to dismissal as being premature. The 30-day appeal period commences upon the expiration of the 30-day compliance period."

In the case of lease I-25268, 1/ IBLA 88-351, Liberty signed the proposed stipulations under protest. Challenging BLM's decision on procedural grounds, Liberty contended it was denied procedural due process and the right to appeal because justiciable issues could not be appealed until the oil and gas lease issued. Liberty contended that it should not need to sign stipulations with which it might not agree. Liberty then filed a notice of appeal on April 8, 1988.

1/ While line 1 of BLM's Feb. 10, 1988, decision, purported to apply to lease I-25269 as well as to I-25268, no further mention is made of the former lease in BLM's decision or the record. Consequently, because BLM's decision only affected lease I-25268, our review here is similarly limited.

Similarly, Liberty signed stipulations required by BLM to be executed for lease I-25273 under protest dated April 1, 1988. Liberty repeated the same procedural objection stated against BLM's handling of lease I-25268, and filed a notice of appeal on April 8, 1988.

Concerning lease I-25374, IBLA 88-353, appellant signed stipulations under protest and filed a protest on March 25, 1988, challenging BLM's decision on the same procedural grounds relied upon in the other two leases. In this case, however, Liberty stated that the lease would not be acceptable if the appeal filed with this Board should prove unsuccessful. Appellant then filed a notice of appeal reiterating that it does not "wish issuance of this lease if our appeal is denied and said denial is upheld" (Liberty Notice of Appeal at 1, IBLA 88-353).

In each of these three appeals, Liberty has challenged BLM's stipulations as overly restrictive, "bring[ing] to [the Board's] attention that oil and gas leases, issued by the State of Idaho on state lands located within the township in which the captioned offers are located, do not require any special stipulations." In the notices of appeal, Liberty avers that "operations on state leases within this township are not burdened with special stipulations."

[1] In Fortune Oil Co., 71 IBLA 153, 90 I.D. 84 (1983), this Board found that

where BLM has required execution of stipulations subject to rejection for failure to comply, a party has a choice of three courses of action that would have three different results. The party may execute and return the stipulations timely and be issued the lease. He may execute the stipulations under protest; meaning, that although he objects to the stipulations and protests their inclusion, he wants the lease regardless. In these circumstances, BLM would then be required to examine the protest and rule on it in a decision granting a right of appeal [to this Board] and issuing the lease. If the Board's decision were adverse, the party's lease would stand as issued. A party's third choice would be not to comply, await receipt of a rejection of his offer and then appeal to this Board. He would take this course of action where he did not want the lease if the stipulations were attached, since he would have waived his right to comply. No additional opportunities to accept the stipulations would be granted if the party lost on appeal to the Board.

71 IBLA 156, 90 I.D. 86.

In leases I-25268 and I-25273, although appellant pursued the second course of action described in Fortune Oil Co., *supra*, BLM has not decided the protests, referring them instead to this Board when Liberty filed notices of appeal. Regardless of the ultimate disposition of the proposed

stipulations in these cases, however, leases will issue to Liberty because it has complied with the order to timely execute required stipulations. Fortune Oil Co., *supra*. As to lease I-25374, however, when Liberty executed the required stipulations, it was stated that the lease was unacceptable should the stipulations ultimately be approved.

Liberty's stated position concerning this lease is inconsistent with the doctrine of merger, which recognizes that a written agreement supercedes all prior statements and negotiations. Carolina R.C. Craig, Ltd. v. Ships of the Sea Inc., 401 F. Supp. 1051 (S.D. Ga. 1975). We conclude, applying the doctrine of merger, that where a party executes stipulations but states it will reject the lease if it ultimately issues with those stipulations, that such action is to be construed as an execution under protest, similar to the action taken by Liberty in the other two leases under review. This lease also, therefore, must be treated as though executed under protest. Fortune Oil Co., *supra*.

Liberty's argument that it is denied a right of appeal and procedural due process because it was required to execute stipulations before it could challenge them does not withstand analysis. Liberty clearly has the right to challenge stipulations without executing them. A party can elect not to execute stipulations within the time allowed and still challenge them. If a challenge so made were successful, the lease would issue without the stipulations. If the challenge failed, BLM would then refuse to issue the lease, granting a right of appeal to this Board. Fortune Oil Co., *supra*.

[2] BLM has neither denied nor sustained Liberty's protests against the required lease stipulations. However, if protests are treated by BLM as though action adverse to an appellant was taken, and the record establishes reasons for imposing stipulations as proposed, no useful purpose would be served by remanding to BLM, and the Board may adjudicate the appeals on their merits despite the absence of a decision by BLM. Beard Oil Co., 97 IBLA 66, 68 (1987); United States v. Napouk, 61 IBLA 316, 322 (1982). The question presented is therefore whether the record is sufficient to allow this Board to adjudicate the matters urged by Liberty.

[3] The lands embraced by lease I-26268 are located in the Caribou National Forest in T. 7 S., R. 45 E. and R. 46 E., Boise Meridian, Idaho. Because the surface of the leased land is managed by the Secretary of Agriculture, BLM requested a recommendation from the U.S. Forest Service (FS) concerning Liberty's proposed leases. In lease I-25268, FS recommended inclusion of six stipulations, providing for acceptance by lessee of regulations issued by the Department of Agriculture, and prohibiting surface occupancy within specified distances of streams, or on slopes in excess of a specified grade, or on muddy ground, and prohibiting activity during specified animal breeding periods. Variations of these stipulations were required for the other two leases.

For leased lands in lease I-26268 lying outside the National Forest, BLM also imposed a no-surface occupancy stipulation within 500 feet of

Emigration Creek in sec. 24, T. 12 S., R. 42 E., Boise Meridian, Idaho, and also imposed "standard stipulations" in a decision record stating: "The land use plan allows for oil and gas exploration and development. Bureau policy is to make energy minerals available on a managed and controlled basis, consistent with national energy policies and related demands."

After the effective date of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA), P.L. 100-203, 101 Stat. 1330-259 (Dec. 22, 1987), BLM lacked authority to reject lease stipulations recommended by the Secretary of Agriculture in issuing leases on public domain lands situated in a National forest. As amended in 1987, 30 U.S.C. § 226(h) (1988), provides: "[t]he Secretary of the Interior may not issue any lease on National Forest System Lands reserved from the public domain over the objection of the Secretary of Agriculture."

Pertinently, FOOGLRA provides with reference to applications, offers and bids pending on the date of enactment, that

all noncompetitive oil and gas lease applications and offers and competitive oil and gas bids pending on the date of enactment of this subtitle shall be processed, and leases shall be issued under the provisions of the Act of February 25, 1920, as in effect before its amendment by this subtitle, except where the issuance of any such lease would not be lawful under such provisions or other applicable law.

Regulations in effect before December 22, 1987, therefore control our review of appellant's challenges to adoption by BLM of the stipulations required by FS. See 43 CFR 3101.7-4(c) (1987). Those stipulations are derived from provisions of a FS land use plan embracing the Caribou National Forest.

[4] Finding that the record did not contain land use plans requiring the use of mineral leasing stipulations or a copy of BLM's statement of "bureau policy" referred to by the decision record quoted above, and that potential adverse environmental consequences of lease issuance sought to be mitigated by imposing stipulations remained unexplained on the record before us, we ordered supplementation of the record on February 15, 1990. In that order we stated:

While appellant thus far has maintained that the required stipulations are overly restrictive because leases issued by the State of Idaho lying within the same county do not contain similar stipulations, appellant has not identified these lands with any specificity or explained why the analogy sought to be drawn is persuasive. In this regard appellant should note that it bears the burden to show error in BLM decisions imposing the challenged stipulations.

On March 12, 1990, BLM supplemented the record with the draft Pocatello Resource Management Plan and Environmental Impact Statement (RMP/EIS) Idaho Falls District, (1987), Pocatello Proposed RMP and Final EIS, (1987), the Record Of Decision for the Pocatello RMP/EIS, (1988), and BLM Mineral Resources Policy Statement dated May 29, 1984, in support of the decisions requiring stipulations in the three leases here under review.

The documents submitted reveal that the source of BLM's standard stipulation is the 1987 RMP/EIS for the Idaho Falls District. The RMP/EIS describes the planning area which embraces oil and gas lease I-25374, identifies and discusses planning issues, planning criteria, the effects or impacts of various uses and lists management alternatives. The RMP/EIS evaluates the environmental consequences of each alternative and selects a preferred alternative plan. The final RMP/EIS and the Record of Decision dated January 8, 1988, document the selection of the Plan.

In response to our February 15, 1990, order, FS has submitted the "Land & Resource Management Plan for the Caribou National Forest & Curlew National Grassland." Acting pursuant to this plan, FS recommended lease stipulations to the three leases before us as a condition of mineral leasing. Stipulations required by the plan are designed to mitigate watershed and erosion damage and protect riparian areas, unstable soils and wildlife habitats. In all cases where surface occupancy is denied or restricted, the stipulations provide that directional drilling from outside those areas may be allowed.

The record as supplemented by FS and BLM identifies the adverse impacts sought to be mitigated by the challenged stipulations, which appear reasonably related to achieving these goals. The stipulations imposed are consistent with the plans provided by BLM and FS.

Liberty has alleged that the stipulations required by FS and BLM are unduly burdensome and not warranted, but has failed to submit any credible evidence in support of this assertion or show that the analogy sought to be drawn to unspecified Idaho State leases issued without similar restrictions in the same area is persuasive. In our February 15, 1990, order we invited Liberty to specify the issues on which the claim of error rests in these cases. No response to our order was received from Liberty. The burden to show error rests with the party who seeks relief. Mary Magera, 101 IBLA 116 (1988); Yates Petroleum Corp., 91 IBLA 252 (1986). Proof in such cases requires that a preponderance of evidence establish the proposition urged by one seeking relief. Bender v. Clark, 744 F.2d 1424 (10th Cir. 1984); Richard E. O'Connell, 98 IBLA 283 (1987).

We find that Liberty has failed to show by a preponderance of the evidence that BLM's decisions requiring stipulations in these consolidated appeals were in error. Liberty's protests against the stipulations are therefore denied in leases I-25268, I-25273, and I-25374, and the required stipulations are made part of the leases.

IBLA 88-351, etc.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Franklin D. Arness
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge

118 IBLA 220