

**Editor's note: Reconsideration denied by Order dated Aug. 9, 1991.**

THE MORAN CORP.

IBLA 90-187

Decided May 7, 1991

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting oil and gas future interest lease offer NM-A 58666 TX.

Affirmed.

1. Oil and Gas Lease: Acquired Lands Leases--Oil and Gas Leases: Applications: Description--Oil and Gas Leases: Future and Fractional Interest Leases

A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close is properly subject to rejection. The future interest lease offeror may cure a defective description after the vesting of the mineral estate in the United States, so long as the curative action occurs prior to the filing of a present interest lease offer. Correcting the defective offer thereafter affords no priority in the face of the conflicting present interest lease offer.

2. Oil and Gas Leases: Applications: Description--Oil and Gas Leases: Description of Land--Oil and Gas Leases: Future and Fractional Interest Leases

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. Because a specific offer form was not required for noncompetitive future interest oil and gas lease offers submitted in 1984, the offer may include several descriptions or means to identify the lands sought. If, after BLM has reviewed all available documents in the offer, it must still refer to extraneous materials to delimit the extent of the offer, the offer is insufficient and must be rejected.

APPEARANCES: Ernest C. Baynard III, Esq., and John L. Gallinger, Esq., Washington, D.C., and Charles E. Shaver, Esq., Houston, Texas, for The

Moran Corporation; John R. Brown, Vice President - Land, Beard Oil Company; Margaret C. Miller, Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Moran Corporation (Moran) has appealed from a December 4, 1989, decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting its oil and gas future interest lease offer NM-A 58666 TX because the description of the lands sought fails to close.

On April 24, 1984, Moran filed an offer to lease future interests in the oil and gas deposits underlying certain lands within the Sam Houston National Forest (Montgomery County, Texas). According to Moran's offer, the parcel, containing 8,263.85 acres, comprised part of Forest Service Tract J1-IV. Title to the surface interests in Tract J1-IV vested in the United States on December 27, 1935, with the mineral interests retained by the grantor until January 1, 1985 (subject to the possible extension by commercial operations or production in paying quantities, neither of which occurred herein). The mineral estate was under lease to Moran by a successor to the grantor when Moran filed its future interest lease offer.

When the mineral estate vested in the United States on January 2, 1985, Moran's offer had not yet been adjudicated and several noncompetitive oil and gas lease offers for the subject lands were then received by BLM, including NM-A 61088 TX and NM-A 61105 TX from Beard Oil Company (Beard). On July 29, 1985, Beard filed a protest against Moran's offer. <sup>1/</sup> Beard asserted that (1) Moran's description was insufficient because it did not close within tolerable limits, and (2) the rental tendered was deficient because the imputed acreage was improperly calculated. Thereafter, BLM performed a computer study of Moran's course and distance description. Further, when asked to verify the acreage calculation, the Forest Service, the surface managing agency, responded that examination of the description in offer NM-A 58666 TX revealed a large error of closure. Consequently, BLM sustained Beard's protest with respect to the insufficient description and rejected Moran's offer. BLM stated that Moran's description was inadequate because the error of record was 1 foot in 140 feet and in excess of the 1 foot in 905 feet closure ratio allowed in accordance with U.S. Department of the Interior, BLM, Manual of Surveying Instructions, 3-124 (1973 ed.). BLM held that this situation prevented

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<sup>1/</sup> An additional protest against Moran's offer was filed by James B. Tennant, another noncompetitive oil and gas lease offeror for the same lands. Tennant argues that Moran's lease interests in the subject lands expired on Dec. 31, 1984, and therefore, Moran was not a holder of "present operating rights" when the mineral estate vested on Jan. 2, 1985. Tennant contends that Moran's offer should not have senior priority to a lease of the subject lands. While the case file indicates that BLM reviewed this issue, there is no indication that this protest has been formally resolved and the question may not, therefore, be decided.

calculation of the correct acreage or rental amounts and, in light of the intervening offers, no curative submissions would be permitted. BLM, however, did reject the deficient rent argument advanced by Beard, because an accurate rental assessment could not be made.

In its statement of reasons (SOR), Moran argues that because the subject lands are located in Texas where the public survey system has not been extended, liberal rules of construction for land descriptions should govern this situation. It asks the Department to recognize that lands "may not be described with the same particularity in Texas that public lands can be described in the public land states" (SOR at 3). Moran contends that the land sought is identified by materials submitted with the application, including the Forest Service acquisition number, an enclosed Forest Service map on which the desired lands were outlined, a copy of the 1935 deed, a description of the lands taken from the deed, and leases under which Moran was operating. Moran concludes BLM should have been able to resolve any errors in closure by reviewing those materials, and further argues such error is de minimis and does not create an "irreconcilable conflict" (SOR at 6).

The Mineral Leasing Act for Acquired Lands provides that acquired lands available for leasing "may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws." 30 U.S.C. § 352 (1988). The Mineral Leasing Act of 1920 provides that, if the Secretary decides to lease a parcel of Federal land, the lease must be issued to the first-qualified applicant. 30 U.S.C. § 226(c) (1988); see McKay v. Wahlenmaier, 226 F.2d 35 (D.C. Cir. 1955). An incomplete application does not qualify an applicant to receive a lease if third-party rights are outstanding. Gerald L. Christensen, 30 IBLA 303 (1977).

BLM determined that the description provided by Moran did not properly close and that Moran's offer was therefore insufficient. At the time of Moran's offer, the adequacy of an acquired lands description was controlled by Departmental regulation at 43 CFR 3111.2-2 (1983). The purpose of Departmental regulation of descriptions in offers is to require the offeror to give a description sufficient on its face to delimit the lands in the offer. See Bernard Silver, 107 IBLA 68, 69 (1989), and cases cited. The lands at issue here are located in Texas where the rectangular system of public surveys does not apply. See Manual of Surveying Instructions (1973), 1-23; Bernard Silver, 107 IBLA at 69. The Departmental regulation in effect in 1984, 43 CFR 3111.2-2(b) (1983), provided methods for describing acquired lands not surveyed under the public land system as follows:

(b) If the lands have not been surveyed under the rectangular system of public land surveys, they shall be described as in the deed or other document by which the United States acquired title to the lands or minerals. If the desired lands constitute less than the entire tract acquired by the United States, it shall be described by courses and distances between successive angle points on its boundary tying by course and distance into the

description in the deed or other document by which the United States acquired title to the lands.

Provisions of 43 CFR 3111.2-2(c) (1983) also allowed reference to the tract acquisition number for a parcel to be used in lieu of the required description in cases where the entire tract was applied for.

Moran, in its description, declared that the parcel desired was only a "part of Tract J1-IV" and therefore provided a course and distance description. The description of Tract J1-IV in the acquiring document involves 115 corner calls and encloses 20,403 acres, subject to an exception of 358 acres for a net of 19,420 acres. Moran's description begins by reciting the courses and distances set forth in the description of Tract J1-IV and mirrors those calls until after corner 37. At this point, Moran diverges with new courses, involving six distances and five new corners. The description then again appears to conform to the Tract J1-IV description, beginning at corner 95.

BLM determined that the description did not close within acceptable limits. <sup>2/</sup> The described error in closure has not been refuted. If a noncompetitive future interest lease offer for acquired lands fails to close, the description is insufficient and the offer is properly subject to rejection. The Joyce Foundation, 102 IBLA 342 (1988). Moran argues that the error in land description is correctable or may be disregarded as de minimis and that the intent of the offeror is conveyed by other documents in the offer (Moran's Response to Answer at 7).

Moran's argument that the error is correctable or may be disregarded is without merit. Under the regulations in effect in 1984, a future interest lease offeror could establish a prior right to issuance of a lease by submitting an offer that was complete and in compliance with the governing laws and regulations. See 43 CFR 3111.3-1 (1983). The offeror could perfect the offer by correcting a defective description of the lands sought. If, however, a proper description was not submitted before the time of filing of a present interest lease offer, filed after the vesting of the mineral estate in the United States, the defective future interest offer afforded no priority in the face of the conflicting present lease offer. Beard Oil Co., 111 IBLA 191 (1989); The Joyce Foundation, 102 IBLA at 348. The Board held in Joyce that it would be improper to allow defective offers to be "cured" because it would give the applicant an unwarranted advantage

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<sup>2/</sup> As Beard states in response to SOR, an anomaly in Moran's description occurs at the first corner that departs from the description of Tract J1-IV, which Moran declares is a distance of 33.88 chains east of corner 37 and 18.39 chains west of corner 38. The distance between corners 37 and 38 is reported in the acquiring document for Tract J1-IV as 56.80 chains, or 4.53 chains more than accounted for by Moran in its description. This anomaly is not explained.

over applicants for a present interest lease who properly wait until the present interest vests to file their applications. 102 IBLA at 349. <sup>3/</sup>

In the instant situation, Moran could only correct the errors in land description by curing the defects therein. If the defective land description had been cured before other individuals filed offers, Moran would have gained priority as of the date the correct description was supplied. But the description was never corrected; to now permit curative action would ignore intervening rights of third parties. After the mineral estate vested in the United States, all lease offers were on the same footing and BLM could not then properly allow a retroactive amendment of the Moran offer because third party rights had intervened.

Moran's contention that its offer for acquired lands in Texas need not meet the standards for limits of closure as defined by the Manual of Surveying Instructions is also without merit. Without proper closure conforming to the Department's long-accepted standards, a description is incorrect and insufficient to determine exactly what land the offer embraced. The Joyce Foundation, 102 IBLA at 349.

As for the remaining argument, that other documents tendered by the offeror should be considered to determine the extent of the offer (see Response to Answer at 7), this issue was recently reviewed in Beard Oil Co., 117 IBLA 54, 61 (1990):

The Board has held that where BLM must go outside the offer form in order to determine exactly what land was embraced in the offer, an offer should be rejected as insufficient. See Leon Jeffcoat, 66 IBLA 80 (1982). In Foster Minerals' situation, "the face of the offer" would be construed differently from "the face of the offer" reviewed in [Henry P.] Ellsworth [97 IBLA 74 (1987)] because a noncompetitive oil and gas lease offer was required to be submitted on a standard form approved by the Director, BLM. 43 CFR 3111.1-1 (1983). In the standard form, a space is provided for the "legal description of land requested." It is the source to which BLM looks to "delimit" the lands of the offer. If the description supplied does not accurately describe the land sought, a lease could not, therefore, be issued unless either BLM interpreted the intent of the offeror through other sources, or the

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<sup>3/</sup> Moran contends that an opportunity to correct a future interests lease offer should be provided in accordance with Instruction Memorandum 87-611 (July 24, 1987) (SOR at 7). Moran bases this argument on a request for reconsideration by Foster Minerals Ltd., in a similar situation, Beard Oil Co., 111 IBLA 191 (1989). In that instance, the Board held that the direction set forth in Instruction Memorandum 87-611 to allow correction of defective future interest lease offers was improper and ineffective where there were competing present interest offers. Moran's challenge is rejected as Foster Minerals' petition for reconsideration in Beard Oil Co., supra, was denied by order of the Board dated Feb. 23, 1990.

offeror demonstrated with supplemental filings which lands were to be embraced by the offer. The Board has held, in such circumstances, that BLM has no authority to render interpretations or consider corrections because it would involve going outside the form itself to determine which lands were sought. [Henry P. Ellsworth, 97 IBLA 74, 76 (1987)]; James M. Chudnow, 70 IBLA 71 (1983). Such an offer is therefore insufficient. Id.

In contrast, for noncompetitive future interest lease offers, there was no mandatory form in 1983; all that was necessary was that the offer include information required by 43 CFR 3111.3-2 (1983). See 43 CFR 3111.3-1, 3-2 (1983); BLM Manual, 3111.32.A. Foster Minerals' offer consisted of the cover letter with "exhibits" in which the land sought was identified by tract number and by the course and distance description of the conveying document. The intent of the offeror was conveyed by the sum of those documents comprising the offer, and BLM was not compelled to "look outside" the offer to delimit the boundaries of the land sought.

In the Beard Oil case, the present interest offeror challenged issuance of a lease to the future interest offeror because a course and distance description included in the offer contained an error. In one of the calls, an "E" for east appeared where it should have read "W" for west. The Board found that the offer was not rendered ambiguous by the mistake because there was more to identifying the lands sought than just the one description. Indeed, the offer was made for an entire parcel described by the proper acquisition number. Further, the deed description and other exhibits to the offer also defined the intent of the offeror to acquire the entire tract. 117 IBLA at 61-62.

Moran's offer consists of a cover letter, maps of the area with an outline of the lands sought, and photocopies of the conveying documents and the operating agreements. Because the parcel sought is less than the acquired tract, referring to the acquisition number or to the acquiring documents will not solve the ambiguity in the offer. Moran states that the attached maps sufficiently depict the lands sought. However, our review of those maps does not support this conclusion. In Beard, the offeror's map demonstrated that the boundary line in question did indeed proceed west instead of east and thus the ambiguity created by the typographical error was resolved, considering that the entire tract was sought. When BLM reviewed the courses and distances of Moran's description and plotted 14] it by computer it did not close. Moran contends that the maps reveal the boundary lines that BLM should have followed, and argues that if there was an error, BLM could have retraced the boundary from the end point to the source of error and dispelled any ambiguity. This argument, however, appears without foundation, because the maps supplied with the offer do not show with accuracy the corners or distances. Moran's exterior boundary lines between corners 37 and 95 appear to be based upon survey boundaries made of smaller tracts concerning which there is no information

in the offer. To determine the exact location of those boundaries would require reference to survey documents not in the offer. Thus, the description provided by Moran is insufficient and the offer is properly rejected.

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

Franklin D. Arness  
Administrative Judge

## ADMINISTRATIVE JUDGE BURSKI CONCURRING IN THE RESULT:

While in accord with the result reached in the lead opinion, I reach that result through an analysis substantially different than that espoused therein. There are two reasons for the difference in approach. First of all, as I shall attempt to show, this Board's prior efforts at interpreting 43 CFR 3111.2-2 have, heretofore, proceeded upon a flawed basis, opening the door to possibly erroneous rulings in a number of differing circumstances. Second, it is my view that two of the decisions cited in the lead opinion, Henry P. Ellsworth, 97 IBLA 74 (1987), and Beard Oil Co., 117 IBLA 54 (1990), are simply not reconcilable. For reasons I set forth, infra, I strongly believe that the decision in Beard Oil is not in accord with our prior precedents and should be accorded no precedential weight in our instant deliberations.

At the outset, it is useful to recollect the regulatory provisions applicable to the cases in question. Four different provisions, of arguably conflicting import, require our consideration. First, 43 CFR 3111.2-2(a) (1983) provided:

If the lands have been surveyed under the rectangular system of public land surveys, the lands shall be described by legal subdivision, section, township, range and meridian. Where the description cannot be conformed to the public land surveys, any boundaries which do not so conform shall be described by metes and bounds, giving courses and distances between the successive angle points with appropriate ties to the nearest existing official survey corner. If not so surveyed but within the area of the public land surveys, the lands shall be described by metes and bounds, giving courses and distances between the successive angle points on the boundary of the tract, and connected with a reasonably nearby corner of these surveys by courses and distances.

Second, 43 CFR 3111.2-2(b) (1983) provided that:

If the lands have not been surveyed under the rectangular system of public land surveys, they shall be described as in the deed or other document by which the United States acquired title to the lands or mineral interests. If the desired lands constitute less than the entire tract acquired by the United States, it shall be described by courses and distances between successive angle points on its boundary tying by course and distance into the description in the deed or other document by which the United States acquired title to the lands.

Next, 43 CFR 3111.2-2(c) (1983) provided:

In those circumstances where the acquiring agency has assigned an acquisition number to the tract applied for, a description by such tract number shall be required in addition to the description otherwise required by paragraph (a) and in lieu of the description otherwise required by paragraph (b) of this section.

Finally, 43 CFR 3111.2-2(d) (1983) provided:

Each offer submitted under paragraphs (b) and (c) of this section shall be accompanied by 5 copies of a map upon which the desired lands are clearly marked showing their location with respect to the administrative unit or project of which they are a part.

Numerous decisions of this Board, interpreting these provisions, have either expressly declared or necessarily implied that paragraph (a) relates to surveyed lands and paragraph (b) covers unsurveyed lands. See, e.g., Beard Oil Co., *supra* at 60; Thomas Connell, 116 IBLA 113, 115 (1990); Bernard Silver, 107 IBLA 68, 69 (1989); The Joyce Foundation, 102 IBLA 342, 346 (1988). All of these decisions, however, have ignored the last sentence of paragraph (a) which provides that

[i]f not so surveyed but within the area of the public land surveys, the lands shall be described by metes and bounds, giving courses and distances between the successive angle points on the boundary of the tract, and connected with a reasonably nearby corner of these surveys by courses and distances.

Clearly, paragraph (a) does apply to unsurveyed lands "within the area of the public land surveys." <sup>1/</sup> This provision would make sense if paragraph (b) were, itself, limited to unsurveyed lands not within the area of the public land surveys, but it is not. By its terms, paragraph (b) applies "[i]f the lands have not been surveyed under the rectangular system of public land surveys," thereby arguably embracing all unsurveyed lands.

The source of this contradiction can be traced to the promulgation of these regulations in 1983. As originally proposed in 1982, 43 CFR 3111.2-2(a) merely provided that "[i]f the lands have been surveyed under

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<sup>1/</sup> While not presently defined in the regulations, the meaning of the phrase "within the area of the public land surveys" was expressly defined in prior regulations. Thus, 43 CFR 200.5(a) (1963), footnote 1, declared that "[l]ands 'within the area of the public land surveys' are those north and west of the Ohio and Mississippi Rivers (except Texas) and in the States of Mississippi, Alabama, Florida, and Alaska." See also Hope Natural Gas Co., 70 I.D. 228, 229 n.1 (1963). This footnote was dropped in the general redesignation of regulations in Title 43 CFR, promulgated on Mar. 31, 1964, 29 FR 4302.

the rectangular system of public land surveys, the lands shall be described by legal subdivision, section, township and range." See 47 FR 28567 (June 30, 1982). In promulgating the final version, however, the authors noted that "[i]n response to several comments, § 3111.2-2(a) of the proposed rulemaking has been expanded by the final rulemaking to incorporate the provisions of § 3101.2-3(a) of the existing regulations which require lands which cannot be conformed to the official survey to be described by metes and bounds." 48 FR 33656 (July 22, 1983).

The final two sentences added to 3111.2-2(a) in 1983 are, indeed, a verbatim restatement of the language appearing at 3101.2-3(a) (1982). The problem is that the authors of the regulation failed to note that 3101.2-3(b) (1982) had applicability only where "the lands have not been surveyed under the rectangular system of public land surveys, and the tract is not within the area of the public land surveys \* \* \*" (emphasis supplied). In other words, the 1982 regulations treated surveyed lands and unsurveyed lands within the area of the public land surveys as one entity and unsurveyed lands not within the area of the public land surveys as a different grouping. The effect of the proposed amendments would have been to create two different groupings: surveyed lands and unsurveyed lands wherever located. By adopting the amendment which it did in the promulgation of the regulations in 1983, however, the Department managed to establish one provision which covered surveyed lands and unsurveyed lands in the area of the public land surveys and another which seemingly covers all unsurveyed lands, wherever located, thereby effectively having the second provision overlap the first.

It might, of course, be argued that this is a problem of no real concern since the last sentence of 43 CFR 3111.2-2(a) (1983) merely required a description by courses and distances between the successive angle points with a tie to a reasonably nearby corner of the public land survey, while the second sentence of 43 CFR 3111.2-2(b) (1983) required courses and distances between successive angle points tied to the description in the deed or other instrument by which the United States acquired title. The problem, however, is that the second sentence of paragraph (b) applied only when less than the entire tract acquired by the United States was desired for leasing. If the whole tract were desired, paragraph (b) required that the lands "be described as in the deed or other document by which the United States acquired title to the lands or minerals." Thus, while paragraph (a) would require a description by metes and bounds, paragraph (b) would require that the application be described as it was in the acquiring document even if this were not a metes and bounds description. An individual applying for unsurveyed land within the area of the public land surveys could arguably be required to provide two descriptions if both sections were deemed to apply to its offer.

This problem becomes exacerbated when the provisions of paragraphs (c) and (d) are examined in tandem with paragraphs (a) and (b). Thus, paragraph (c) requires use of the acquisition tract number where the acquiring agency has assigned an acquisition number to the tract applied for, and provides that this is in addition to the description required by

paragraph (a), but in lieu of the description required by paragraph (b). If the application is for a parcel of unsurveyed land within the area of the public land surveys it could well be argued that the application must come under paragraph (a) rather than paragraph (b) which would therefore require compliance with paragraph (c) in addition to compliance with paragraph (a). Yet, at the same time, an applicant could well point to the language of paragraph (b) which seemingly covers all unsurveyed lands and argue that the application was made under the unrestricted language of paragraph (c) and that, therefore, the acquisition tract number was submitted in lieu of any other description.

Should such a situation arise, I believe that the Board would have no choice but to apply the old and salutary principle that no applicant for an oil and gas lease should be deprived of a preference right to lease for failure to comply with the requirement of a regulation unless that regulation is so clearly set out that there is no basis for his noncompliance. See, e.g., Beard Oil Co. (On Reconsideration), 98 IBLA 299, 302 (1987); Arthur E. 23] Meinhart, 5 IBLA 345, 350 (1972). Clearly, when paragraphs (a) and (b) are read in conjunction, they are anything but clear. Accordingly, it is my view that an individual who made an application for an acquired lands lease on unsurveyed lands within the area of the public land surveys between July 22, 1983, and June 17, 1988 (the date on which the regulations were again amended, see 53 FR 22840 (June 17, 1988), 43 CFR 3110.5-3 (1988)), may show compliance under either paragraph, provided the individual has complied with the other requirements applicable to the paragraph under which compliance is alleged. 2/

Paragraph (d) also impacts upon this analysis. That paragraph required submission of a map and applied to those offers submitted under paragraphs (b) and (c) of the regulation. In Thomas Connell, supra, this Board held that "where paragraph (d) requires maps for offers submitted 'under paragraphs (b) and (c),' our conclusion is that it does not refer to offers for surveyed land, which are filed under paragraph (a) and, where appropriate, paragraph (c)." Id. at 116 (emphasis in original). The rationale for this was based on an analysis of the 1982 regulation which concluded that:

If, prior to 1983, the regulations did not require a map for an acquired lands oil and gas lease offer for surveyed lands which could be described by aliquot part and the 1983 rulemaking promulgating the regulations presently under consideration make no substantive changes to the map requirement, the conclusion is

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2/ In any event, it is difficult to see how paragraph (c) could be applied to an application for unsurveyed lands within the area of the public land surveys which was described by metes and bounds in the acquiring document if both paragraphs (a) and (b) were deemed to apply since it is impossible for the tract number to be both in addition to and in lieu of the description otherwise required. This conundrum, alone, militates against interpreting the regulations as requiring compliance with both paragraphs (a) and (b) for any single application.

inescapable that no map was required to accompany appellant's offers.

Id. at 117. While this reasoning is valid, so far as it goes, it must also be recognized that the 1982 regulations did not require a map for unsurveyed lands within the area of the public land surveys either. See 43 CFR Subpart 3101.2-3 (1982). It would seem to me that, consistent with the holding in Connell, an applicant who had filed for unsurveyed lands within the area of the public land surveys under paragraph (a) of the 1983 regulations and who had submitted the assigned acquisition tract number required under paragraph (c) of those regulations would not be required to submit a map under paragraph (d).

The main point of this rather lengthy perambulation through the maze of the regulations is simply that it is dangerous to assume that the 1983 regulations somehow drew a bright line separating acquired lands applications for surveyed lands from those made for unsurveyed lands. In other words, whether a description by tract number is in addition to or in lieu of another description and whether a map is required to accompany the offer is not, as our prior cases might have indicated, simply a matter of determining if the land sought is unsurveyed. Rather, in each case, care must be taken to ascertain whether the unsurveyed lands were located within the area of the public land surveys and, if so, what paragraphs properly apply giving due regard to the specific facts of each case.

Paradoxically, even though our past adjudications have not differentiated between unsurveyed land within the area of the public land surveys and unsurveyed lands outside of the area of the public land surveys, the results reached have been generally sustainable under what I perceive to be the correct approach. This has been the result of the fortuitous fact that the vast majority of such determinations have arisen in Texas, which is not a public land State. See, e.g., Beard Oil Co., 117 IBLA at 54; Beard Oil Co., 111 IBLA 191 (1989); Bernard Silver, *supra*; The Joyce Foundation, *supra*; Henry P. Ellsworth, *supra*. While both Beard Oil Co., 97 IBLA 66 (1987), and Thomas Connell, *supra*, arose in Michigan, which is within the area of the public land surveys, the first case turned on the definition of acquisition tract number and the second case involved surveyed lands which clearly fall within the purview of paragraph (a). Inasmuch as the instant appeal arises within the State of Texas, there is no question but that this application must fall within paragraph (b) of the regulations. But, it is, I believe, important that we approach adjudication of issues arising under these regulations with a wary eye so as to avoid stumbling into the many traps which these regulations have laid.

As noted above, the lead opinion purports to rely on both the Ellsworth and Beard 3/ cases in reaching its result. It is useful, therefore, to briefly limn the relevant facts from those cases. In Ellsworth,

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<sup>3/</sup> Henceforth, any references to Beard Oil Co. in this opinion may be assumed to mean that decision reported at 117 IBLA 54 (1990), unless otherwise specifically noted.

the New Mexico State Office, BLM, had rejected an offer for an acquired lands lease in Texas because the application had contained a description by courses and distances but failed to provide the final call with the result that the description did not close. Since a proper intervening offer had been filed, BLM further refused to allow the offeror to correct the error. On appeal to the Board, the appellant argued that, since he sought to lease the entire acquired parcel, he was not required to provide a description by courses and distances, but need merely describe the lands sought "as in the deed or other document by which the United States acquired title to the lands or minerals," which he had done.

While the Board agreed that Ellsworth was not required to submit a description by courses and distances, it refused to ignore the description which he had submitted. Thus, the Board noted that "[b]y including a description by courses and distances to more particularly describe the land sought which was not compatible with the actual description of the land acquired \* \* \*, appellant created an ambiguity in his offer." *Id.* at 76. Citing Bob G. Howell, 63 IBLA 156 (1982), the Board noted "not only was BLM not required to alter, modify, or correct erroneous descriptions in offers, but it was without authority to do so, or to construe ambiguities therein in such a way as to make them acceptable." (Emphasis supplied.) Accordingly, the Board affirmed rejection of appellant's offer to lease.

This holding was subsequently amplified in Bernard Silver, *supra*. That decision involved an appeal by an unsuccessful protestant who had objected to issuance of an acquired lands lease for unsurveyed lands in Texas to an earlier priority offeror. The appellant in that case argued that the successful offeror had supplied both the acquisition tract number as required by paragraph (c) of the regulations and a description of the land as required by paragraph (b) of the regulations. This latter description, appellant pointed out, included not only the description provided in the deed by which the United States acquired title but also contained the phrase "as shown on the attached Boundary Description." Appellant argued that the effect of this was to make the attachment the controlling document and this attachment was not the document by which the United States had acquired title. Thus, appellant contended, that the offeror had failed to comply with the requirements of paragraph (b) and his offer should have been rejected.

In affirming the rejection of this protest, the Board made two points. First, the Board noted that paragraph (c) provided that use of the acquisition tract number was in lieu of the description otherwise required by paragraph (b) and, therefore, the fact that the priority offeror had amended that description was a legal irrelevancy since that description was surplusage. Secondly, the Board noted that the additional description which the priority applicant had provided was, itself, correct and, thus, the applicant's use of this description "created no ambiguity on the face of his offer as to which lands he requested." *Id.* at 70.

The decision in Beard can only be viewed as a dramatic departure from the Board's prior analyses. In that case, Foster Minerals, Ltd. (Foster),

had filed an offer for unsurveyed acquired land in Texas. Its offer noted that "Foster Minerals, Ltd. hereby offers to lease the parcel of land, described in Exhibit A attached hereto and made a part hereof \* \* \*." The first page of the attachment was captioned: "5,497 acres of Tract J2-III, as described by metes and bounds in Exhibit A attached." The next page provided a course and distance description, which, however, simply did not close.

Both BLM and this Board, in affirming the BLM decision, assumed that the reason why the description did not close was that an error had been made in recounting the course of the 10th call. Thus, Exhibit A provided from the ninth corner "Thence N. 21 degrees 0' E., continuing with the lands of E. D. Tidwell \* \* \* 18.10 chains to corner 10 \* \* \*." The Board concluded that an error had been made in transcribing the call as N. 21 degrees 0' E., when it should have been N. 21 degrees 0' W. The Board based its assumption on the fact that Exhibit B, which contained the deed description, traced all of the calls on Exhibit A except for the 10th call, and Exhibit D, a map, delineated Tract J2-III in its entirety. In rejecting Beard's contention that the fact that the description in Exhibit A failed to close made the offer unacceptable, the Board opined that "[t]he effect of the error in Exhibit 'A' was not fatal to the offer, as no ambiguity was created which could not be resolved within the 'face of the offer itself' by reference to the tract number and the map description." (Emphasis added.) 117 IBLA at 61-62. It seems to me that the emphasized portion of the holding in Beard is inconsistent with all prior decisions dealing with ambiguous descriptions.

The simple fact of the matter is that, until Beard, absent curative action occurring prior to the initiation of third-party rights, the existence of an ambiguity in a description was considered absolutely fatal to the offer because, as stated in Ellsworth, the Department lacks authority "to construe ambiguities therein in such a way as to make them acceptable." Id. at 76. Recourse to other sources of information on the "face of the offer" has only been permitted to supply information otherwise lacking, not to resolve a conflict within the face of the offer. See, e.g., Beard Oil Co., 88 IBLA 268 (1985); Irvin Wall, 68 IBLA 308 (1982).

Appellant in Beard, through inadvertence or neglect, filed a description which did not close. The fact that it was able to plausibly suggest the source of the error did not alter the fact that its offer did not meet the requirements of the regulations in delimiting the land sought. The additional descriptions contained in the deed and which might be gleaned from the map did not correct the misdescription. At best, they merely served to make the description of the land sought ambiguous. But, it is not the province of this Board or of BLM to resolve such ambiguities, for reasons which have been set forth on numerous occasions:

First, by "qualifying" [a] deficient first-filed offer which otherwise would be unacceptable, BLM is acting to the prejudice of one who subsequently filed a proper offer which is entitled to statutory priority. Second, in attempting to interpret

the true intention of the offeror, BLM runs a risk of doing so improperly, resulting in action contrary to the offeror's intention, as occurred in B. D. Price, [34 IBLA 41 (1979)]. Third, attempt to resolve such errors and ambiguities in some cases and not in others is violative of the salutary objective of consistent, uniform administration, and can lead to charges of favoritism, discrimination, and prejudice. Fourth, such efforts frequently are administratively troublesome, costly, and time-consuming.

Bob G. Howell, supra at 158. I believe that there is no gainsaying the proposition that a review of Board precedents highlights the Beard decision as an aberration in our consistent approach to the existence of ambiguities within the description of an oil and gas lease offer. I would overrule that case forthwith.

This opinion has spent a considerable amount of time examining the Beard decision not merely to correct a perceived error on a tangential point but rather because my review of the facts of the instant appeal convinces me that the decision in Beard should necessarily control the disposition herein. Thus, as in Beard, the written description submitted by The Moran Corporation (Moran) did not close. As with the Beard case, the calls were consistent with the acquiring deed to a point certain, in this case to corner 37. At that point, because it was appellant's intention to lease only part of the acquired tract, the description did not proceed as in the deed, but varied as follows:

Thence, East, in part with the lands of James M. Pool and W. J. Pool common to the Hezekiah Faris Survey, and in part to the John Welch, Jr. Survey, the M. L. Womack, Jr. Survey, Abstract No. 729, a distance of 33.88 chains to corner, located 18.39 chains West of corner 38, the third corner of the Hezekiah Faris Survey and the sixth corner of the Edward C. Allender Survey, a fence post witnessed by old marked bearing trees.

Thereafter, the description in the offer proceeded generally south, between the boundary lines of various parcels of land, eventually arriving at corner 95 of the acquisition deed, at which point it followed the deed description to the point of beginning.

When BLM ran a computer printout of the description, it discovered a major closure problem of approximately 1,023 feet, on the order of 1/140, far in excess of the 1/905 error permitted for public land surveys. Moreover, the description in the offer exceed the limit of closure (1/1280) in both latitude and departure as well. Accordingly, BLM rejected the description. In my view, if the description was the only source of information in the offer as to the identity of the land sought, no other course could be even theoretically justified, appellant's attempts to the contrary notwithstanding.

Appellant, however, argues that there were other sources of information included in its offer and that, when viewed in its totality, the offer did clearly delimit the land sought. Appellant notes that the description in the offer clearly tracks the description in the deed of acquisition from corners 1 to 37 and from corner 95 back to the point of beginning. Thus, the error had to have occurred between these corners. Appellant contends that a review of the deed of acquisition and a map which it submitted delineating the lands it desired clearly indicates that the error occurred in the 37th call.

As noted above, that call was for a distance of 33.88 chains, terminating at the third corner of the Hezekiah Faris Survey, which was also the sixth corner of the Edward C. Allender Survey, located, 36] according to the offer, a distance of 18.39 chains from corner 38 of the acquisition description. The problem with this call is immediately apparent if one reviews the acquisition deed which appellant also submitted. The deed repeats the initial part of the call contained in the offer but goes a total of 56.80 chains to reach corner 38. According to the call in the offer, the distance between corner 37 and corner 38 would be 52.22 chains, or 4.58 chains less than that reported in the deed. Thus, some part of this call is clearly erroneous.

Appellant points to its map of tract J1-IV and an overlay which delineated the area sought for lease, and argues that it was easy to ascertain the correct description and to compute the actual acreage sought therefrom. The map overlay indicates that from corner 37 the call should go due east along the common boundary line of the Hezekiah Faris Survey and the John Welch survey and continue due east on the same line running between the Faris survey and an unnamed survey (presumably the M. L. Womack, Jr. Survey), terminating at the corner of the E. G. Allender survey at which point it turns south along the west boundary of the Allender survey and the east boundary of the Womack survey, as called for in the description contained in the offer.

Appellant argues that the actual distances can be obtained from this map. Thus, appellant contends that the number "784" which appears below the line between the first and second corners of the Faris survey, and the number "218" <sup>4/</sup> which appears below the second and the third corner of the Faris survey, which latter corner is also the sixth corner of the Allender survey, represent the distance traversed in varas. A vara is a Spanish unit of measurement which was used in many areas of the West and in Florida. While varas may be of varying value, the established value

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<sup>4/</sup> In point of fact, a close review of the map reveals that the number is "219" not "218." This can be further corroborated by computing the south segment of the parcel along the north line of the George Daffan Survey. This difference would, as the text subsequently explains, result in a 33.33 inch error, which, of itself, would not be of sufficient magnitude to affect the acceptability of the description. Accordingly, I shall use the figure "218" in the remainder of the text.

of the vara in Texas is 1 vara = 33.3333 inches and ordinarily, therefore, 36 varas = 100 feet. See Manual of Surveying Instructions, 1947, at Appendix II.15. Appellant argues that if you add these two figures together (784 and 218) and then change the varas into chains (23.7 varas = 1 chain), the proper distance call from corner 37 can be computed as 42.28 chains, rather than 33.88 chains as called for in the description in the offer. 5/

Appellant asserts that this is clearly the correct distance since, otherwise, the subsequent calls do not match throughout the description. The description in the offer traces individual boundary lines to arrive at corner 95. As described in the offer, however, the eastern boundary line of the offer would be approximately 8.40 chains west of these boundaries throughout the eastern limit of the parcel and would, accordingly, not intersect corner 95. Thus, appellant contends that the correct distance call was clearly 42.28 chains.

Moreover, appellant argues that the correct acreage was also easily computed. Not only was the total acreage figure provided in the offer, but the map showed the individual acreage of each of the private parcels within the desired lands and another map had added the acreage of these parcels together, arriving at the 8,263.85-acre total which appeared in its offer. Accordingly, appellant argues that, read in its totality, any ambiguity created by its error in the distance to be traversed in call 37 was capable of being resolved within the "face of the offer" which it submitted.

I think that this appeal highlights the slippery slope embarked upon in the Beard decision. Certainly, the descriptive error in this case is considerably more difficult to discern than that which the Board faced in Beard. But this difference is, essentially, one of degree and not of nature, and while BLM would have been required to make a number of computations to arrive at the proper solution, the necessary elements which would allow it to do so, were contained in the offer.

Adoption of a rule that ambiguities may be resolved within the limits of an offer would lead inexorably into a morass of ever more difficult judgments as to which ambiguities we deem to have been resolved and which we find, as does the lead opinion herein, unresolvable. It is precisely because of the inherent problems in such an approach that the Department has, for nigh on 30 years (see, e.g., Robert B. Schick, A-28928 (Aug. 6,

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5/ This computation would show an error of 8.40 chains between the correct description and the description contained in the offer. While the source of this error would be difficult to ascertain "on the face of the offer," appellant did provide the answer in its request for withdrawal of the decision of the State Office, filed on Jan. 2, 1990. Appellant noted that the individuals who had drafted the description had misread the number "218" as "21," thereby creating a shortage of 197 varas. Thus, the total varas which the drafters used to compute the distance of the call would have been 805, or 2,236 feet, or 33.88 chains, as reported.

1962)), held that, if a description in an offer contains an ambiguity which makes uncertain the identity of the land covered by the offer, the offer can be afforded no priority. Such an offer cannot be accepted until the ambiguity is removed by curative action by the offeror and where, as here, the rights of a third party have intervened, the offer must be rejected. Since, in my view, Beard can only be viewed as aberrational, I have no problem in affirming the decision to reject Moran's application herein, as it is obvious that the offer, as submitted, when viewed in its entirety, is ambiguous. Therefore, for the reasons set forth in this opinion, I concur with the result reached in the lead opinion.

James L. Burski  
Administrative Judge

