169 IBLA 178, Celeste C. Grynberg
Editor's Note: appeal filed, Civ. No. 06-CV-01878-WYD-MJW (D.Colo. Sept. 20, 2006)

CELESTE C. GRYNBERG

IBLA 2004-287 Decided June 22, 2006

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring null and void all bid offers for an oil and gas lease in parcel COC 67344 of the February 2004 competitive sale and canceling the issued lease.

Affirmed as modified.

1. Oil and Gas Leases: Acquired Lands Leases

Section 3 of the Mineral Leasing Act for Acquired Lands of 1947 clearly mandates that no mineral deposit shall be leased except with the consent of the department or agency having jurisdiction over the lands containing the deposit. 30 U.S.C. § 352 (2000).

2. Oil and Gas Leases: Cancellation

Where an oil and gas lease is issued for acquired lands administered by another agency without that agency's prior consent, the lease is properly canceled.

APPEARANCES: Phillip D. Barber, Esq., Denver, Colorado, for Celeste C. Grynberg; Duane Spencer, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Celeste C. Grynberg appeals from a July 1, 2004, decision of the Colorado State Office, Bureau of Land Management (BLM), declaring null and void all competitive bids submitted for oil and gas lease parcel COC 67344 at the February 12, 2004, competitive sale and canceling an issued lease. BLM's decision

stated that it did not have the prior approval of the surface managing agency and, should such consent be given, would place the parcel in the first available sale.

The 617.85 acres of lands at issue were conveyed to the United States on October 1, 1940, with a reservation of minerals to the private landowner for a period of 50 years. In a letter received by BLM on September 8, 2003, Grynberg Petroleum Company nominated these lands for inclusion in a competitive oil and gas lease sale. BLM offered them as Parcel COC 67344 in the February 12, 2004, competitive lease sale; Celeste C. Grynberg, with her bonus bid of $16 per acre, was the highest bidder. [1/] Advance rent and administrative fees in the amount of $10,890.00 were paid prior to the sale. BLM personnel prepared and signed an "Offer to Lease and Lease for Oil and Gas" form for competitive lease COC 67344 on June 18, 2004, with an effective date of July 1, 2004. [2/]

On July 1, 2004, BLM issued the decision which Grynberg has appealed. The decision is entitled "Lease Invalid Ab Initio" and therein BLM explains that it failed to consult the surface managing agency, the U.S. Forest Service, Department of Agriculture (USFS), as required by regulation. The decision states that filing fees, rental, and bonus bid monies will be refunded at the conclusion of the appeal period. (Decision at 1.) In her statement of reasons (SOR), Grynberg cites three reasons for her appeal: The regulation cited by BLM in its decision does not apply to acquired lands; the appropriate action is to suspend the lease because the lease is a vested interest; and BLM should be estopped from canceling the lease. BLM has not responded to these arguments.

[1] All mineral interest in lands acquired by the United States, including interests acquired by deed, are governed by the Mineral Leasing Act for Acquired Lands of 1947 (MLAAL), as amended, 30 U.S.C. §§ 351-359 (2000). Under section 3 of the MLAAL, no mineral deposit within such acquired lands may be leased without the consent of the administrative agency having jurisdiction over the lands sought for leasing. 30 U.S.C. § 352 (2000); see, e.g., Beard Oil Co., 88 IBLA 268, 271 (1985). Section 10 of the MLAAL authorizes the Secretary "to prescribe rules and regulations as are necessary and appropriate to carry out the purposes of this chapter, which

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[1/] The lands of Parcel COC 67344 are described as Lots 2-4 and SW¼NE¼, sec. 5, Lot 7, sec. 6, Lots 1-3 and W½NE¼, E½NW¼, NE¼SW¼, N½SE¼, sec. 7, T. 8 N., R. 59 W., 6th Principal Meridian, Weld County, Colorado.

[2/] Nothing in the case file shows whether a copy of the executed document was ever transmitted to Grynberg.

rules and regulations shall be the same as those prescribed under the mineral leasing laws to the extent they are applicable." 30 U.S.C. § 359 (2000).

The record contains a copy of a plat for T. 8 N., R. 59 W., 6th Principal Meridian, that indicates that all Federal lands within this township were withdrawn and that jurisdiction was transferred to the USFS on March 24, 1949. In accordance with the provisions in 43 CFR 3101.7 (Federal lands administered by an agency outside of the Department), BLM was obligated to contact USFS before leasing these lands:

> (a) Acquired lands shall be leased only with the consent of the surface managing agency, which upon receipt of a description of the lands from the authorized officer, shall report to the authorized officer that it consents to leasing with stipulations, if any, or withholds consent or objects to leasing.
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> (b) Public domain lands shall be leased only after the Bureau has consulted with the surface managing agency and has provided it with a description of the lands, and the surface managing agency has reported its recommendation to lease with stipulations, if any, or not to lease to the authorized officer. If consent or lack of objection of the surface managing agency is required by statute to lease public domain lands, the procedure in paragraph (a) of this section shall apply.
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> (c) National Forest System lands whether acquired or reserved from the public domain shall not be leased over the objection of the Forest Service. The provisions of paragraph (a) of this section shall apply to such National Forest System lands.

43 CFR 3101.7-1. [3/]

[3/] We observe BLM's internal guidance likewise requires consent from USFS before preparing parcels for lease sales. See BLM Handbook H-3120-1 at 8. We also note the existence of two interagency agreements between USFS and BLM, one for oil and gas leasing and one for oil and gas operations on National Forest System lands, executed in November 1991. The leasing agreement requires BLM to provide USFS with a copy of the Notice of Competitive Lease Sale at least 30 days prior to the posting of the sale notice to allow USFS 30 days to review and respond regarding whether the correct stipulations are being used for each sale parcel on USFS lands.

(continued...)

In its decision, BLM cited and quoted paragraph (b) of 43 CFR 3101.7-1, which pertains to public domain lands. Appellant correctly argues that this section does not pertain to the subject acquired lands. The process expounded in paragraph (a) governs, and a report describing the lands sought for leasing should have been sent to USFS for its response before the parcel was offered for lease. However, the fact that paragraph (b) and not (a) was cited does not obviate or alter BLM's obligation to obtain USFS's consent before leasing lands it manages. We therefore modify this aspect of BLM's decision to correctly cite 43 CFR 3101.7-1(a), noting that the appropriate subsection of the regulation was in fact applied, and that Grynberg was in no way prejudiced by the improper citation.

[2] Grynberg contends that, once the lease issued, a property right vested. In this case, by executing the competitive lease bid form (3000-2), Grynberg, as the highest bidder, presented BLM with a legitimate lease offer. See 43 CFR 3120.5-3(a). The related lease form (3100-11) was executed on behalf of BLM on June 18, 2004, with an effective date of July 1, 2004. Under the regulations governing competitive oil and gas leasing, "[a]ll competitive leases shall be considered issued when signed by the authorized officer." 43 CFR 3120.2-2. [4/] It is well established that the Secretary of the Interior, through his authorized representative, BLM, has discretionary authority to lease available Federal lands, public or acquired, for oil and gas purposes; until a lease is properly issued, the offer to lease is but a hope or expectation, rather than a valid claim against the Government. Udall v. Tallman, 380 U.S. 1, 4 (1965); see also United States v. Wilbur, 283 U.S. 414, 419 (1931); Burglin v. Morton, 527 F.2d 486, 488 (9th Cir.), cert. denied, 425 U.S. 973 (1976).

Appellant alleges that the lease cannot be unilaterally voided without proper explanation of what consents were needed, and that BLM's action in doing so constitutes a Fifth Amendment "taking" under the Constitution. (SOR at 2.) [5/]

[3/] (...continued)
See BLM Handbook H-3101-1 at 26-27, Appendix 3. BLM's failure to notify USFS prior to this sale also breached that agreement.

[4/] A separate signature by the lessee on the lease form is not necessary, as the signature on the lease bid constitutes the signature required for leasing. See BLM Manual at 3120.53.B.

[5/] The Board has long held that it has no authority to declare an act of Congress unconstitutional. Amerada Hess Corp., 128 IBLA 94, 98 (1993), and cases cited therein. Such power resides with the judicial branch of Government, not the executive branch. Idaho Mining and Development Co., 132 IBLA 29, 34 (1995).

Appellant further argues that no consent is required merely to offer a parcel for competitive bid, that it should not be punished because BLM "failed to discharge its duties," and that it would be equitable to suspend the lease issuance until it has obtained the required consent. (SOR at 3.) To support the requested outcome, Grynberg cites several cases pertaining to suspension under 30 U.S.C. § 209 (2000), which, among other things, authorizes suspensions of operations and/or production on leases. That provision, 30 U.S.C. § 209 (2000), and the implementing regulation at 43 CFR 3103.4-4 presuppose the valid issuance of a lease in compliance with applicable law. Here, the lease was not lawfully issued because it did not comply with the MLAAL. Moreover, 30 U.S.C. § 209 (2000), and 43 CFR 3103.4-4 relate to suspensions of operations, production, and/or production and operations and payments of rental and minimum royalty when directed or assented to by the authorized officer in the interest of conservation of natural resources, a finding that is not relevant to the circumstances of this appeal.

Grynberg next cites Board decisions to the effect that "the Department has repeatedly held that an oil and gas lease, although improvidently issued in violation of regulations, will be permitted to stand, in the absence of intervening rights" to further support its contention that cancellation was improper. (SOR at 4.) In the first and primary case cited by appellant, Claude C. Kennedy, 12 IBLA 183 (1973), the Board affirmed BLM's decision to cancel an oil and gas lease. Referring to the line of cases on which Grynberg relies, the Board correctly stated:

> [T]hose cases are addressed to situations where the offer was deficient. The case at bar involves the non-availability of the land for oil and gas filings. In such a case, the lease must be cancelled. R. B. Whitaker, 63 I.D. 124 (1956). Whitaker, at 127-128, makes clear that when land is unavailable for leasing, by reason of a regulatory deficiency, such land is virtually in the status of withdrawn land.

12 IBLA at 184. This is not an instance of a defective offer to lease. Without USFS consent, the subject lands were simply not available for leasing. The cases on which Grynberg relies therefore do not buttress her contention that here, because there were no intervening rights, the lease should stand. In addition, however, the concept of an "overriding policy consideration" has since been articulated as a bar to permitting improvidently issued leases to stand. See Merle C. Chambers, 40 IBLA 144, 145 (1979) ("in the absence of intervening rights or some overriding policy consideration"). We find that the failure to obtain the consent of the surface managing agency as required by the MLAAL certainly constitutes an overriding policy consideration. Thus, the circumstances of this appeal do not align with those to which the principle established in the Kennedy line of cases applies.

Section 3 of the MLAAL clearly mandates that no mineral deposit shall be leased except with the consent of the department or agency having jurisdiction over the lands containing the deposit. 30 U.S.C. § 352 (2000). The lease was therefore issued in violation of section 3 of the MLAAL. By Departmental regulation, an improperly issued lease is subject to cancellation. 43 CFR 3108.3(d). Indeed, it is well established that the Secretary of the Interior has the authority to cancel any oil and gas lease issued contrary to law because of the inadvertence of his subordinates, including administrative errors committed prior to lease issuance. Boesche v. Udall, 373 U.S. 472, 478-79 (1963); Clayton W. Williams, Jr, 103 IBLA 192, 202, 95 I.D. 102, 107 (1988). As the Board has held, where an officer of BLM acts beyond the scope of his authority in issuing an oil and gas lease, such action will not bind the Department and any lease so issued is "voidable." High Plains Petroleum Corp., 125 IBLA 24, 26 (1992). The United States cannot be bound by the acts of its employees when they "cause to be done what the law does not sanction or permit." 43 CFR 1810.3(b); see Bowers Oil and Gas, Inc., 152 IBLA 12, 16 (2000). We must conclude that the lease was properly canceled, because a contrary conclusion would permit the unauthorized act of a subordinate official to oblige the Department to follow a course that is inconsistent with governing law. Accordingly, we find no basis for a claim of estoppel. [6/]

As for Grynberg's request for a hearing, there are no significant issues of fact raised by the appeal that cannot be answered on the record before us. See Mark Patrick Heath, 163 IBLA 381, 388-89 (2004). The request for a hearing is therefore denied.

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.

T. Britt Price
Administrative Judge

[6/] Grynberg's disappointment in not receiving the lease is understandable, but the mistake was identified and corrected before the lease became effective. We doubt that Grynberg has been injured by reliance on the issued lease, as the record does not indicate that she (or anyone else) was even notified that the lease had been executed before BLM issued its decision determining that the lease was invalid.

I concur:

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Lisa Hemmer
Administrative Judge