

DUNCAN MILLER

IBLA 70-302

Decided June 22, 1972

Appeal from the decision of the New Mexico land office requiring lease offeror to consent to certain special stipulations imposed by the Forest Service as a condition to the issuance of an oil and gas lease on public lands within a national forest. (N.M. 0556030).

Reversed.

Oil and Gas Leases: Generally -- Oil and Gas Leases: Acquired Lands --  
Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Consent of  
Agency

Although statute requires the consent of the agency administering the surface of acquired federal lands and an applicant for an oil and gas lease must execute any special stipulations required by such agency as a condition to the issuance of the lease, where an oil and gas lease offer is made for available public lands which have been withdrawn the determination to lease or not to lease is properly made by the Department of the Interior and it may adopt and incorporate special stipulations proposed by the agency administering the surface and require the offeror to agree

thereto, or it may decline to adopt any such proposed stipulations and issue the lease without them. Proposed special lease stipulations must be supported by valid reasons which will be weighed by this Department with due regard for the public interest.

OVERRULED: The following Departmental decisions are hereby overruled: Mountain Fuel Supply Company, A-31053 (December 19, 1969); Cecil H. Phillips, A-30851 (November 16, 1967); J. D. Archer, A-30750 (May 31, 1967); Duncan Miller, A-30722 (April 14, 1967); Duncan Miller, A-30742 (December 2, 1966); Halvor F. Holbeck, A-30376 (December 2, 1965); H. E. Shillander, A-30279 (January 26, 1965); Jacob N. Wasserman, A-30275 (September 22, 1964); Duncan Miller, A-29760 (September 18, 1963).

#### OPINION BY MR. STUEBING

Duncan Miller has appealed from a land office decision which required his consent to certain special stipulations imposed by the Forest Service, United States Department of Agriculture, before a noncompetitive oil and gas lease would be issued to him for public lands within the Santa Fe National Forest, New Mexico.

Our review of the matter discloses that in addition to the eleven standard stipulations routinely required for leases of lands subject to the surface jurisdiction of the Department of Agriculture (Form

3103-2, October 1964), the Regional Forester, Southwestern Region (Region 3), imposed twenty-four special, or supplemental, stipulations as a precondition to his approval of the Bureau of Land Management's issuance of the lease.

The special stipulations would forbid the lessee from exercising the rights nominally conferred by the lease unless and until he applied for and received from the Forest Supervisor special land use permits specifically authorizing that particular activity. Summaries of the prohibitions, by stipulation number, are as follows:

1. No surface use of the land for any purpose.
2. No geophysical work involving core holes or shot holes.
5. No drill sites will be authorized within 1/2 mile of present or proposed recreation areas, administrative sites, residences, lodges or camps, except by approval of the Regional Forester.
6. No drill sites will be authorized within 1/4 mile of any permanent water, including springs, stock tanks and wildlife water catchments.
7. No improvement of any existing road.
8. No road relocation work.
15. No drill site to exceed one acre. Specifications provided for pods, pits, equipment removal and restoration.
16. No more than one tank battery to each noncontiguous section. None on game migration routes.

The affirmative obligations imposed upon the lessee by the proposed special stipulations are as stringent as the negative obligations enumerated above. The Regional Forester will decide if it is necessary for wells to be drilled only in accordance with a unit plan approved by the Director, Geological Survey (Stip. #3). After receiving a special land use permit from the Forester to conduct some specific activity on the leasehold, the lessee must give the Forester 10 days advance notice prior to the initiation of the authorized activity (Stip. #4). Pipelines away from the drill pad must be buried at least 12 inches, except in the discretion of the Forest Supervisor (Stip. #10). Surplus water will be disposed of, or used by the forest officer at his discretion (Stip. #11). Lessee's water wells become the property of the United States upon abandonment, and the casing therein will be left in place. During lessee's operations, whenever possible, water will be supplied from lessee's wells for livestock and wildlife and any other use authorized by the Forest Service (Stip. #12). The lessee may be required to locate pumps underground whenever deemed necessary by the Forest Supervisor for aesthetic or other purposes (Stip. #19). The lessee must remove the drilling rig after well completion and within 30 days after notice by the Forest Supervisor (Stip. #20). Lessee must deliver to the Forest Service a surety bond in the amount of \$10,000 with sureties satisfactory to the Forest Service to guarantee performance of these stipulations and the requirements of the special land use permits in conjunction therewith (Stip. #23).

Some of these special stipulations appear to be extremely arbitrary. For example, where the leasehold is a section or its equivalent, any water located near the center would preclude drilling, as would a building or recreation site. Also, section 2(a) of the lease terms provides for the filing of a \$10,000 drilling bond to insure compliance with the lessee's obligations. This is supposed to protect the interests of the United States, and it is difficult to understand why the Forest Service requires an additional \$10,000 bond to protect its interests as though it were a separate entity.

Aside from the lessee's quandary in such cases, there is the critical question of the basic authority of the Secretary of the Interior to issue and administer oil and gas leases on public domain lands. The stipulations are so stringent as to be nugatory of the lease itself, in that the lessee could not exercise the basic rights afforded by the lease until he applied for and was granted a series of special land use permits at the discretion of the Forest Supervisor. The issuance of a lease under such conditions would constitute little more than an expression of the consent of the Secretary of the Interior to seek to explore for and recover oil and gas at the pleasure and discretion of the Forest Service, subject to such terms and conditions as it may impose. This may be regarded as an abnegation of the authority of this Department or a usurpation of that authority by the Forest Service.

The Forest Service informed the Bureau of Land Management that the purpose of the supplemental stipulations is to provide essential protection and to permit administration of the renewable surface resources under the Multiple Use Act of June 12, 1960 (74 Stat. 215; 16 U.S.C. 528 (1970)). <sup>1/</sup> It further advised that the supplemental stipulations spell out the requirements of the standard stipulations and put the lessee on notice that he will be required to operate his lease under an acceptable surface management plan. The Forest Service, stating that it had fully considered the stipulations, advised that they had been in use for a number of years and have had widespread acceptance. However, it is our understanding that these stipulations are only required in Forest Service Region 3.

The additional special stipulations requested by the Forest Service have not been drafted with any particular regard to the lands included in the appellant's lease offer. They are not addressed to any specific need. Had they been tailored to meet a need to protect or preserve identifiable resource values on the land involved they doubtless would have been accorded favorable consideration. This Board has repeatedly affirmed decisions to impose reasonably necessary special stipulations of this ilk.

Bob Owen White, et al.,

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<sup>1/</sup> This Act, incidentally, contains a proviso that, "[n]othing herein shall be construed so as to affect the use or administration of the mineral resources of national forest lands \* \* \*."

5 IBLA 229 (March 22, 1972); Benjamin T. Franklin, et al., 4 IBLA 130 (November 30, 1971); Quantex Corp., et al., 4 IBLA 31, 78 I.D. 317 (1971).

But where, as here, rigid restraints and controls would be imposed on oil and gas lessees generally, regardless of a specific need therefor in any particular case, in the apparent hope that they might have a salutary effect in some instances unknown to their draftsman, or for the purpose of investing Forest Service field officers with extraordinary authority to regulate lessee's activities, which they would not otherwise have, we must regard such stipulations as arbitrary.

On August 7, 1969, Solicitor Melich of this Department, in commenting to the Chairman of the Public Land Law Review Commission on the Oil and Gas Study prepared under the auspices of the Commission, stated:

\* \* \* the reference to the Department's frequently refusing to lease lands in national forests when the Forest Service objects is too sweeping. The Department requires that valid reasons must be submitted. These are weighed in determining whether to lease or not to lease in the public interest.

The standard stipulations of Form 3103-2 are intended to afford appropriate general protection to the timber, wildlife, vegetative and other resources of national forests. If they do not accomplish

this they should be revised. Instead, the eleven standard stipulations are supplemented by twenty-four additional special stipulations, which in turn will be supplemented by the additional terms, conditions and stipulations of the several special land use permits which the lessee must obtain before he can exercise the rights nominally bestowed by the lease. This would operate to negate the control over the lease terms which is exercised by this Department and invest that control in field officers of the Forest Service.

There is a significant difference in the language of the Mineral Leasing Act (for public domain lands) and the Mineral Leasing Act for Acquired Lands, in that the latter expressly provides that no mineral deposit on acquired lands may be leased by the Secretary except with the consent of the head of the executive department or agency having jurisdiction over the land, and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired. 30 U.S.C. § 352 (1970). (Also to the same effect see 43 CFR 3109.3-1 (1972)). This Board has recognized this obligation even where it has appeared to the Board that the special stipulations requested by the administering agency were unreasonable. Duncan Miller, 5 IBLA 364 (April 19, 1972).

Had it been the legislative or regulatory intent to similarly restrain the Secretary in the exercise of his authority to grant

mineral leases and permits on public lands withdrawn or reserved it could easily have been so stated.

The fact that it has not is significant. 2/

In the transfer of certain functions from the Secretary of the Interior, section 2(c) of the Act of June 11, 1960; 74 Stat. 206, reads:

Nothing in subsection (1) of section 1 hereof shall be construed to authorize the Secretary of Agriculture to dispose of coal, phosphate, sodium, potassium, oil, oil shale, gas, or sulfur, or to dispose of any minerals which would be subject to disposal under the mining laws if such laws were applicable to the lands in which the minerals are situated.

The Secretary of the Interior is the official designated by statute to issue leases or permits for the exploration, development and utilization of mineral deposits in public lands under general rules and regulations to be prescribed by him. 30 U.S.C. § 189 (1970).

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2/ This is borne out by the fact that an exception to this general rule is afforded by statute with regard to public-domain lands within the exterior boundaries of national forests in Minnesota, where the development and utilization of mineral resources can be permitted by the Secretary of the Interior only with the consent of the Secretary of Agriculture. Act of June 30, 1950, 64 Stat. 311; 16 U.S.C. § 508b (1970).

The Bureau of Land Management is the Interior agency which exercises the delegated authority of the Secretary for this purpose. The following regulations in Title 43 CFR (1972 ed.) are applicable:

§ 3109.4 Reserved, withdrawn, or segregated lands.

§ 3109.4-1 Requirements

With respect to lands embraced in a reservation or segregated for any particular purpose the lessee shall conduct operations in conformity with such requirements as may be made by the Bureau of Land Management for the protection and use of the land for the purpose for which it was reserved or segregated, so far as may be consistent with the use of the land for the purpose of the lease, which latter shall be regarded as the dominant use unless otherwise provided or separately stipulated. (Emphasis added.)

§ 3109-4-2 Special stipulations.

Offerors for noncompetitive oil and gas leases and applicants for permits, leases, and licenses for lands, the surface control of which is under the jurisdiction of the Department of Agriculture, will be required to consent to the inclusion therein of the stipulation on a form approved by the Director. Where the lands have been withdrawn for reclamation purposes the offeror or applicant will be required to consent to the inclusion of a stipulation on the approved forms. If the land is potentially irrigable, or if the land is within the flow limits of a reservoir site or within the drainage area of a constructed reservoir, or if withdrawn for power purposes, or where the lands have been withdrawn as Game Range Lands, Coordination Lands, or Alaska Wildlife Areas, the offeror or applicant will be required to consent to the inclusion of a stipulation on an approved form. Additional conditions may be imposed to protect the land withdrawn if deemed necessary by the agency having jurisdiction over the surface. (Emphasis added.)

In this instance the standard stipulations appear to conform to the regulation in that they are on a form approved by the Director, but the special stipulations have not been so approved.

These regulations raise the question of whether the form of the stipulation itself is subject to the Director's approval or whether he must accept the stipulation and require the offeror's consent to it on a form devised or approved by him. While the language employed may be construed to indicate that it is the format of the paper on which the stipulations are written that must be approved by the Director, this interpretation is inconsistent with the exercise of the delegated authority of the Secretary to prescribe the terms and conditions which will govern a mineral lease.

In dealing with this appeal we have encountered a substantial body of contrary departmental case law. It has been the consistent policy of the Department not to question the merits of terms and requirements imposed by other agencies as conditions precedent to their agreement to lease the public land withdrawn for their use. Interior decisions have held that the propriety or meaning of any special stipulation should be taken up with that agency by the offeror, and that the burden is on him to persuade the administering agency to modify its stipulations. Unless the Forest Service (or other agency) agreed to modify, the Department has required consent to them as a condition to issuance of the lease. Mountain Fuel

Supply Company, A-31053 (December 19, 1969); Cecil H. Phillips, A-30851 (November 16, 1967); J. D. Archer, A-30750 (May 31, 1967); Duncan Miller, A-30722 (April 14, 1967); Duncan Miller, A-30742 (December 2, 1966); Halvor F. Holbeck, A-30376 (December 2, 1965); H. E. Shillander, A-30279 (January 26, 1965); Jacob N. Wasserman, A-30275 (September 22, 1964); Duncan Miller, A-29760 (September 18, 1963). In light of our conclusion that these decisions do not correctly reflect the applicable law or the regulations, they are overruled. These cases are distinguished from the decision of this Board in Quantex Corporation et al., 4 IBLA 31; 78 I.D. 317 (1971), in that in Quantex the Board did undertake to review the special stipulations proposed by the Forest Service and, having considered them on their merits, found that the stipulations were not unreasonable, thereby discharging this Department's responsibility to determine the propriety of the stipulations in the light of the circumstances.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decision of the New Mexico land office is reversed and the case is remanded to that office to ascertain whether the Forest Service has a specific need for any special stipulation(s) in addition to the standard stipulations approved by the Director on Form

3103-2. Should additional stipulations be proposed they will be considered in accordance with the criteria set forth herein.

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Edward W. Stuebing, Member

We concur:

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Newton Frishberg, Chairman

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Douglas E. Henriques, Member

