

CECIL A. WALKER  
ALAN C. F. DILLE'

IBLA 76-94  
IBLA 76-95

Decided July 9, 1976

Appeals from decisions of the Nevada State Office, Bureau of Land Management, requiring execution of special stipulations as a condition precedent to the issuance of oil and gas leases.

Affirmed.

1. Environmental Quality: Generally -- Environmental Quality:  
Environmental Statements -- Oil and Gas Leases: Consent of Agency  
-- Oil and Gas Leases: Stipulations -- Secretary of the Interior

The Secretary of the Interior may require an oil and gas lease applicant to accept stipulations reasonably designed to protect environmental and other land use values as a condition precedent to the issuance of a lease. Where a Bureau of Land Management district-wide environmental analysis record establishes the likelihood that significant archaeological values are prevalent in the district and may be found in the land embraced by leases in that district, a special protective stipulation is not unreasonable solely because no archaeological values have yet been discovered in the lands in the lease offer.

2. Environmental Quality: Generally -- Oil and Gas Leases: Stipulations  
Oil and gas lessees must bear the expenses occasioned by compliance

with stipulations for the protection of the environment and other land use values.

3. Administrative Authority: Generally -- Delegation of Authority:  
Generally -- Oil and Gas Leases: Stipulations

A stipulation requiring an oil and gas lessee to provide a certified statement by an archaeologist concerning the existence of archaeological values on lands to be disturbed by the lessee does not constitute an unlawful delegation of authority because the purpose of the statement is to notify an authorized officer of the Department who retains the authority to determine whether the archaeological data are significant and whether such data are being or may be irrevocably lost or destroyed.

Earl R. Wilson, 21 IBLA 392 (1975), modified and distinguished.

APPEARANCES: Sheridan L. McGarry, Esq., Salt Lake City, Utah, for appellants.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

These are appeals from decisions of the Nevada State Office, Bureau of Land Management (BLM), requiring execution of special stipulations as a condition precedent to the issuance of oil and gas leases on appellants' offers. <sup>1/</sup> The stipulation to which appellants object provides as follows:

To secure specific compliance with the stipulations under Sec. 2, paragraph (q) of the oil and

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<sup>1/</sup> The appeal of Cecil A. Walker, IBLA 76-94, involves lease offers N-7983, N-7984, N-7985, N-7986, N-7987, and N-7988. The appeal of Alan C. F. Dille', IBLA 76-95, involves lease offers N-7684, N-7685, N-7686, N-7687, and N-7688. We note that the offers submitted by Dille' were not made on Form 3120-3 (1968), but rather on Form 4-1158 (1961) which has no general provision for the protection of archaeological values such as clause 2(q) of Form 3120-3 (1968), discussed infra.

gas lease form, the lessee shall, prior to operations, furnish to the Authorized Officer a certified statement that either no archaeological values exist or that they may exist on the leased lands to the best of the lessee's knowledge and belief and that they might be impaired by oil and gas operations. Such certified statement must be completed by a qualified archaeologist acceptable to the Authorized Officer.

If the lessee furnishes a statement that archaeological values may exist where the land is to be disturbed or occupied, the lessee will engage a qualified archaeologist, acceptable to the Authorized Officer, to survey and salvage, in advance of any operations, such archaeological values on the lands involved. The responsibility for the cost for the certificate, survey and salvage will be borne by the lessee, and such salvaged property shall remain the property of the lessor or the surface owner.

The stipulation is recommended for inclusion in every oil and gas lease issued in the Elko District, where the land included in appellants' offers is located. The stipulation would supplement the protective provision of clause 2(q) of the standard lease form which provides in part as follows:

When American antiquities or other objects of historic or scientific interest including but not limited to historic or prehistoric ruins, fossils or artifacts are discovered in the performances of this lease, the item(s) or condition(s) will be left intact and immediately brought to the attention of the contracting officer or his authorized representative.

As a basis for requiring execution of the special stipulation, the State Office refers to its Environmental Analysis Record (EAR) for oil and gas leasing and geothermal steam leasing in the Elko District, N-10521, No. 27-010-4-82. The EAR lists a number of sites of historical and archaeological significance, but we must note that the stipulation is directed at the protection of archaeological values which have yet to be discovered as well as any which may already be known. As a justification for the stipulation, the EAR points to the number of known sites in the district and offers the following description of the general archaeological value of the district:

\* \* \* The subject area has been inhabited by early peoples for approximately the past 10,000 years.

Archaeological findings have involved primarily Indian campsites located to provide accessible food, water and shelter. Investigations in the subject area have revealed significant items such as arrowheads of different periods, pottery, spearheads and chippings. Much work remains to be done for complete inventory to determine extent and significance of this resource. Better location of known sites is not given to prevent further theft and vandalism.

Environmental Analysis Record, p. 63.

[1] Appellants contend that the stipulation would establish a mechanism whereby a lease owner could be deprived of a property right in an unconstitutional manner because lease operations may be delayed or prohibited. However, it is well established that the Secretary of the Interior may require an applicant for an oil and gas lease to accept stipulations reasonably designed to protect environmental and other land values as a condition precedent to the issuance of a lease. W. E. Haley, 25 IBLA 311 (1976); Earl R. Wilson, 21 IBLA 392 (1975); Richard P. Cullen, 18 IBLA 414 (1975); W. T. Stalls, 18 IBLA 34 (1974); Duncan Miller, 16 IBLA 349 (1974); 43 CFR 3109.2-1. The need for the stipulation should be clear and the stipulation should be a reasonable means to the intended purpose. Earl R. Wilson, *supra*.

Several statutes establish the authority for the Department's involvement in the protection of archaeological values. 2/ We find one statute especially pertinent to the issues raised in the instant case.

The Act of June 27, 1960, 74 Stat. 220, provided for "the preservation of historical and archeological data which might otherwise be lost as a result of the construction of a dam." In 1974, the scope of the Act was broadened to cover "any alteration of the terrain caused as a result of any Federal construction project or federally licensed activity or program." Act of May 24, 1974, 88 Stat. 174, 16 U.S.C. § 469 (Supp. IV, 1974). The 1974 amendments direct any federal agency to notify the Secretary of the Interior whenever it becomes aware that its activities "in connection with any Federal construction project or any federally licensed project, activity, or program may cause irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data." 16 U.S.C. § 469a-1(a) (Supp. IV, 1974).

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2/ See, e.g., the Antiquities Act of June 8, 1906, 16 U.S.C. §§ 431, 432 (1970); The Historic Sites Act, as amended, 16 U.S.C. §§ 461-467 (1970); and Pub. L. 86-523, as amended, 16 U.S.C. §§ 469-469c (Supp. IV, 1974).

16 U.S.C. § 469a-2(a) (Supp. IV, 1974) describes the Secretary's responsibilities when notified of a possible loss or destruction of archaeological data:

The Secretary, upon notification, in writing, by any Federal or State agency or appropriate historical or archeological authority that scientific, prehistorical, historical, or archeological data is being or may be irrevocably lost or destroyed by any Federal or federally assisted or licensed project, activity, or program, shall, if he determines that such data is significant and is being or may be irrevocably lost or destroyed and after reasonable notice to the agency responsible for funding or licensing such project, activity, or program, conduct or cause to be conducted a survey and other investigation of the areas which are or may be affected and recover and preserve such data (including analysis and publication) which, in his opinion, are not being, but should be, recovered and preserved in the public interest.

The broad language of the statute is sufficient to indicate a Congressional desire to preserve archaeological values from surface disturbing activities conducted under federal oil and gas leases. <sup>3/</sup> The pivotal issue is whether it is reasonable to require a qualified archaeologist to inspect a site prior to surface disturbing activities despite the fact that any archaeological values that may exist on the site have yet to be discovered. We find that the legislative history of the 1974 amendment to that statute indicates a Congressional intent to protect values which have yet to be discovered as well as values which are already known.

In citing the need for the legislation, the House Report makes the following observation:

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<sup>3/</sup> The House Report contained the following statement concerning the broadened scope of the amendments:

"Public Law 86-523, as an extension of the Historic Sites Act of 1935, declared that where the construction of Federal or Federally licensed dams, reservoirs and related activities might result in the loss of historical or archeological data, it should be the policy to preserve and recover such information. As recommended, this legislation broadens that policy to include any Federal or federally assisted construction projects involving the alteration of the terrain, as well as other Federally licensed projects, or Federal activities or programs which might disrupt such values." House Report No. 93-992, 1974 U.S. Code Cong. & Ad. News, p. 3172.

By way of example, the report of the Department of [the] Interior specifically cites the need for this legislation. It indicates that "significant remains were destroyed by Federal, federally assisted, or federally licensed projects because there was either insufficient statutory authority or insufficient lead-time for advance funding." It specifically cites five examples where significant values could have been saved if adequate authority (such as that contained in H.R. 296) existed. [Emphasis added.]

House Report No. 93-992, 1974 U.S. Code Cong. & Ad. News, p. 3171.

The report by this Department including the five examples was appended to the House Report. Assistant Secretary Kyl wrote to the House Interior Committee concerning the legislation as follows:

Following are several instances where significant remains were destroyed by Federal, federally assisted, or federally licensed projects because there was either insufficient statutory authority, or insufficient leadtime for advance funding.

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4. Construction of the Southwest International Airport, Fort Worth, Texas, undoubtedly destroyed some archeological remains in this largely unstudied area, where any archeological remains would be significant. [Emphasis added.]

Id., pp. 3176-77.

The underscored language suggests that there were no known sites involved, yet the legislation would be considered adequate to authorize the Secretary to conduct archaeological investigations prior to surface disturbing activities when he has reason to believe that archaeological values might be present. In view of the fact that this authority was granted at the request of this Department, we are not disposed to hold that a stipulation for the protection of archaeological values is unreasonable for the sole reason that no known values exist on a particular parcel of land, especially where the number of sites in the general region of that parcel suggest that there is a possibility that archaeological values might be found on the particular parcel under consideration. To the extent that any prior decisions may be interpreted as requiring a showing of known archaeological values before a special stipulation will be approved, e.g.,

Earl R. Wilson, supra, those decisions are hereby modified. See also Bill J. Maddox, 22 IBLA 97 (1975).

Archaeological stipulations have been considered by this Board in other decisions. In Earl R. Wilson, supra, the Board ruled that the following stipulation was unreasonable:

The lands included in this lease may contain significant prehistoric and/or historic artifacts, therefore, the lessee agrees not to enter the lease area until an inventory of archeological and/or historical sites is made by the surface management agency or its designated representative, and conditions of use are prepared to protect the sites in accordance with the Antiquities Act of June 8, 1906 (34 Stat. 225; 16 U.S.C. 431) and the Historical Sites Act of August 21, 1935 (49 Stat. 666; 16 U.S.C. 461-467).

Because it was not clear when the surface management agency could conduct the survey, and because the stipulation would have prohibited entry until a survey had been conducted, the Board conceived the possibility that a lessee might never be authorized to enter the lease. However, the stipulation involved in this appeal presents no such difficulty.

The stipulation in this appeal remedies the perceived defect in the stipulation in Wilson. By allowing a lessee to engage an archaeologist, the stipulation provides a mechanism for a rapid determination of the likelihood of the presence of archaeological values. The lessee need not wait interminably for an agency with limited resources to examine his lease. If it be determined that archaeological values are unlikely in the area to be disturbed, the lessee would have experienced only a minimal delay which in no way resembles anything this Board has previously considered as unreasonable. Compare Earl R. Wilson, supra; A. Helander, 15 IBLA 107 (1974). If the lessee's archaeologist offers the view that archaeological values are likely to exist, a more extensive survey would be made, but we have no evidence that such a survey would unduly interfere with the lessee's enjoyment of the lease.

If archaeological values were to be determined to exist on the site, the operation of the special stipulation would impose no greater delay than would exist under clause 2(q) which requires that any archaeological values be left intact and the contracting officer be notified of their existence.

[2] Having recognized the Department's authority to require archaeological investigations prior to surface disturbing operations on federal oil and gas leases, we note that the new stipulation makes the lessees responsible for causing archaeological survey and salvage work to be conducted. Congress has provided authority for the Secretary to contract with others and to accept funds to carry out such work. 16 U.S.C. § 469b (Supp. IV, 1974). Insofar as the need for such work is occasioned only by the lessees' use of the land, it is appropriate that lessees, as the primary beneficiaries of the federal oil and gas leasing program, be charged with the responsibility for ensuring that the work is done. 31 U.S.C. § 483a (1970); Office of Management and Budget, Circular A-25, September 23, 1959, as amended. Moreover, this Board has consistently held that oil and gas lessees must bear the expenses occasioned by compliance with stipulations for the protection of the environment and other land use values. Duncan Miller, 18 IBLA 71 (1974). Indeed, we recently held that an oil and gas lessee must bear the expenses of compliance with an archaeological stipulation which imposed burdens similar to those imposed by the stipulation in this appeal. Duncan Miller, 24 IBLA 203 (1976). See also W. E. Haley, 25 IBLA 311 (1976).

[3] Appellants finally contend that the stipulation involves an unauthorized delegation because it would permit a private citizen (the lessee's archaeologist) to decide whether the values exist and whether the same might be impaired by oil and gas operations. However, the law provides for notice to the Department by an "appropriate historical or archeological authority" concerning the existence of archaeological values. 16 U.S.C. § 469a-2(a) (Supp. IV, 1974). We construe the stipulation as requiring a certified statement which would serve to notify the authorized officer about the existence of archaeological values. This does not relieve the authorized officer of the responsibility to determine whether the archaeological data is significant and whether it is being or may be irrevocably lost or destroyed. 16 U.S.C. § 469a-2(a) (Supp. IV, 1974).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

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Frederick Fishman  
Administrative Judge

We concur:

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Anne Poindexter Lewis  
Administrative Judge

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Joseph W. Goss  
Administrative Judge

