

MICHAEL JOHN HARVEY, JR.
YATES PETROLEUM CORP.
BILL SELTZER

IBLA 93-97, 93-99, 93-107

Decided July 9, 1996

Appeals from New Mexico State Office, Bureau of Land Management, issuance of competitive oil and gas leases with a 5-year primary term. TXNM 89745, et al.

Reversed and remanded.

1. Administrative Practice—Administrative Procedure: Generally—Oil and Gas Leases: Competitive Leases

Fairness dictates that, unless good cause can be shown for doing otherwise, leases emanating from the same competitive sale should have comparable primary lease terms. There was no apparent reason for awarding different primary lease terms to bidders at the same competitive lease sale based solely upon the date they made full payment of the first year's rental, when all of the lessees submitted payment within the same 10-day period allowed by law. The action penalized those who submitted payment promptly and rewarded those who paid at the last moment.

APPEARANCES: A. J. Losee, Esq., Artesia, New Mexico, for Michael John Harvey, Jr., and Yates Petroleum Corporation; Bill Seltzer, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Michael John Harvey, Jr., Yates Petroleum Corporation (Yates) and Bill Seltzer have appealed New Mexico State Office, Bureau of Land Management (BLM), issuance of competitive oil and gas leases having a primary term of 5 years. 1/

1/ The leases subject to this appeal are:

Michael John Harvey, Jr.

TXNM 89745	TXNM 89750	OKNM 89767	NMNM 89791
TXNM 89746	TXNM 89751	OKNM 89768	NMNM 89802
TXNM 89747	OKNM 89758	OKNM 89771	NMNM 89818
TXNM 89748	OKNM 89763	OKNM 89772	NMNM 89821
TXNM 89749	OKNM 89766	OKNM 89774	NMNM 89823

Appellants were high bidders in a competitive oil and gas lease sale held by the New Mexico State Office in Santa Fe, New Mexico, on October 21, 1992. Appellants tendered the required payments, including the full amount of the bonus bid, on the day of the sale. The regulation applicable to payments of fees, rental, and bonus bids, 43 CFR 3120.5-2, provides:

(a) Payments shall be made in accordance with § 3103.1-1 of this title.

(b) Each winning bidder shall submit, by the close of official business hours, or such other time as may be specified by the authorized officer, on the day of the sale for the parcel:

(1) The minimum bonus bid of \$2 per acre or fraction thereof;

(2) The total amount of the first year's rental; and

(3) An administrative fee of \$75 per parcel.

(c) The winning bidder shall submit the balance of the bonus bid to the proper BLM office within 10 working days after the last day of the oral auction.

BLM issued the 5-year primary term leases on October 23, 1992, which was 2 working days after the oral auction. On October 24, 1992, the President signed the Energy Policy Act of 1992, P.L. 102-486, 106 Stat. 2776. Section 2509 of that Act amended section 17 of the Mineral Leasing Act, 30 U.S.C. § 226(e) (1994), by increasing the primary term for all onshore competitive (and noncompetitive) oil and gas leases from 5 to 10 years, effective October 24, 1992. See 58 FR 40753 (July 30, 1993). Other successful bidders at the same October 21, 1992, competitive oil and gas lease sale who tendered the balance of the bonus bid after the

fn. 1 (continued)

Yates Petroleum Corporation

NMNM 89777	NMNM 89787	NMNM 89814	NMNM 89833
NMNM 89778	NMNM 89790	NMNM 89816	NMNM 89834
NMNM 89781	NMNM 89792	NMNM 89817	NMNM 89835
NMNM 89782	NMNM 89809	NMNM 89825	NMNM 89836
NMNM 89785	NMNM 89813	NMNM 89826	

Bill Seltzer

NMNM 89794	NMNM 89796	NMNM 89798	NMNM 89800
NMNM 89795	NMNM 89797	NMNM 89799	NMNM 89801

The appeals filed by Harvey (IBLA 93-97) and Yates (IBLA 93-99) were consolidated, and the Seltzer appeal (IBLA 93-107) was subsequently consolidated with the Yates and Harvey appeals. All appeals present the same issues of fact and law.

oral auction, but within the 10-day period allowed by 43 CFR 3120.5-2, were issued leases with 10-year primary terms.

In their statements of reasons Harvey and Yates argue that since June 17, 1988 (the effective date of the competitive lease regulations found at 43 CFR Subpart 3120), it had been the regular practice of the New Mexico State Office to sign and issue all leases emanating from a given competitive oil and gas lease sale on the same date, which was at least 10 working days after the last day of the oral auction, regardless of when the balance of the bonus bid had been tendered.

Appellants note that the only difference between the successful bidders who received the 10-year term leases and those who received 5-year term leases issued after the October 21 competitive oil and gas lease sale was the date they tendered the balance of the bonus bid. They assert that, had BLM followed its normal procedure, none of the leases would have been signed and issued until several days after the effective date of the Act. They reason that the bidders at the October 21 sale were not treated equally, and BLM's decision to distinguish between the bidders, based solely upon when full payment was made, was arbitrary and capricious.

In support of their argument, appellants note that the October 21 sale was conducted pursuant to the August 21, 1992, notice, that all bidders were bound to accept the lease and pay full bonus consideration, that all leases were to be issued with a November 1, 1992, effective date, and that all leases would normally have been issued after the effective date of the Act. Appellants state that there is no reasonable basis to differentiate between bidders at a competitive sale based upon when the balance of the payment in full was made.

Appellant Seltzer states that the payment procedure outlined in the Notice of Sale did not indicate that a bidder who delayed payment to the end of the 10-day period would receive an oil and gas lease with a 10-year primary term. He asserts that the effective date of the lease has always controlled when determining the ownership and rights of the parties, and reasons that BLM erred when granting a 5-year term lease effective November 1, 1992. He argues that it is against BLM policy to penalize prompt payment of bonus bids, but he was penalized when BLM granted him a 5-year primary term lease, while rewarding applicants at the same sale who delayed payment of the balance of the bonus bid until after October 24, 1992.

[1] Appellants submitted full payment of all amounts owing under 43 CFR 3120.5-2 on the date of the sale, but could have paid part on the date of the sale and submitted the balance at any time within 10 days after the date of the competitive oil and gas lease sale. 43 CFR 3120.5-2 allowed the bidder 10 days from the last day of the competitive oil and gas lease sale to make full payment.

The issue is whether BLM acted arbitrarily when it issued 5-year primary term leases to some of the successful bidders 2 days after the sale

and 1 day before the effective date of the Energy Policy Act of 1992 and issued 10-year leases to other successful bidders in the same competitive oil and gas lease sale after that date. The outcome of this appeal rests on whether there was a rational basis for the BLM action in this case. Fairness dictates that, unless good cause can be shown for doing otherwise, leases emanating from the same competitive sale should have comparable primary terms. We find no regulation or BLM instruction memorandum requiring issuance of leases immediately after the bonus bid is paid in full. The BLM Manual H-3120-1, Illustration 7, page 4, states:

AWARD/ISSUANCE OF LEASES: Prospective lessees are advised that leases may be issued, upon signature by the authorized officer, without further action on their part, once all remaining bonus bid monies are timely received. The effective date of the lease shall be the first day of the month following execution of the lease form by the authorized officer, except that leases may, upon written request from the lessee received prior to signature on the lease by the authorized officer, be effective the first day of the month in which issued. (OPTIONAL: Successful bidders tendering the full amount of the bonus bid, the first year's advance rental, and the \$75 administrative fee may be issued a lease at the auction. If it is desired that such a lease should be effective the first day of (the month and year in which the oral auction is held, e.g., November 1988), a specific written request from the lessee must be submitted with the completed Form 3000-2 and payment.) [Emphasis in original.]

This section provides that successful bidders tendering all required payments on the date of the sale may be issued a lease at the competitive oil and gas lease sale, but does not require the authorized officer to issue a lease on that date. In fact, the leases in question were not issued the day of the sale, but were issued 2 days later.

As noted previously, appellants contend that the New Mexico State Office practice at the time had been to issue all leases generated by a given competitive lease sale on the same date. This practice seems both logical and efficient. We note, however, that if all leases are issued on the same date, the issuance date would be after the expiration of the 10-day period successful bidders are given to submit the required payments.^{2/} Harvey and Yates argue that BLM acted arbitrarily because there is no reasonable basis for awarding different lease terms to some of the bidders at the same competitive lease sale based solely upon the date they make full payment of the first year's rental, when those awarded a 5-year

^{2/} We note that the Board has held that BLM may not retroactively apply a change in policy when an applicant has relied on that policy. See Timber River Rafting, Inc., 95 IBLA 90 (1986) (BLM not permitted to retroactively amend policy to allow deduction in computation of annual use fee for river rafting operation).

lease and those awarded a 10-year lease all submitted payment within the same 10-day period allowed by law. We agree. The action taken penalized those who submitted payment promptly and rewarded those who paid at the last moment.

Therefore, BLM should cancel the leases dated October 23, 1992, and issue new ones dated after the passage of the Act, with a primary term of 10 years, but effective the same date as the original leases, *i.e.*, November 1, 1992. There is no evidence that this action would infringe on any third party right, that it would be detrimental to BLM, or that it would adversely affect the public interest.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the action of BLM in issuing leases with 5-year terms is reversed and the case files remanded to BLM for action consistent with this opinion.

R. W. Mullen
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

