

THE MORAN CORP.

IBLA 90-177

Decided August 9, 1991

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting, in part, future interest oil and gas lease offer TX NM 58644.

Affirmed as modified.

1. Administrative Authority: Generally--Administrative Procedure: Administrative Review--Delegation of Authority-- Rules of Practice: Appeals: Generally--Secretary of the Interior

Once jurisdiction over an appeal has been lodged in the Board of Land Appeals by the timely filing of a notice of appeal, the supervisory authority provided by 43 CFR 4.5 may be exercised only by the Secretary, Deputy Secretary, or Director, Office of Hearings and Appeals.

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

A noncompetitive over-the-counter future interest lease application for acquired lands which incorrectly describes the land sought must be rejected since BLM is without jurisdiction to alter, modify, or correct such a description so as to make it acceptable.

3. Oil and Gas Leases: Acquired Lands Leases--Oil and Gas Leases: Applications: Descriptions--Oil and Gas Leases: Description of Land--Oil and Gas Leases: Future and Fractional Interest Leases

A future interest oil and gas application for less than an entire tract of acquired land, not surveyed under the rectangular system of public land surveys, is required to describe the lands sought for leasing by course and distance between the successive angle points of the boundary of the tract. Where the description of the exterior boundary of one such

tract includes within it another tract not sought for leasing, the area excluded must likewise be described by course and distance between its angle points.

APPEARANCES: Ernest C. Baynard III, Esq., and John L. Gallinger, Esq., Washington, D.C., for appellant The Moran Corporation; Richmond F. Allan, Esq., and Edward Weinberg, Esq., Washington, D.C., for respondent Beard Oil Company; Margaret C. Miller, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Moran Corporation (Moran) has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting, in part, future interest oil and gas lease offer TX NM 58644. For reasons set forth below, we affirm.

As filed on April 4, 1984, application TX NM 58644 purported to embrace 7,072.7 acres of land in Walker and Montgomery Counties, Texas, within the Sam Houston National Forest. The application noted that it included part of the lands within Tract J1-II and all of the lands within Tract J1-V, which acquisition tract numbers had been assigned to the properties by the Forest Service, United States Department of Agriculture. Moran noted that it was the lessee of Central Coal & Coke Corporation, which then held the mineral interests underlying these parcels. Accompanying the application was a metes and bounds description of the lands desired and a map depicting the area sought for leasing.

Under the procedures then applicable, BLM referred the application 1/ to the Forest Service, requesting a title report and inquiring as to whether the Forest Service would consent to leasing, pursuant to the provisions of 30 U.S.C. § 352 (1988). On November 5, 1985, the Forest Service submitted the title report and informed BLM of its consent to leasing, subject to a standard Forest Service stipulation. The stipulation was forwarded to Moran, which signed and returned it on November 25, 1985. At the same time, an offer to lease the land described in the original application was filed.

On June 9, 1986, a protest to the acceptance of lease offer TX NM 58644 was filed on behalf of Beard Oil Company (Beard), alleging various deficiencies. This protest also noted that lease offer TX NM 58644 was in conflict

1/ We note that, historically, the terms "application" and "offer" have been used interchangeably within the context of future interest lease filings. See, e.g., 43 CFR 3111.3-2 (1983); 43 CFR 3130.4-5 (1971); 43 CFR 3212.3(b) (1964); see also BLM Manual Handbook 3111-1, Over-the-Counter Offers, H-3111-1.III. The same practice has been followed in the text of this decision, using the terms "application" and "offer" as used below, mutatis mutandis. Regardless of the terminology used, however, the documents considered in the context of TX NM 58644 are all of those documents submitted by appellant prior to Jan. 2, 1985, on which date Beard Oil Company filed its conflicting offers.

with lease offers TX NM 60907 and 60908, which had been filed by Beard on January 2, 1985.

By decision dated November 17, 1989, the State Office substantially upheld the protest filed by Beard. Thus, it noted that the description of that part of Tract J1-II which Moran sought and which had been attached to the lease offer contained an apparent error in distance in one call and failed to provide cardinal courses for three subsequent calls, with the result being that it was impossible to ascertain the correct acreage and rental or even to determine whether the description attained the limits of closure. Additionally, the State Office pointed out that, as described in the offer, Tract J1-II embraced Tract J1q, but this latter tract was not requested in the offer. Moreover, the State Office also noted that while the offer had requested Tract J1-V, which was surrounded by Tract J1-II, the attachment had not separately described it, nor had it excluded it from the description of Tract J1-II. Rather, the description merely described the exterior boundaries of Tract J1-II. Citing decisions of this Board such as Katherine C. Thouez, 69 IBLA 391 (1983), and Chevron U.S.A., Inc., 67 IBLA 266 (1982), BLM noted that "where there is an exclusion of an area within the boundary of the tract, the exclusion must likewise be described by courses and distances" (Decision at 2). BLM concluded that only Tract J1-V was adequately described and rejected the offer to the extent it embraced any part of Tract J1-II.

On December 18, 1989, Moran filed two documents with the State Office. The first of these was a notice of appeal of the November 17 decision. The second was titled "Request for Withdrawal of Decision (Undated) [2/] BLM No. TX NM 58644," in which Moran argued at length that the decision rejecting its offer with respect to Tract J1-II should be withdrawn. We note, however, that the simultaneous filing of a notice of appeal with, in effect, a request for reconsideration of the decision appealed deprived the State Office of authority to reconsider its decision since the timely filing of a notice of appeal eo instante vests jurisdiction over the matter appealed in this Board. See, e.g., Benton C. Cavin, 83 IBLA 107, 113-14 (1984). Accordingly, BLM made no formal response to the request for withdrawal.

In its statement of reasons in support of its appeal (SOR), appellant made various arguments for reversal of the State Office's decision. Thus, while appellant admitted that there were "typographical errors" in the description of the lands sought, appellant argued that the correct courses and distances could be obtained by following the map outline and the courses and distances shown thereon. Secondly, appellant contended that de minimis errors should not result in rejection of its lease offer. Finally, appellant asserted that BLM Instruction Memorandum (IM) 87-611, which authorized providing future interest applicants with an opportunity to cure deficiencies in their applications, was valid and binding and sought reconsideration of the Board's decision to the contrary in Beard Oil Co., 111 IBLA 191

2/ While the copy of the decision which appellant received was apparently undated, the decision in the case file is dated Nov. 17, 1989.

(1989). ^{3/} Beard thereafter filed a reply, assailing each of these contentions. In response, Moran argued that, contrary to Beard's assertion that the failure to provide three courses made it impossible to determine whether the description closed, Forest Service employees were, in fact, able to ascertain that the error of closure was only 1/1,333 as opposed to the 1/905 limit of closure allowed in the Manual of Surveying Instructions, 1973, § 3-214 (1973).

Before analyzing the issues presented by this appeal, however, it is necessary to deal with an ancillary matter which arose while this appeal was pending. On October 11, 1990, the Director, BLM, issued IM 91-38. This IM referenced an attached memorandum by the Associate Solicitor, Energy and Resources, in which it was concluded that, under established Departmental precedent, abstracts of title, certification of title, deeds, leases, and maps accompanying a future interest lease application could be considered in determining the adequacy of the legal descriptions provided in the application, and directed the BLM State Directors to immediately process any pending applications in accordance therewith. Furthermore, in compliance with an October 9, 1990, memorandum from the Deputy Assistant Secretary - Land and Minerals Management to the Director, BLM, the IM also provided that any decisions issued by BLM State Directors should provide for the concurrence of the Assistant Secretary - Land and Minerals Management, thereby constituting the final administrative action by the Department.

On May 7, 1991, this Board issued a decision styled The Moran Corp., 119 IBLA 178 (1991), in which it affirmed a decision of the New Mexico State Office rejecting a different future interest lease application filed by appellant herein. In that case, while recourse was made to the documents which accompanied the future interest lease application, it was, nevertheless, concluded that the entire package was insufficient to render the description definite and rejection of the application was therefore required. Id.

On May 16, 1991, this Board received a request from the New Mexico State Office to remand both the instant appeal and, apparently unaware that a decision had been issued with respect to The Moran Corp., supra, that appeal as well. In addition to referencing IM 91-38, this request referred to a letter, dated February 4, 1991, from the Assistant Secretary, Land and Minerals Management, to attorneys for Beard, declining their request that he rescind IM 91-38. It also enclosed a copy of a request filed by counsel for Moran with the Field Solicitor seeking to have the State Office reconsider its original decision. The State Office sought a remand to review Moran's request in light of the IM, though it noted that "[n]either this office nor the agency make any representation as to the likelihood that the agency will revise its decisions" (Remand Request at 1).

^{3/} We would note that, subsequent to the filing of appellant's SOR herein, a petition for reconsideration of the Beard decision, filed by Foster Minerals Ltd., was denied by Order of the Board dated Feb. 23, 1990. See also The Joyce Foundation, 102 IBLA 342 (1988).

On June 5, 1991, the Board received a response from Beard in opposition to the request for remand. Arguing that BLM had already reviewed Moran's application under the proper legal standard, Beard contended that a remand could serve no useful purpose since the same result must obtain.

On June 24, 1991, counsel for Moran filed a petition for reconsideration of this Board's decision in The Moran Corp., *supra*, contending that the February 4 letter of the Assistant Secretary constituted the assumption of jurisdiction by the Assistant Secretary under 43 CFR 4.5(a) and that, therefore, the Board lacked jurisdiction to issue the decision which it had rendered therein. Since this argument would also necessarily apply to our consideration of the instant appeal, we think it judicious to consider it herein, as well. 4/

The contention that the letter of February 4 constituted the assertion of supervisory authority by the Assistant Secretary over cases already pending before the Board is fallacious on virtually every ground advanced by appellant. Thus, nothing in that letter even purported to deal with the instant appeal, the great bulk of the letter being addressed to assertions by Beard's attorneys that issuance of the order by the Director, BLM, that decisions be prepared for signature of the Assistant Secretary constituted improper rulemaking in derogation of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1988). 5/ No fair reading of that letter supports the conclusion that the Assistant Secretary sought to affect cases already pending before the Board.

Moreover, we are constrained to point out that appellant's present assertion that the letter, itself, constituted the assertion of jurisdiction over the instant appeal is contradicted by its own letter of March 5, 1991, in which it requested that the Field Solicitor, Santa Fe:

[J]oin THE MORAN CORPORATION in requesting that MORAN's two subject Applications TXNM 58644 and TXNM 58666, now on appeal

4/ The petition for reconsideration of The Moran Corp., *supra*, is being denied by separate order of this date.

5/ Indeed, the sole reference to matters already appealed appeared at the end of the letter and refers to a subsequent attempt by Beard to file an appeal of the IM, itself. See Opposition to Request for Remand, Exh. B. The Assistant Secretary declared that "to the extent the notice attempts to invoke IBLA jurisdiction, it is without effect." (Emphasis supplied.) We would note, in this regard, that the Board has long held that efforts to appeal general policy statements which are not self-executing are not appealable to the Board, even where application of the policy might be deemed appealable. See Tenneco Oil Co., 36 IBLA 1 (1978). Moreover, to the extent that application of the policy would involve a decision approved by the Assistant Secretary, a prospective appellant would be unable to invoke the Board's jurisdiction under 43 CFR 4.410. See Marathon Oil Co., 108 IBLA 177 (1989); Blue Star, Inc., 41 IBLA 333 (1979). This latter point is examined in greater detail in the text of this decision.

before The Interior Board of Land Appeals as Case 90-177 and as case 90-187 respectively, be remanded to the State Director, BLM, New Mexico, to be reconsidered in the light of the hereinbefore mentioned recent memorandum and policy affirmation.

(Letter of Mar. 5, 1991, from Charles E. Shaver, attorney for Moran, to Gayle F. Manges, Field Solicitor, Santa Fe, at 2-3). The conclusion that the Assistant Secretary had purported to assert jurisdiction over the instant appeal is clearly late in coming to appellant.

[1] More fundamentally, appellant is in error in a critical part of its analysis. Thus, appellant argues that the Assistant Secretary invoked the supervisory authority of 43 CFR 4.5(a) in his February 4, 1991, letter. However, contrary to appellant's implicit assumption, the supervisory authority provided by 43 CFR 4.5(a) applies only to the Secretary and the Deputy Secretary (formerly the Under Secretary 6/).

The Office of Hearings and Appeals was originally established pursuant to a memorandum, dated January 30, 1970, from Solicitor Melich to Secretary Hickel. The cover memorandum, upon which Secretary Hickel indicated his approval, referenced an attached "detailed memorandum from [the Solicitor] supporting the establishment of an Office of Appeals and Hearings [7/]." The attached memorandum, also written by Solicitor Melich, discussed in detail both the rationale for the establishment of the Office of Hearings and Appeals and the appellate structure which would result upon creation of the Office. This memorandum expressly noted that:

Decisions and orders of the Boards constituting the Office of Appeals and Hearings shall be the final departmental action and shall exhaust the administrative remedy, except that the Secretary or the Under Secretary may assume jurisdiction of any appeal and render the final decision thereon. No other Office, Bureau, Commission or Board of the Department will participate in or advise as to the decisions of the Office of Appeals and Hearings in any proceeding. [Emphasis supplied.]

(Memorandum from the Solicitor to the Secretary, "Reorganization of Departmental Appeals and Hearings Administration" at 5).

6/ The position of Under Secretary was abolished and the position of Deputy Secretary was created in its place by section 112(a)(2) of the Act of Nov. 5, 1990, 104 Stat. 1454, 43 U.S.C. § 1452 (Supp. II 1990).

7/ The memoranda contemplated that the Office containing the various Boards and the Hearings Division would be known as the Office of Appeals and Hearings. However, in order to avoid confusion with the BLM appellate system which had also been known as the Office of Appeals and Hearings and which was being abolished in conjunction with the establishment of the new Departmental appeal structure, the name of the Office was ultimately changed to the Office of Hearings and Appeals.

Thus, from its initial inception, it has been universally recognized that the supervisory authority of the Secretary over the Office of Hearings and Appeals, as codified in 43 CFR 4.5(a), relates solely to the Secretary or the Under Secretary (now Deputy Secretary), and did not apply to the Assistant Secretaries. Indeed, the necessity for this distinction becomes apparent when it is recalled that "[i]t was partly to abolish the exercise of jurisdiction by the Assistant Secretary for Public Land Management over appeals within the Department that the Office of Hearings and Appeals was created" (Memorandum dated Feb. 24, 1977, from Acting Solicitor Ferguson to Solicitor-Designate Krulitz, re "Recommendation of Six Administrative Law Judges to Abolish the Appeal Boards in the Department" at 2).

This policy determination by Secretary Hickel has never been altered. Thus, in 1985, Under Secretary McLaughlin, in discussing comments received on a proposed amendment of both 43 CFR 4.5 and the ex parte rules set forth at 43 CFR 4.27(b), declined to establish rules regarding the exercise of Secretarial jurisdiction, noting that "[t]he procedures to be followed by the Secretary will necessarily depend upon such factors as the status of the case at the time the Secretary decided to consider it personally." 50 FR 43704 (Oct. 29, 1985) (emphasis supplied). Subsequently, the Under Secretary declined to apply the ex parte rules to prohibit "communications from Departmental representatives and lawyers to the staffs of the Under Secretary or Secretary once jurisdiction has been assumed under § 4.5." 50 FR 43704-43705 (Oct. 29, 1985) (emphasis supplied).

And, most recently, the limitation of 43 CFR 4.5(a) to the Secretary and the Under Secretary was recognized by the Report prepared by The Twentieth Anniversary OHA Blue Ribbon Committee. Thus, the report examined a proposal to eliminate the practice "of allowing certain appeals to be removed from the appellate process in the early stages due to Secretarial action, or denied standing due the prior Assistant Secretarial action" (Final Report on the Organization, Management and Operations of the Office of Hearings and Appeals (August 1990) at 32). In discussing the present appellate structure, the Blue Ribbon Committee Report clearly differentiated between the authority of the Secretary and Under Secretary to assume jurisdiction over a matter presently pending before the Board and the power of the Assistant Secretaries to preclude Board jurisdiction from attaching by approving a decision prior to the filing of a notice of appeal. Id. We note that the Report was, itself, approved by Secretary Lujan on October 31, 1990, once again reaffirming the consistent interpretation of the scope of 43 CFR 4.5.

Indeed, the distinction between the power of the Assistant Secretary to preclude review by the Board by approving a decision before a notice of appeal is filed and the authority of the Secretary and the Deputy Secretary to assume jurisdiction after an appeal has been filed is the essential theoretical predicate of the decision in Blue Star, Inc., 41 IBLA 333 (1979), upon which appellant also purports to rely.

The appeal in Blue Star involved the question of whether uranium lessees of lands for which patents had been cancelled on order of the

Assistant Secretary of the Interior for Indian Affairs could appeal the BLM decisions cancelling the patents. After reviewing the various delegations of authority to the Assistant Secretaries, the Director of the Office of Hearings and Appeals, and to the Office of Hearings and Appeals, itself, the Board concluded:

From these expressions we find that the authority which has been delegated to the Office of Hearings and Appeals and to its Director, for the purpose of its specific functions, is the equivalent of that delegated to each of the several Assistant Secretaries, i.e., "all of the authority of the Secretary." Accordingly, each has power to act with finality on matters within his or her own province. It follows that it was not contemplated that one officer who commands all of the authority of the Secretary should employ that authority to invade the province of another such officer who is not under his direct supervision. Thus, where an Assistant Secretary has made a decision or, prior to the filing of an appeal, has approved a decision made by a subordinate, that decision may not be reviewed in the Office of Hearings and Appeals since the full authority of the Secretary has been exercised. [Emphasis supplied.]

Id. at 335-36. This analysis was recently reaffirmed in Marathon Oil Co., 108 IBLA 177 (1989), wherein the Board noted that the effect of the prior approval of a BLM decision by the Assistant Secretary was to remove the matter from ambit of the Board's jurisdiction under 43 CFR 4.410(a)(1). 8/ But the clear predicate for both these decisions is that the Assistant Secretary must exercise his authority prior to the filing of a notice of appeal since, upon the filing of an appeal, the jurisdiction of the Board attaches and the matter is removed from the Assistant Secretary's jurisdiction, being subject only to the jurisdiction of the Board and those officials who have supervisory authority over the Board's adjudicatory functions, viz., the Secretary, the Deputy Secretary, and the Director, OHA.

For all the foregoing reasons, we must reject appellant's assertion that anything in the Assistant Secretary's letter of February 4 deprived this Board of jurisdiction over the instant appeal.

8/ While Beard's challenge to the procedures implemented pursuant to the IM is not properly before the Board in the instant appeal, we noted in the face of a similar objection in Marathon that, where an Assistant Secretary has approved a decision prior to issuance, "[n]ot only is the subject matter of the decision beyond the Board's jurisdiction, so, too, is any inquiry as to * * * the procedures utilized in obtaining his approval." Id. at 180.

The State Office's request for remand remains to be considered, however. The State Office's request was premised on a desire to review the application at issue in light of IM 91-38. After carefully considering the matter, we have come to the conclusion that there is no utility to be gained in following this course of action. In his February 4 letter, the Assistant Secretary noted that "[t]he IM has no impact on either the procedural resolution of applications before the Department or on Departmental policy regarding the substance of those claims" (Feb. 4 letter at 4 (emphasis supplied)). Thus, there is no substantive reason to remand this appeal.

More importantly, the whole purpose of providing for Assistant Secretary concurrence on State Office decisions was to expedite final Departmental resolution of these conflicting applications. Since the Board is, at the present time, in a position to finally dispose of this matter for the Department, it would not only be counterproductive to remand the matter to the New Mexico State Office for yet further consideration, it would be directly contrary to the expressed desires of the Assistant Secretary that these conflicts be speedily resolved. We must, therefore, deny the request for a remand.

[2] Turning to the substance of the matter under consideration, it is useful at the outset to briefly review the applicable regulations which must guide our consideration of the appeal. Under the regulations applicable when the application at issue was filed, future interest lease applications were required to describe the land sought pursuant to the regulatory scheme set forth at 43 CFR 3111.2-2(a)-(d) (1983). 9/ These regulations provided:

(a) 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 exist-ing 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.

(b) If the lands have not been surveyed under the rectangular system of public land surveys, they shall be described as

9/ These requirements, which were the general requirements for over-the-counter offers, were in addition to other requirements specific to future interest lease applications. See 43 CFR 3111.3-2 (1983).

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.

(c) 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.

(d) 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.

While paragraph (a) may contain the seeds of confusion where the land sought is unsurveyed land within the area of the public land surveys (see The Moran Corp., supra at 185-89 (concurring opinion); John R. Chitwood III, 84 IBLA 300, 302 n.2 (1985)), consideration of this provision need not detain us as the lands involved are located in Texas and, thus, are not within the area of the public land surveys. The Moran Corp., supra at 186 n.1.

Paragraph (b), which relates to unsurveyed land, is clearly applicable. That provision requires that the land sought be described as in the deed or other document by which the United States acquired title to the minerals, except that where less than the full tract so acquired is sought for leasing, the parcel must be described by courses and distances, between successive angle points on its boundary tied, by courses and distances into the description in the deed or other document by which the United States acquired title. Paragraph (c), however, provided an alternate descriptive approach where the land sought constituted the entire tract of land acquired by the United States. Thus, use of the acquisition tract number assigned by the acquiring agency was required in lieu of the description required by paragraph (b), where the entire parcel acquired was sought for leasing. 10/

10/ Admittedly, while paragraph (c) does not, by its terms, apply only where the entire tract is sought for leasing, this Board has long noted that no other interpretation is possible since use of the acquisition tract number, where only part of the lands so described was sought for leasing, would not delimit the lands sought to be leased. See, e.g., Chevron, U.S.A., Inc., 67 IBLA 266 (1982).

Finally, under paragraph (d), the offer was required to be accompanied by a map depicting the lands sought and showing their relationship to the administrative unit or project of which they were a part.

The application filed by appellant included all of the information required by the regulations. The problem, however, as indicated by BLM, was that one of the calls apparently included an erroneous distance and another three of the calls failed to contain cardinal directions for the courses and bearings. Additionally, as described, the parcel included Tract J1q, which had not been sought, and failed to exclude Tract J1-V from the description of Tract J1-II. We will examine each of these points seriatim.

As submitted, the description in the application tracked the description in the deed of acquisition through the 22nd corner. At that point, the description diverged from the deed of acquisition, taking a generally southerly course until it connected with corner 45 of the acquisition deed four calls later. The first of these calls provided: "Thence S. 00 deg. 30 min. E., continuing with the West line of the George W. Stramler Survey common to the William S. Mays Survey and the most northerly East line of the Charles Black Survey, A-78, Walker County, 86.27 chains to the S. W. corner of said Stramler Survey, same being a northeasterly interior corner of the said Black Survey." The problem with this call was that, proceeding from corner 22 for a distance of 86.27 chains on a bearing of S. 00°30' E., one did not arrive at the SW corner of the Stramler survey. To reach that point, one must travel approximately 99 chains along the same bearing. The three succeeding calls all failed to provide cardinal directions for the bearings, merely providing that the description proceeded thence 89°30' a distance of 60.31 chains, thence 00°30' a distance of 47.64 chains, and thence 89°30' a distance of 74.07 chains to corner 45.

Appellant contends that both the error and the omissions are easily corrected. Thus, appellant argues, "If the map corner calls and courses and distances shown thereon are followed, the descriptions will close." An examination of the maps submitted, however, shows that significant mathematical computations are necessary merely to compute the distance shown on the map. The reason for this is that map contains distance figures in varas, a Spanish unit of measurement which was used in many of the areas of the West. The established value of the vara in Texas is 1 vara = 33.3333 inches and, ordinarily, therefore, 36 varas = 100 feet and 23.7 varas = 1 chain. See Manual of Surveying Instructions, 1947, at Appendix II.15. Dividing the number shown for the west boundary line of the G. W. Streamler 11/ parcel (2350) by the number of varas in a chain (23.7), a total of 99.15 chains is derived.

11/ We would point out that while both the deed of acquisition and appellant's description refer to this parcel as the Stramler parcel, the map which appellant submitted shows it as the Streamler parcel, while BLM's Oil

Appellant suggests that BLM should have merely inserted this figure in place of the figure which it provided on its attachment 1. Similarly, appellant argues that BLM should have inserted the cardinal directions shown on the map in the three courses for which no cardinal directions were provided in the application. BLM's authority to make such amendments, however, is strictly limited by Departmental precedent.

While the Board has long recognized that where omissions in a description are amenable to supplementation from other information contained on the "face of the offer" recourse may be made thereto, it has consistently rejected attempts of offerors to require or permit BLM "to construe ambiguities therein in such a way as to make them acceptable." Henry P. Ellsworth, 97 IBLA 74 (1987). Admittedly, in the context of future interest lease applications, the Board, recognizing that an applicant is required to file considerably more information than that generally required of acquired lands offerors, has expanded the definition of "face of the offer" to include other documents which must be filed in conjunction with the application. See The Moran Corp., supra at 182-83. But the bedrock proposition that BLM lacks authority to construe ambiguities within an offer or application so as to make clear what is unclear has, with one arguable exception, remained unchallenged. 12/

The basis for this rule has been enunciated on numerous occasions. Thus, in Bob G. Howell, 63 IBLA 156 (1982), after noting that "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," the Board explained why this was so:

fn. 11 (continued)

and Gas Plat shows it as the Strambler parcel. While we believe that there is no question that these three varying spellings refer to the same parcel, we do believe that the variant spellings highlight the danger of assuming that the map correctly reflects the underlying facts. 12/ The one arguable exception is the Board's decision in Beard Oil Co., 117 IBLA 54 (1990). See The Moran Corp., supra at 189-92 (concurring opinion). In Beard, the Board permitted BLM to conform one cardinal direction in the description (rendered as N. 21° 0' E.) to the cardinal direction contained in the deed of acquisition (N. 21° 0' W.). In essence, the Board determined that a scrivener's error had occurred in the transcription of that call. It should be noted that, unlike the instant appeal, Beard involved a situation in which the applicant sought all of the land within a tract and had provided the acquisition tract number in accordance with 43 CFR 3111.2-2(c) (1983), and the description provided was in the nature of surplusage. See Bernard Silver, 107 IBLA 68 (1989). Thus, the parallels between that case and this appeal are minimal, even assuming the continuing validity of that precedent. But see The Moran Corp., supra at 189-92 (concurring opinion).

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, attempts 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.

Id. at 158.

So, too, with respect to the instant case, appellant's description clearly contained a call for 86.27 chains. As a result of this call, quite apart from any other deficiency, the description will not close. The fact that the same distance can be computed from the map accompanying the offer as 99.15 chains does not resolve an ambiguity, it creates one. ^{13/} Once it is recognized, however, that an ambiguity exists within the face of the offer, BLM is without any authority to construe such an ambiguity so as to make the application acceptable. Such an application can be afforded no priority until the ambiguity is removed by curative action by the applicant, and where, as here, the rights of a third party have intervened before such curative action is undertaken, the application must be rejected.

While the foregoing provides an adequate basis, in and of itself, for rejection of the application, we will address the other deficiencies delineated by BLM. Thus, BLM noted that, on the next three successive calls, no

^{13/} Contrary to appellant's assertion in its SOR, these deficiencies were not the result of a "typographical error in the typed description taken from the deeds" (SOR at 5). All four of the errors cited by BLM involved calls along the line bisecting Tract J1-II. None of these calls were replicated in the acquisition deed. This point was essentially admitted in appellant's supplemental SOR.

Similarly, appellant's attempt in its supplemental SOR to argue that the corner should control over the distance is equal unavailing. While it is true that the location of the corner in a deed normally will control over a conflicting call, it is the corner as located on the ground which controls. See, e.g., Elmer L. Lowe, 80 IBLA 101, 105; United States v. Heyser, 75 I.D. 14, 18 (1968). Nothing in appellant's submissions, however, establish the location of the corner on the ground. Moreover, since there is no requirement that appellant apply for land consistent with ownership or patenting patterns, there is no reason to assume that, in case of a conflict, appellant desired the corner to control over a conflicting call. Indeed, the description of lands submitted with its offer noted that it embraced "in whole or in part" subsequently listed patented surveys.

cardinal directions were provided. With respect to this deficiency, however, BLM was not called upon to determine which of two conflicting descriptions was accurate. Rather, appellant sought to have BLM examine the map submitted with the application to obtain information which was lacking in the description. Since, as we have indicated above, BLM may examine the entire application to ascertain information otherwise lacking within the description provided (see, e.g., Beard Oil Co., 88 IBLA 268 (1985); Irvin Wall, 68 IBLA 308 (1982)), it was error for BLM to reject the application on this basis, and we modify the decision below to delete this ground from the decision.

[3] We will discuss the final two bases for BLM's decision, the failure to exclude, by courses and distances, either Tract J1q or Tract J1-V from the description of Tract J1-II, in tandem. With respect to Tract J1q, BLM noted that appellant had neither requested that tract nor excluded it from the description of Tract J1-II. Appellant does not contend that it identified Tract J1q anywhere in its application. Rather, appellant argued below that while Tract J1q was inadvertently omitted it was plainly its intent to include the parcel in its application. Notwithstanding appellant's arguments as to what it intended, it is clear that, insofar as Tract J1q is concerned, the application is fatally flawed since 43 CFR 3111.2-2(c) (1983) requires the use of an acquisition tract number where such a number has been assigned by the acquiring agency and appellant failed to reference that number in its application.

Moreover, the failure to exclude this tract from the description of that part of Tract J1-II which appellant was seeking to lease rendered the description of Tract J1-II unacceptable as well. The Department has consistently held that where a parcel of land, otherwise embraced within a description of land sought for leasing, is to be excluded from a lease, but that parcel is not described by either metes and bounds or a quadrant description, as appropriate, the description is fatally defective and must be rejected. See Katherine C. Thouez, supra at 393; Sam P. Jones, 45 IBLA 208, 211-12 (1980); Finlay MacLennon, A-31068 (Jan. 16, 1970). Appellant's failure to identify Tract J1q by acquisition tract number in its application necessitated that the tract be excluded by courses and distances from the description of the land sought. Appellant's failure to do so rendered its description of Tract J1-II unacceptable and BLM's rejection of the application on this basis is sustained.

BLM's decision with respect to the failure to exclude Tract J1-V in the description presents a slightly different problem. Since appellant sought all of this tract and properly identified its acquisition tract number, appellant was not required to provide a metes and bounds description of this parcel. See 43 CFR 3111.2-2(c) (1983). Thus, insofar as Tract J1-V is concerned, the application was acceptable and BLM's decision to issue a lease therefor was correct. But BLM also held that the failure to exclude Tract J1-V by a metes and bounds description from the description tendered was fatal to the description of that part of Tract J1-II which appellant sought.

The problem with this latter holding, however, is that both the regulations and the decisional law of the Department requiring the exclusion of land from descriptions relates to the exclusion of lands not sought for leasing. Inasmuch as appellant clearly sought to lease Tract J1-V (unlike Tract J1q), it is questionable whether appellant was required to exclude the land in its description under the rulings of cases such as Katherine C. Thouez, supra. While the Department has strictly applied regulations relating to the proper application for oil and gas leases, it has also recognized that regulations should be so clear that there is no reasonable basis for an applicant's noncompliance before they are invoked to deprive an applicant of priority. See, e.g., Brian D. Haas, 66 IBLA 353 (1982); A. M. Shaffer, 73 I.D. 293 (1966). In the instant case, the applicable regulation is not completely clear that a tract of land, properly described by acquisition tract number pursuant to the regulations, but which is totally within another tract of land, must be excluded from the description of the surrounding tract of land. Therefore, to the extent that the decision below rejected the application for Tract J1-II on this basis, the decision must be modified to delete this ground. 14/

Finally, in its SOR, appellant suggests that such errors as it may have made were of a minor nature and did not justify rejection of its application for Tract J1-II. In fact, however, the failure of the application to clearly delimit those lands in Tract J1-II sought for leasing is absolutely critical since the proper description of lands sought is a prerequisite to lease issuance. The observation made by Judge Pratt in Reichhold Energy Corp. v. Andrus, Civ. No. 79-1274 (D.D.C. Apr. 30, 1980), is equally applicable herein: "[P]laintiff made * * * mistakes in a business that has exacting requirements and as a consequence plaintiff has been penalized. We will not permit the plaintiff to shift the blame for its troubles to the Secretary of the Interior."

In summary, since appellant's application, as it relates to Tract J1-II, contained a fatal ambiguity with respect to the distance to be traversed following the call to corner 22 and also failed to either request Tract J1q or exclude it from the description of Tract J1-II, its application for Tract J1-II was unacceptable until curative action was taken by the applicant, and where, as here, the rights of a third party have intervened, the application must be rejected.

14/ The failure of appellant to exclude Tract J1-V did, however, create a different deficiency. Thus, under 43 CFR 3111.2-2(b), an applicant is required to describe the land as in the deed of acquisition. In point of fact, the deed expressly excepted the land embraced by Tract J1-V, but appellant failed to include this exception in its description. However, since the exclusion was included in the copy of the deed submitted with the application, we view the failure to include it in the description an omission which could be cured by reference to the deed submitted therewith. See discussion supra.

Therefore, 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 as modified.

James L. Burski
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge