VESSELS COAL GAS, INC.

175 IBLA 8 Decided June 26, 2008

United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

VESSELS COAL GAS, INC.

IBLA 2007-213 Decided June 26, 2008

Appeal from a decision of the State Director, Utah State Office, Bureau of Land Management, denying a protest against the inclusion of three parcels in a competitive oil and gas lease sale. UTU0207-124, UTU0207-125, and UTU0207-126.

Lease sale protest decision reversed.

1. Oil and Gas Leases: Competitive Leases

Methane released into the environment, which the U.S. Environmental Protection Agency encourages coal mining companies to capture, from vents drilled by a coal mine operator at the direction of the U.S. Mine Safety and Health Administration for the protection of coal miners, is not an oil and gas deposit subject to leasing under section 17 of the Mineral Leasing Act, 30 U.S.C. § 226 (2000).

APPEARANCES: James K. Aronstein, Esq., and Ilona Dotterrer, Esq., Denver, Colorado, for Vessels Coal Gas, Inc.; Christopher J. Morley, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management; John S. Kirkham, Esq., and Richard R. Hall, Esq., Salt Lake City, Utah, for intervenor UtahAmerican Energy, Inc.; Gregory S. Brown, Esq., and Jack M. Merritts, Esq., Denver, Colorado, for intervenor Oso Oil & Gas Properties, LLC.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

Vessels Coal Gas, Inc. (Vessels), appeals from an April 23, 2007, decision of the State Director, Utah State Office, Bureau of Land Management (BLM), denying Vessels' protest against the inclusion of three parcels offered in a February 20, 2007, competitive oil and gas lease sale.[1] The lands embraced in the three parcels directly

[1] The Feb. 20, 2007, lease sale offered for issuance, by competitive bidding, leases (continued...)

correspond to lands subject to pre-existing coal leases on which an operating underground coal mine is located. This mine is venting methane into the atmosphere. The three relevant leases subject to the 2007 oil and gas lease sale were not issued for purposes of conveying rights to explore for, drill for, mine or develop gas deposits, but only to convey the right to capture methane at surface venting structures constructed and maintained by the coal operator. As such, they are not leases issued pursuant to the Mineral Leasing Act (MLA), 30 U.S.C. § 226 (2000), or subject to competitive bid at a lease sale conducted pursuant to that statute.

Although the State Director properly concluded that the MLA is not a source of authority for the leases, we nonetheless reverse the protest decision. The protest against inclusion of the leases in an oil and gas lease sale under the MLA should have been granted.

BACKGROUND

The facts of this case are complicated and raise matters of first impression. The parcels at issue are subject to MLA leases for coal. Federal coal leases UTU-81893, UTU-66060, and UTU-79975, were issued no later than 1994 for lands in Carbon County, to, *inter alia*, Andalex Resources, Inc. (Andalex), and AMCA Coal Leasing, Inc.[2] The coal leases give the lessee rights to explore for, mine, and produce coal deposits, subject to payment of a 12.5% royalty. 30 U.S.C. § 207 (2000). Federal coal leases do not convey such rights with respect to oil and gas. *Amoco v. Southern Ute Indian Tribe*, 526 U.S. 865, 879-80 (1999). Rather, oil and gas deposits on public lands subject to coal leases remain in the lessor, and rights to explore for, drill for, and develop them are conveyed by oil and gas leases issued under the MLA. *Id.*; 30 U.S.C. § 226 (2000).

UAE is the operator of the deep underground Aberdeen Coal Mine (Aberdeen Mine) which mines coal resources on State-owned and private lands, as well as on public lands subject to the three Federal leases. To the extent the Aberdeen Mine

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[1] (...continued)
for 79 parcels of land in Carbon County, Utah. Vessels Exhibit (Ex.) 7, Jan. 5, 2007, Notice of Competitive Lease Sale, Oil and Gas, attached to Vessels' Statement of Reasons (SOR). Other than the three leases subject to Vessels' protest, the remaining oil and gas leases are not at issue and we address them no further.

[2] BLM's case record does not include the three coal leases. Vessels' Reply attaches three leases at Ex. B, but its copy of coal lease UTU-81893 is unsigned and fails to identify a lessee. BLM asserts that all three leases are held now by Andalex and we accept this as true for purposes of this appeal. Andalex's name was apparently changed to UtahAmerican Energy, Inc. (UAE).

covers Federal lands, UAE was obligated by law to prepare, for approval by BLM, a Resource Recovery and Protection Plan (R2P2) pursuant to BLM regulations at 43 C.F.R. § 3482.1. *See also* 43 U.S.C. § 202a (2000); 43 C.F.R. § 3487.1 (applications for approval of logical mining units (LMUs)). UAE must conduct its operations in accordance with its R2P2, and any LMU approval, neither of which is present in the record.

The old adage of the canary in the coal mine establishes well enough what is commonly known to be true, that coal mining releases methane. During the 1980s, as a result of technological advances, oil and gas companies developed the ability to produce coalbed methane economically. *Burlington Northern Resources Oil & Gas Company*, 153 IBLA 45, 49 (2000). The advent of this technology and the Supreme Court's decision regarding the ownership of coalbed methane gas deposits, *Amoco v. Southern Ute Indian Tribe*, 526 U.S. 865, generated conflicts between oil and gas lessees and coal lessees on the same public lands. Coalbed methane deposits on Federal lands are undoubtedly leased pursuant to MLA oil and gas leases and not coal leases. *E.g.*, *Powder River Basin Resource Council*, 120 IBLA 47, 49 (1991). Consequently, BLM and the Department issued various Instruction Memoranda and policy statements on the topic. *E.g.*, Feb. 5, 1991, Memorandum from Associate Solicitor, Division of Energy and Resources, to Director, BLM, "Use of Compensatory Royalty Agreements Rather than Competitive Leasing for Future Interest Oil and Gas Lands with Producing Wells"; Feb. 22, 2000, Instruction Memorandum No. (IM) 2000-081, "Policy on Conflicts between Coal Bed Methane (CBM) and Coal Development"; Aug. 21, 2003, IM 2003-253, "Policy and Guidance on Conflicts Between Coalbed Natural Gas (CBNG) and Surface Coal Mine Development in the Powder River Basin."

Considering the policy guidance of IM 2000-081 regarding conflicts between lessees of coal and lessees of oil and gas, the Deputy State Director, Natural Resources, Utah State Office, BLM, issued a "Policy for Oil and Gas Leasing on Lands Presently Being Developed for Underground Coal," on March 23, 2001. This document pertained to public lands managed by the Utah State Office and states:

> [E]xisting policy for oil and gas leasing on lands presently being developed for coal needs to be documented. *We have determined that oil and gas development is incompatible with underground longwall mines, so oil and gas leases will not be offered over coal lands contained within the mine permit areas for existing coal mines* or within coal lease tracts expected to be developed within the next ten years.

Mar. 23, 2001, Deputy State Director Policy Memorandum (emphasis added). Consistent with this policy, the public lands subject to coal leases authorizing development of the Aberdeen Mine are not leased for oil and gas.

The following background facts give rise to this appeal. We note that such facts are undisputed but also that the record before us contains little to verify some assertions. We recite what we understand from the parties to be true.

Coal at the Aberdeen Mine is mined by the room and pillar method, employing a series of longwalls, or rooms, separated by pillars.[3] The mining process produces coal as a product and releases methane as an inadvertent byproduct. Initially UAE vented the methane into the atmosphere by a fan and ventilation system that draws ambient air into and through the mine to dilute the methane. The resulting mixture is then expelled from the mine. This mixture is called Ventilation Air Methane or VAM. It is defined by the U.S. Environmental Protection Agency (EPA) as containing a low concentration (often less than 1%) of methane, due to the large quantities of air swept in and through the mine to mix with methane and be blown out of the mine. www.epa.gov/cmop/vam/whatisvam.html.

As UAE mined deeper, towards a depth of approximately 3,000 feet, the fan and ventilation system used at the mine lost effectiveness at protecting miners from the danger and explosive hazard wrought by methane released underground. This raised a flag to the U.S. Mine Safety and Health Administration (MSHA), which advised, or ordered, UAE to improve its methane removal system as an issue of mine safety. In response, UAE installed what the parties agree is a "state of the art" drainage system of vertical vents to remove what is identified by some parties as "gob gas."[4] Nonspecific references in the record suggest that it cost the coal companies over $2 million to drill the vent holes. The record indicates that UAE drilled wells to the depth of the underground mine to remove the gob gas from mine panels. The wells are cemented to approximately 2,400 feet, with the bottom 400 feet lined with slotted steel to collect methane from the fracture zone of the longwall. In some cases, the methane flows up the well exiting at the surface vent; in others the methane must be pumped out of the vent.

The precise number or location of gob hole vents (GHVs) that have been or ultimately will be drilled is not clear. Maps depict approximately 10 GHVs in the

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[3] Vessels claims that the room dimensions are approximately 8,775 x 775 feet. Vessels Ex. E, Affidavit of Thomas J. Vessels, ¶ 3.

[4] This term is not defined as used here, though this Board has referred to the "gob" in various decisions as a coal mine refuse pile. *E.g., Richard S. and Cathy L. Maddock (On Reconsideration)*, 168 IBLA 303, 313 (2006). "Gob" is defined in "A Dictionary of Mining, Mineral, and Related Terms," Bureau of Mines (1968 ed.), to include the "part of a mine from which the coal has been worked away and the space more or less filled up." The EPA has established an "Enhanced Gob Gas Recovery" program. *See* www.epa.gov/cmop/docs/ggasrecpv.pdf.

eastern mine area. These GHV locations are not correlated, on any maps in the record, with ownership of the surface or the mineral estate by private or public entities. At least one GHV is alleged to be located on Federal surface.

The parties agree that the vent holes are venting or will vent huge amounts of methane gas into the atmosphere. Vessels claims that "approximately 2.5 billion cubic feet of methane is or will be vented *from each mine panel* at the Aberdeen Mine through Vertical Drillholes." Vessels Ex. E, Affidavit of Thomas Vessels, at ¶ 6 (emphasis added). BLM's decision asserts that the Aberdeen Mine already has "vented 5 to 10 billion cubic feet of mixed methane, hydrogen sulfide, and atmospheric gas into the environment." Decision at 2.

Unlike VAM, which is mixed with ambient air pulled into the mine, the methane from the gob hole vents is anticipated to contain a comparatively high concentration of methane. *See* Vessels Ex. H, Aug. 21, 2006, e-mail from Douglas Cook, Chief, Division of Fluid Minerals, Utah State Office, BLM, to Tim Spisak, Chief, Division of Fluid Minerals, Washington Office, BLM ("GOB gas . . . is about 95% methane, so little has to be done to make it marketable"). While the actual concentration of methane at any particular GHV is not documented in this record, the relatively high methane concentration at the vents of UAE's state-of-the-art gob gas venting system raises the potential that the gas may be marketable.

At the same time, release into the atmosphere of billions of cubic feet of methane also raises an environmental issue for the EPA, which is responsible for regulating air pollutants. The EPA promotes a "Methane to Markets Partnership" initiative to "reduce global methane emissions to enhance economic growth, promote energy security, improve the environment, and reduce greenhouse gases" by encouraging cost-effective, near-term methane recovery in four sectors. www.epa.gov/methanetomarkets. One sector is coal mines. The EPA explains the importance of cooperation with and participation by the coal mining industry in its discussion of the "Methane Outreach Program." www.epa.gov/cmop. The goal of this program is "to promote the profitable recovery and use of coal mine methane (CMM), a greenhouse gas more than 20 times as potent as carbon dioxide." *Id.*

Consistent with the EPA's directive, UAE and Oso Oil and Gas Properties, LLC. (Oso), entered into a private Operating Agreement on February 14, 2006. We do not have a copy of this private agreement; nor are any background facts leading to the parties' decision to enter into this agreement found in the record.[5] There appears to be consensus that under the terms of this agreement, Oso would capture mine gas emitted from vent holes on the surface and, if feasible, gather and transport methane to market for any treatment and sale. UAE does not dispute that it receives

[5] Vessels has attached as Ex. J the first and last pages of the Operating Agreement.

compensation by terms of the private agreement, presumably to recover its investment in the vertical wells. The arrangement appears to be unique in BLM's experience in managing Federal coal leases; the parties agree that, if not unique, the gob gas recovery operation is highly unusual.

By letter dated April 5, 2006, Oso contacted the Utah State Office, BLM, on behalf of UAE and Oso, regarding "our proposed gob gas capture project in Carbon County, Utah." Oso explained the project's background and requested that it be given a license "issued under the broad Secretarial powers granted to the BLM under the Federal Land Policy and Management Act ("FLPMA") to capture the federal portion of the gob gas that would otherwise be vented into the atmosphere from the Andalex vertical gob gas ventilation program." Vessels Ex. F, Apr. 5, 2006, letter from Oso to BLM, "Request for Compensatory Royalty Agreement to Capture and Market Vented Gob Gas," at 2. Oso stated that it had entered into an agreement with UAE by which "Oso was responsible to obtain leases from the private oil and gas owners [of lands associated with the mine]. Oso has done this and the owners are unanimous in their desire to stop the waste of their resources and to collect royalties, to the extent possible, from Oso."

Oso explained that UAE was mining in a direction that would soon mine coal and vent gas from GHV #4 in the gob area of panel #6, which is located on Federal minerals and private fee surface. *Id.* Oso explained that the Federal mineral estate was "currently not under oil and gas lease in accordance with the policy of the BLM to not issue leases for oil and gas within a known coal mining area." *Id.* Oso also noted that in other areas UAE intended to mine, "there are both leased and unleased oil and gas interests managed by BLM." *Id.* at 3. Oso described the processing and gathering system and proffered a return, which it called a compensatory royalty, equal to the standard 12.5% oil and gas royalty on coalbed methane found in Federal oil and gas leases issued pursuant to the MLA. *Id.* at 2.

The main impediment to moving forward was that the situation was new to BLM's experience; consequently, BLM employees were unsure of the proper legal authority for Oso's proposal. BLM employees explained that the situation was unique and required "a new kind of agreement." Apr. 28, 2006, Briefing Paper for Utah State Director prepared by Cook, BLM. BLM considered permits and a "new form of agreement" using existing BLM regulations. *Id.* The record reveals both the curiosity of a unique legal arrangement and an urgency based on the opportunity to stop the venting of methane into the environment. For example, in his August 21, 2006, e-mail, Cook, BLM, explained to Spisak, BLM, that "there really is no precedent (I am familiar with a couple other attempts to do something similar, but they really didn't get off the ground) and we may be building on sand. The quicker we get an approvable document the better, because considerable gas volumes are being vented daily." Later, the two discussed the fact that "the gob gas only lasts until the mining

company finishes mining" and that "no leasehold rights [are] associated with the gathering of this byproduct such as drilling a new well, doing exploration, or assigning the operations to others. If we strip-out all of those things that make an oil and gas lease a lease what would we have?" Aug. 24, 2006, e-mail from Cook to Spisak. Explaining that "only Oso Energy has proven to the mining company that the gob gas can be safely gathered," Cook noted that six panels had already been mined on private lands "with no Federal minerals and Oso has been gathering the gas from those panels." Cook opposed competitive bidding arrangements because "companies other than Oso might win the bid and not be approved by Andalex." *Id.*

Oso proceeded to identify the agreement as one for compensatory royalties. *E.g.,* Aug. 8, 2006, e-mail from Mary Scott, Oso, to BLM. A draft agreement dated August 10, 2006, apparently prepared by Oso, was identified as a Compensatory Royalty Agreement, or "CRA."[6]

The record indicates that communications with the Department's Office of the Solicitor suggested that "unless there is an O&G lease it is no go." Aug. 24, 2006, e-mail from Spisak to Cook. On September 14, 2006, BLM's Steve Salzman, Deputy Division Chief, Fluid Minerals, Washington Office, e-mailed, *inter alia*, Cook and Spisak with the news that two attorneys in the Washington, D.C., Office of the Solicitor (WO) had "reviewed your issue paper and ideas for some type of agreement . . . . They both agree that the only legal way to collect the gas and pay royalties is to offer an oil and gas lease for competitive bid." *Id.* "It is their opinion that there is no other legal remedy." *Id.*

Thereafter, all BLM efforts directed at an agreement with Oso derived from the assumption that an MLA oil and gas lease, sold at a competitive lease auction pursuant to MLA section 17, 30 U.S.C. § 226 (2000), was the only possible option. Presumably to facilitate this outcome, in a letter dated September 29, 2006, Oso presented an "expression of interest" for parcels to be included in the next competitive lease sale to be held on February 20, 2007. *See* 43 C.F.R. § 3120.3-1.

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[6] A "compensatory royalty" is defined, *inter alia*, by BLM rule to be owed on a determination "that lands owned by the United States are being drained of oil or gas *by wells drilled on adjacent lands*." 43 C.F.R. § 3100.2-1 (emphasis added). This definition derives from common law principles of drainage and is meant to cover the situation where an adjacent oil and gas operator drills for and produces gas from reservoirs that may extend into the boundaries of the Federal mineral estate. While this definition might arguably be stretched to apply to the coal mine operator's drilling of GHVs on adjacent lands, it is unclear that it would cover all situations involving GHVs on Federal lands or the Federal mineral estate. The parties do not suggest that this rule applies here, and we agree that it is problematic at best; we take no further position on its application.

Thereafter, Vessels entered the scene. It is unclear to us when Vessels became aware of the arrangement between Oso and UAE. Thomas J. Vessels claims that the company first contacted UAE regarding collection of gob gas in the fall of 2005, attempting to "participate in the capture of Drillhole Gas discharged from the Aberdeen Mine." Vessels Ex. E, Affidavit of Thomas J. Vessels, ¶ 8; SOR at 13.[7] Vessels claims that in February 2006 UAE responded that it was working with Oso, and told Vessels that any involvement by Vessels would be required to be made by direct arrangement with Oso. *Id.*

Months later, Vessels acquired private lease interests in Carbon County, seemingly in hopes of participating in the capture of gob vent gas. Thus, while Vessels claims that its interest in this matter exists by virtue of its holding a number of private oil and gas leases "in and around the area covered by the Aberdeen Mine," *see* Vessels Ex. I, Affidavit of Fleet White, Jr., at ¶ 2, the fact is that its acquisitions took place months after UAE and Oso entered into the February 2006 Operating Agreement. Vessels' claimed ownership interests are those identified on its Exhibit S. SOR at 13. These include four private lease interests "dated August 1, 2006" and several "dated April 7, 2007," thus post-dating the lease sale and even the date of Ex. S. Vessels Ex. S.

Vessels thus obtained lease interests at a time it knew the GHVs were subject to contract for Oso's operation system. Vessels' Exhibit S, prepared as an attachment to its February 5, 2007, protest letter, claims that Vessels acquired three future private lease interests "dated April 7, 2007," but recorded June 20, 2006. Vessels Ex. S. Those interests "dated April 7, 2007" (postdating the lease sale) are located in sec. 32, T. 12 S., R. 11 E., Salt Lake Base & Meridian. A legal opinion solicited by Tom Vessels indicates that Vessels acquired the sec. 32 leases in the belief that GHV #5 was located in that section, and that Vessels was attempting to obtain the right to capture gas from that vent by becoming a Federal oil and gas lessee. This issue apparently evaporated when it became clear that GHV #5 is located in sec. 31, on which Oso is a private lessee.[8]

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[7] But for this assertion, this contact is not documented.

[8] *See* Dec. 12, 2006, Opinion Letter from Ducker, Montgomery, Aronstein & Bess, P.C., to Tom Vessels. Vessels' attorney took the position there that "it appears that Vessels has the right to capture, produce, and sell methane from the Gob Vent if the Gob Vent is situated in Section 32, and OSO has the right to capture, produce and sell methane from the Gob Vent if the Gob Vent is situated in Section 31." *Id.* at 2. Presaging the issue in this case, the Opinion Letter also concluded that the ability of an oil and gas lessee to capture and sell gas from the vent depends on whether it was permitted as "an oil and gas well" by the Oil and Gas Division of the Utah Division of

(continued...)

BLM issued a January 5, 2007, Notice of Competitive Lease Sale, offering for competitive bidding the three leases at issue along with dozens of MLA leases. Vessels Ex. T. Unlike the other MLA leases offering the right to explore for, mine for, drill for, and develop oil and gas deposits under the standard MLA form lease, the three lease parcels UTU0207-124, -125, and -126 were identified in the Notice as "for Mine Vent gas only." *Id.* at 26-27. As no document regarding the January 5, 2007, Notice contains a copy of the lease form offered for the three leases or the stipulations to be attached, we presume that the stipulations finally attached to the "Aberdeen Coal Mine Oil and Gas Leases" as issued were the ones also offered to the public. The stipulations read in relevant part, as follows:

> 1. *This lease is issued granting the exclusive right for the surface capture of ventilated mine vent gas*, known also as mine vent gas, from the Aberdeen Coal Mine, Carbon County, Utah, *and for no other purpose*. The mine vent gas is produced as a waste product from the mining of coal, exhausted through ventilation wells designed specifically for that purpose, and vented to the atmosphere to remove hazardous, potentially explosive gases from the Aberdeen mine. The lessee shall have the right to remove, utilize, and dispose of all the mine vent gas gathered at the discharge point of the wells drilled and constructed by the mining company, to transport the mine vent gas from the discharge point through the lessee's gathering system to a facility where the mine vent gas can be cleaned, scrubbed, pressurized, and placed into marketable condition, and to sell the marketable products.
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> 2. *This lease does not grant the right to drill for, mine, extract, remove and dispose of all the oil and gas* (including helium) in all the lands herein described.
>
> 3. *This lease shall be issued and become effective only under the completion of an explicit agreement with the mine operators.*
>
> 4. *This lease shall not be issued for a specific period of time but shall remain in force solely at the discretion of the mining company*. Upon mine closure the mining company is responsible for plugging the wells in accordance with the terms of the coal lease and any applicable permits. . . .
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> 5. *Mine vent gas venting is solely at the discretion of the Aberdeen mine operator and may be stopped or altered at any time for mine safety,*

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[8] (...continued)
Oil, Gas and Mining. *Id.*

> *maintenance of the ventilation system or for any other purpose deemed necessary to mine operation.* The coal lessee or mine operator is not responsible for the quality or quantity of the mine vent gas.
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> 6. Because the lessee does not have the right to drill a well or conduct oil and gas production operations, the bonding requirement provided for in section 3 of this lease may be waived.

Vessels Ex. V, Lease UTU-85441, Stipulations (emphasis added).

On February 5, 2007, Vessels protested the lease sale with respect to the three parcels. Vessels Ex. B. Vessels objected to the portions of stipulations 3, 4, and 5 italicized above, and to the fact that those stipulations authorize UAE's operational control of the gob vents, and therefore of the leases. Vessels claimed that the stipulation terms prohibited any company except Oso from competing for the leases, are anti-competitive and inconsistent with the terms and requirements of the MLA, and constitute an improper delegation to UAE of BLM's regulatory authority for wells under MLA oil and gas leases. Vessels claimed that under MLA oil and gas leases, only BLM has the authority to make decisions delegated to UAE in stipulations 3, 4 and 5. Vessels also objected to stipulation terms regarding unitization, and to the bonding provision cited above in stipulation 6.

BLM proceeded with the lease sale. According to BLM, it received bids from Oso for all three leases, and from another company for two of the leases. (This latter fact is not verified in the record.) Vessels did not bid for the three leases, asserting that it did not have sufficient information regarding the terms UAE would impose in any private contract that the lease required as a condition of obtaining the lease and that in any event UAE already had refused such a contract with Vessels. The leases were issued to Oso as UTU-85441, UTU-85442, and UTU-85443. Oso paid a bonus bid totalling $17,000 for the three leases.

The State Director issued his decision denying the protest on April 23, 2007. In background information, the State Director explained correctly that the leases are issued for mine vent gas. He proceeded, however, to describe the leases as if they had been issued to capture VAM with its substantially lower methane content than the byproduct at the GHVs. Apr. 23, 2007, State Director Decision at 2. The State Director concluded that BLM properly included the stipulations giving UAE the power to control operations because the "paramount concern not only for BLM but also for the operator of the Aberdeen Mine is mine safety . . . ." *Id.* He went on to explain that the remainder of the stipulations were designed to "negate those clauses of the printed form lease that grant oil and gas development rights." *Id.* The State Director denied that the stipulations rendered the lease sale anti-competitive, explaining that "other bidders actively participated." *Id.* at 3.

Addressing Vessels' arguments that the special stipulations violate the MLA, the State Director denied that the MLA applies at all. He stated that

> because VAM is artificially created in the mine and discharged through a *mechanical ventilation system at the earth's surface*, it does not meet the definition of gas found in 43 C.F.R. § 3000.0-5(a):
>
> > *Gas* means any fluid, either combustible or noncombustible, **which is produced in a natural state from the earth** and which maintains a gaseous or rarefied state at ordinary temperatures and pressure conditions.
>
> Thus, pollutant VAM is not subject to leasing or regulation under the [MLA]. VAM, if it is a resource with commercial value, is more appropriately subject to the authority of [FLPMA] section 102(a)(8) and (9), and Section 302(b). Consequently, BLM has chosen to modify the standard form 3200-24, Offer to Lease and *Lease for Geothermal Resources*, removing as much as practical any references to the rights commonly associated with an oil and gas lease.

Decision at 3 (italicized emphasis ours, bold emphasis in original).[9]

Vessels appealed. By orders dated July 18, and July 26, 2007, this Board granted motions to intervene submitted by UAE and Oso, respectively.

In an extensively detailed set of legal arguments, Vessels repeats and enhances its prior arguments that what it calls the "Offending Special Stipulations" 3, 4, and 5 are illegal under the MLA, that the allegedly competitive lease sale was anti-competitive because it favored only Oso, that BLM and Oso conspired to ensure that only Oso could reasonably bid on the leases, and that UAE and Oso committed violations of 30 U.S.C. § 195(a) (2000), by engaging in a scheme to violate the MLA.[10] In Vessels' terms, the several issues are as follows:

A. Oil and gas lease sales under the MLA, as amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987, must

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[9] The State Director also addressed Vessels' arguments regarding unitization and bonding. As Vessels does not pursue these arguments in this appeal, we do not address them.

[10] MLA section 41, 30 U.S.C. § 195(a)(1) (2000), makes it unlawful to "organize or participate in any scheme, arrangement, plan, or agreement to circumvent or defeat the provisions of this chapter or its implementing regulations."

afford all prospective bidders a fair and equal opportunity and prevent arrangements that diminish competition.

B. The Offending Special Stipulations and the arrangements between [UAE] and OSO contravene the MLA, as Amended by the Reform Act, by stifling competition and affording undue advantage to a single bidder.

C. The Offending Special Stipulations are unreasonable, overbroad and unduly onerous; the BLM's objectives could have been accomplished through less stringent stipulations that would not have impaired either the ability of bidders (other than Oso) to compete for the subject oil and gas leases or the public interest under the MLA.

D. The Offending Special Stipulations constitute and effect an improper and illegal delegation of administrative powers and authority.

E. The BLM's decision must be reversed because it was premised on a demonstrable error of fact; the subject parcels are being leased for the capture of drillhole gas, not the capture of VAM.

F. The BLM's decision must be reversed because it was premised upon a clear error of law; federal methane from the Aberdeen Mine must be leased under the MLA, not disposed of under FLPMA.

SOR at 16-17.

BLM's Answer defends the stipulations attached to the leases and contends that the lease sale was not anti-competitive, but agrees with the State Director that the leases are not MLA leases at all. Citing the State Director's holding that VAM is not "gas" within the definition at 43 C.F.R. § 3000.0-5, BLM acknowledges that the State Director's belief that VAM was to be captured was misguided, but concludes in any event that neither "VAM [n]or MVG" (mine vent gas) falls within the regulatory definition of "gas." Answer at 5.

UAE responds in support of the decision but primarily to defend against Vessels' charges that Oso and UAE engaged in some form of illegal conspiracy under 30 U.S.C. § 195(a) (2000). UAE asserts that "in a world of free competition, the fact that one party (Oso) is successful and another is not in acquiring a contract, alone, does not create grounds for a claim of unfair competition." UAE Answer at 8. UAE acknowledges debate over whether the MLA applies to the lease at all and "does not, by [its] pleading, concede that the [MLA] is applicable." *Id.* at 4 n.1.

Oso objects paragraph by paragraph to Vessels' SOR and defends BLM's stipulations. Oso challenges Vessels' standing to appeal. Oso refutes Vessels' claims that the stipulations stifle competition, noting that the private contract between UAE and Oso was negotiated at arms' length and "both parties had operated successfully under the pre-existing contract for some time and . . . BLM had no authority to substitute its judgment for that of two private entities." Oso Answer at 14-15. Oso recognizes that the lease sale for the subject leases was not competitive but asserts that "BLM had to recognize the reality that the Aberdeen mine operators could not legally offer multiple contracts to capture and gather the same mine vent gas to more than one party" and that the lease contract "could not, as a practical matter, be structured" so as to be acquired by multiple parties. *Id.* at 15-16. Moreover, Oso excuses BLM from making the lease sale competitive, or conversely suggests it was as competitive as BLM could make it, because "BLM had no control over the disclosure of the terms of that contract between Oso and [UAE]." *Id.* at 17. In Oso's view, BLM was bound by the terms of the private contract between Oso and UAE, and had no option but to structure leases to be acquired by other parties "consistent with the pre-existing contractual arrangements made by [UAE], with Oso or any other party."[11] *Id.* at 19. Oso thus presumes that as mine operator UAE had the exclusive right to make arrangements for the sale of gas which was a byproduct of mining the Federal coal estate.

In its Reply, Vessels objects to Oso's assertion regarding standing. Vessels relies for its party status, *see* 43 C.F.R. § 4.410, on its protest against the sale itself and its explanation that it contacted both UAE and Oso and was told that it could not participate in the program, at the same time that the lease stipulations require UAE's approval of the lessee. Vessels contends that the other parties are wrong to suggest that the lease agreements at issue could have been issued under any authority but the MLA. Vessels portends that any suggestion that such leases could be issued under FLPMA would "throw the Federal gas leasing system into disarray." Reply at 29. Vessels asks the Board to reverse the State Director, but also to compel BLM to "reoffer" the leases at another competitive lease sale conducted pursuant to the MLA. *Id.*

Analysis

Given the exhaustive briefing filed, in particular by Vessels and Oso, it would be quite difficult to respond to every argument raised. And we are reluctant to do so, given a healthy respect for the disarray predicted by Vessels and the minefield through which any decision on the issues must travel without exploding well-settled principles of law. Our analysis begins with the troubling factual issues raised by the

[11] The only record evidence of the private Operating Agreement is two pages from a contract between Oso and UAE. Vessels Ex. J.

State Director's decision, addressed in Vessels' issue E. We proceed to focus on Vessels last issue F regarding the applicability of the MLA. If Vessels does not prevail on that issue, its other legal assertions in issues A-D may be irrelevant. Even if inclusion of the Offending Special Stipulations would violate the MLA, Vessels still could not achieve its goal of bidding for MLA leases for GHV gas at another MLA competitive lease sale if the leases were not appropriately issued under the MLA.

I. The State Director's Decision.

We agree with Vessels' issue E that the protest decision does not appear to be properly informed as to the facts with respect to the nature of the gas for which "capture" is permitted under the subject leases. The State Director asserted that the point of the leases was to "capture the VAM," as defined by the EPA, Decision at 4, and that the VAM contains such a low concentration of methane that it does not rise to the level of a "gas" as defined by MLA implementing regulation 43 C.F.R. § 3000.0-5(a). Decision at 3. By focusing on the low concentration of methane in VAM, the State Director thus determined that the leases do not permit recovery of "gas" and therefore are not MLA leases. This logic misses the entire nature of the project and undercuts the rationale of his decision affirming competitive bidding for MLA leases.

First, the entire reason that some sort of gas capturing system was pursued by Oso and Vessels is that what is exiting the vents is *not* of the same composition as ordinary VAM. It has a sufficiently higher concentration of methane gas that it might be financially profitable to treat and sell it. It is not possible to know what the State Director might have believed had he properly understood the coal mining byproduct being captured.

BLM compounded the problem by attempting to endorse the State Director's logic that the gob gas at the GHVs is not "gas." BLM claims that neither VAM (which is a byproduct of the ventilation and fan system not at issue in this appeal) *nor* the mine vent gas emitted from the vents drilled by UAE to the mine depth (which *is* at issue) is "gas" within the meaning of 43 C.F.R. § 3000.0-5(a). We cannot fathom BLM's logic in asking the Board to construe that rule as defining methane as something other than "gas," merely because it is produced as an inadvertent byproduct of coal mining. We agree with Vessels that such a conclusion would create disarray in the Department's efforts to regulate coalbed methane in other contexts.

Second, whether or not the material emitted from the mine vents is "gas," if the State Director is correct that the leases at issue are not issued under the MLA, then there is no justification for his decision to deny the protest and uphold a competitive lease sale authorized solely for leases under that statute. Whether his underlying reasoning was correct or not, once he decided that BLM had offered

potential FLPMA leases and not MLA leases, he had no basis for maintaining that the lease sale was properly conducted for such leases under the MLA's competitive bidding process. The consequences of his conclusion are fairly weighty and go beyond consequences to Vessels. If, in fact, the State Director believes BLM issued FLPMA leases, then the bidding process for a MLA lease sale would not apply. Moreover, under the MLA, the State receives a 50% share of bonuses, rentals, and royalties. 30 U.S.C. § 191(a) (2000). It is fairly difficult to follow the terms of the leases at Vessels' SOR Ex. V, given that they appear to grant rights authorized under the MLA, and then, by stipulation to take away all of those rights. But, to the extent MLA provisions remain and purport to subject the lessee to MLA regulations, some of these provisions may not be enforceable.

BLM finds itself taking the contradictory positions that (a) it properly conducted a competitive MLA lease sale (b) for leases its attorneys now contend are FLPMA leases, while at the same time (c) BLM, Oso, and UAE all apparently concede that the leases at issue here could not have *been* competitively issued under the MLA because UAE could only contract with a single entity that it had already chosen. UAE, at least, directly acknowledges that Oso had the competitive advantage by virtue of its Operating Agreement with UAE. UAE Answer at 8. Thus, at least UAE and Oso concede Oso's competitive advantage in the lease sale, while arguing that it was not an "unlawful advantage," a murky distinction under the MLA, and an irrelevant one if there was no need for an MLA lease sale.

II. Reversal of the State Director's Decision Rejecting the Protest.

For all of these reasons, we reverse the State Director's decision. This was not a lease for VAM. The methane being emitted is undoubtedly "gas" under 43 C.F.R. § 3000.0-5(a) and it is being captured *because* it is methane gas. There are plenty of reasons, found merely by reading the parties' concessions, to conclude that the lease offer for three leases that eschewed all MLA standard form lease rights with respect to oil and gas deposits but granted the rights to capture the gob vent gas, was not "competitive." Oso and UAE were in the possession of contract information relevant to the bidding process that they concede was outside the possession of, and therefore disclosure by, BLM.

III. Vessel's Request for a Second Competitive MLA Oil and Gas Lease Sale.

But simply reversing the State Director's decision does not resolve the parties' disputes. Vessels asserts that once the decision is reversed, it is entitled to relief in the form of a new "competitive" lease sale under the MLA, presumably for leases with amended stipulations to avoid the terms of the Offending Special Stipulations, with disclosure of details of the contract between Oso and UAE, and a requirement that UAE enter into contracts with other parties either for the service to be provided by

Oso, or for an overriding royalty. *See* Vessels Reply at 29. This is not the case if Vessels is wrong in arguing that the authority for leases in this situation is the MLA.

And so we move on to address whether the MLA is appropriate authority for issuing leases containing the terms found in Stipulation 1 – that is, "*granting the exclusive right for the surface capture of ventilated mine vent gas*." We begin with a detour to the contract between UAE and Oso. The best information we have regarding the portion of coal to be mined by UAE that is part of the Federal mineral estate is in anecdotal guesses by Oso and BLM participants in the negotiating process; they surmise that a third of the mine's coal is Federal coal, leaving two-thirds owned by private entities or the State. We have no jurisdiction over State-owned or privately-owned coal. To the extent UAE claims that BLM has no jurisdiction over private contracts between UAE and Oso over such resources, or in particular the gas emitted as a byproduct of mining them, this is generally true. Therefore, as a general matter, we would not question such contracts, examine them, or opine about them. We agree that such contracts would be governed by other authority, presuming UAE and Oso had legal rights to engage in private contracts for the sale of that non-Federal methane gas.

We are not so sanguine about such options when it comes to the Federal gas being emitted as a byproduct of mining Federally-leased coal. In this case, to the extent Oso's and UAE's private contract for gas released in association with coal mining ventured into gas associated with the Federal coal, what may have been a perfectly legal private contract between Oso and UAE put UAE in the tricky position of selling gas released from Federally-leased coal, and therefore gas in which the Supreme Court has quite directly stated that UAE, as a coal lessee, owns no interest under a Federal coal lease. Thus, we do not necessarily endorse Oso's various conceptual positions before us to the effect that BLM had no interest in the terms of a contract between Oso and UAE for collection of Federally-owned gas.[12]

In fact, UAE's options with respect to such byproducts and with respect to such private contracts would be guided to some extent by the R2P2 that would, of necessity, contain data missing from the record before us, including any LMU agreements and incorporated MSHA mine safety requirements. In fact, 43 C.F.R. § 3482.1(c)(4) describes the material to be included in the R2P2, including maps and cross-sections of, *inter alia*, coal beds to be mined, LMU boundaries, surface ownership and boundaries, and the planned mining sequence, and 43 C.F.R. § 3482.1(c)(6) includes data required to be submitted to MSHA. Notably, the record contains information suggesting that the State of Utah permits its coal lessees to

[12] Even with respect to privately-owned coal, Oso voluntarily sought to become and did become a lessee of the oil and gas associated with that coal, voluntarily paying a royalty.

dispose of methane released from coal mining. The extent to which LMU agreements addressed this issue may have some bearing on what UAE is permitted to contract for, consistent with the R2P2. *See* 30 U.S.C. § 202a (2000). We cannot validate Oso's presumption that BLM was necessarily bound by a contract between Oso and UAE for the sale of Federal gas if UAE had no authority to sell it.

We further reject Oso's inference that BLM had no option to structure MLA leases as other than "consistent with the pre-existing contractual arrangements made by Andalex." With respect to any oil and gas deposits associated with the parcels of Federal land leased for coal, BLM was free to lease them under the MLA, consistent with the MLA, for rights available to MLA lessees, without UAE's authority or approval. Nothing UAE does as a private contractual matter changes that authority. Oso, at most a private contractor to UAE, would have even less say over the terms of an MLA lease for Federal oil and gas. Such leases would be issued under 30 U.S.C. § 226 (2000) at a competitive lease sale for which bidders would, with data available to all, competitively bid.

But the practical reality here is that, because of the many problems presented by an active and authorized underground coal mine operation causing methane to be released during the mining process and because of existing BLM Utah State Office policy, BLM had not issued such MLA leases for oil and gas deposits. It bore no obligation, either to Oso or to Vessels, to do so. Vessels' suggestion that BLM must conduct a competitive MLA oil and gas lease sale because coal mining is occurring, is entirely without foundation in any law or rule. Thus it does not follow, from our conclusion reversing the State Director's decision, that an MLA lease sale is required.

Despite our inability to endorse Oso's conceptual positions regarding BLM's authority in the face of Oso's private contract with UAE, in reality such dilemmas brought Oso to BLM in the first place, prior to UAE's mining of the Federal coal estate, to enter into some sort of arrangement with BLM so that Oso could perform its private contract with UAE when Federal coal was mined. Clearly, that was in the best interest of both Oso and UAE. But that does not mean, as Vessels would infer, that there was anything improper about it. The two companies had entered into a private contract to capture vent gas emissions from non-Federal coal, and they were free to, and wise to, contact the Government to determine what arrangements were possible when UAE reached the point of mining Federally-leased coal.

This brings us to the crux of the matter – whether BLM was obligated, once coal mining was releasing methane gas and it was determined that such emissions, which were going to be released to the atmosphere during the mining process, might be marketable, to issue to some party an oil and gas lease under the MLA. As Vessels presents the issue in its last articulated issue F, BLM's decision must be reversed

because "federal methane from the Aberdeen Mine must be leased under the MLA." SOR at 17.

We disagree. The MLA leasing scheme does not contemplate and does not address the current situation at the Aberdeen Coal Mine, where a company has contacted BLM to request a lease to capture gob gas from vents installed by a coal lessee. Further, concluding that the situation is controlled by standard form MLA oil and gas lease provisions would generate problems that would contribute to the disarray Vessels foretells.

The MLA establishes that "*[d]eposits of* . . . oil . . . *gas*, and lands containing such deposits . . . shall be subject to disposition in the form and manner provided by this chapter . . . ." 30 U.S.C. § 181 (2000) (emphasis added). In section 17(a), directly addressing oil and gas leases, the statute again specifies that all lands subject to disposition under the MLA "which are known or believed to contain oil or gas *deposits* may be leased." 30 U.S.C. § 226(a) (2000) (emphasis added).

It is well-settled under the MLA that competitive leasing is to be based upon reasonable assurance of an existing valuable mineral deposit. *American Gilsonite Company*, 111 IBLA 1, 24, 96 I.D. 408 (1989). Gas already legally released into the atmosphere is not remotely a "deposit." While the term "deposit" is not defined in the statute or the regulations, "A Dictionary of Mining, Mineral, and Related Terms," Bureau of Mines (1968 ed.), defines "deposit" to be "anything laid down," and a "mineral deposit" as "*a natural occurrence* of a useful mineral . . . in sufficient extent and degree of concentration to invite exploitation." (Emphasis added.) In short, a deposit is the mineral in place in the ground. Moreover, an MLA "lease shall be issued *only on the standard form approved by the Director.*" 43 U.S.C. § 3101.1-1 (emphasis added). Such standard form leases confer "the right to use so much of the leased lands as is necessary to explore for, drill for, mine, extract, remove and dispose of all the leased resource in a leasehold." 43 C.F.R. § 3101.1-2.

It is clear from the statute and implementing regulations that oil and gas leases were intended to be granted for purposes of exploring for, drilling for, mining for, extracting, removing, and disposing of the resulting production from oil and gas deposits in place. That is not the situation here.

Were we to try to extend the statute to cover a situation where there is no deposit, but rather a *coal* lessee liberates (and thereby effectively extracts and removes) gas as a result of its coal mining operation, and then an oil and gas lessee "captures" the gas at the surface vent hole, serious problems would arise. First, it would put the coal lessee in the untenable position of effectively performing and paying for the functions with respect to the oil and gas deposit normally vested by the standard lease form in the oil and gas lessee, with the oil and gas lessee reaping the

benefit of the coal lessee's work. The coal lessee would expend its resources to perform functions the oil and gas lessee ordinarily must perform under its lease. Indeed, this is precisely the situation Vessels would formulate here. Vessels has no precise information about the costs UAE has incurred to ensure mine safety for activities that would effectively perform the mining function of an oil and gas lessee. Nonetheless, it believes that UAE should be forced to disclose private contract information so that Vessels can obtain the right to treat and sell the methane without shouldering the costs of exploration and production, subject only to a 12.5% royalty in the United States. That statutory royalty rate presumes the lessee has explored and produced pursuant to statutory lease rights, and may thus be inappropriately low if the lessee of the gas does not incur the associated costs.

Second, we are concerned about the potential dilemma facing UAE in this situation if we were to determine that the released gas is a "deposit" that remains intact throughout the process. In such a case, despite its mandatory obligation under MSHA's rules or requirements to protect coal miners by removing dangerous, explosive methane in the coal mine, UAE arguably risks being held accountable for acting with respect to a deposit in a manner appropriate only for an oil and gas lessee, contrary to the limited rights it is given under its coal lease. *See Amoco v. Southern Ute Indian Tribe*, 526 U.S. at 879-80.

Third, on the unique facts of this case, we find no basis for adding an MLA oil and gas lessee to the mix of participants. It would appear that UAE and Oso have collaborated in creating a new coal mine degasification operation that has the benefit of protecting miners as required by MSHA, minimizing pollution to the environment as sought by the EPA, and permitting use of additional energy resources as promoted by national policy. We see nothing in the MLA that would compel us to add an uninvited third party that would perform no role envisioned by the MLA except to profit from the business investment and industry innovation performed by others.

[1] Based on the unusual facts of this case, we agree with the State Director that this situation is not covered by the MLA, and therefore no MLA competitive lease sale is required or proper under that statute. We do not agree that this conclusion stems from the definition of "gas" in BLM's rules. Rather, it comes from the MLA itself, which authorizes leasing of oil and gas "deposits." The methane mixture released by coal mining into the environment, which the EPA contends should be captured, from vents drilled by the coal mine operator, at the direction of MSHA for protection of coal miners, is not the oil and gas deposit addressed by leasing under the MLA.[13]

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[13] Our holding (and BLM's position) that the leases were not properly issued under the MLA necessarily means that the apportionment of funds to the State of Utah,

(continued...)

Should Vessels continue to seek an oil and gas lease on the public lands, Vessels would be afforded only the same opportunity to bid for such a lease as any other party, for rights granted on the standard MLA oil and gas lease form for the subject oil and gas lease deposits. That said, BLM bears no obligation to conduct a public competitive MLA lease sale for the parcels being mined subject to coal leases.

This analysis resolves Vessels' arguments A-D. Technically, however, it opens the question of BLM's authority at all to issue leases, permits, or contracts for the capture of the vent gas, similar to the ones issued to Oso. In his decision the State Director concluded that such leases are more appropriately issued under FLPMA sections 102 and 302.[14] Belatedly, in its Answer, BLM took the position that FLPMA section 302 and its implementing regulations may provide authority for the leases in this situation. The State Director's advertence to FLPMA thus raises the question of whether the situation fits within the statutory authorization for a use or development of the public lands within the meaning of that statute. We understand the opportunity FLPMA and BLM's Manual provisions appear to provide to address gob vent gas, but we also perceive the limits of such authority in the circumstances of this appeal. We leave to BLM and its counsel the debate regarding whether the "use" or "development" of the public lands extends to Oso's capture of the gas, based on MSHA's directive to UAE, effectively, to vent the gas, and the EPA's directive, effectively, not to vent it, so that the byproduct must be disposed of.[15]

We take no position in this appeal regarding the proper application of FLPMA, or any other authority for BLM to issue permits, leases, contracts, or licenses. While

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[13] (...continued)
under 30 U.S.C. § 191(a) (2000) does not apply here.

[14] We disagree with the State Director's assertion, Decision at 3, that such authority is found in FLPMA section 102, 43 U.S.C. § 1701 (2000), which is a Congressional statement of policy, not a grant of authority to the Secretary.

[15] We recognize that Vessels' position may suggest that that the "Offending Special Stipulations" are a violation of FLPMA. Nonetheless, Vessels' position that the only option for BLM was to issue MLA leases for the capture of gob gas ensured that Vessels did not present that argument. Particularly given that we do not address whether FLPMA applied here, we will not contrive such FLPMA arguments for Vessels. Moreover, Oso's assertion that Vessels could show no harm to itself from the issuance of the leases may relate to the view that, even had Vessels raised specific challenges that the stipulations violate FLPMA, Vessels could show no harm to itself from the issuance of non-competitive FLPMA leases with the cited stipulations pursuant to 43 C.F.R. § 4.410. *Donald K. Majors*, 123 IBLA 142, 143 (1992). Just as we do not manufacture arguments under FLPMA for Vessels to challenge the stipulation terms, we do not further develop a FLPMA standing argument for Oso.

the issue was presented in the State Director's decision, and the parties adopt self-interested positions on the topic, the issue has not been fully addressed by any party. Moreover, our undertaking to decide the appropriate authority for the capture of gob vent gas would inappropriately supplant BLM's plain responsibility to investigate legal options through research and consideration of relevant facts of record and data not before us. Any decision by this Board, in the absence of a full record and the benefit of such BLM research and analysis, would be premature. We thus take no position on the future of the technology at issue in this case or the sort of legal arrangements BLM will ultimately invoke to address it. Once the technology becomes freely available, it will be incumbent on BLM to address such issues in advance and with its coal lessees under approved R2P2s.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed as discussed herein.

/s/
Lisa Hemmer
Administrative Judge

I concur:

/s/
Geoffrey Heath
Administrative Judge