

BARBARA C. LISCO

IBLA 74-175 (Supp.) (On Court Remand)

Decided September 7, 1976

Proceeding on remand from the U.S. District Court for the District of New Mexico for readjudication of IBLA 74-175 in light of Skelly Oil Co. v. Morton, Civil No. 74-411 (D. N.M., February 6, 1975).

Prior Board decision vacated in part, Bureau of Land Management decision cancelling lease in part set aside, and case remanded.

1. Contracts: Generally -- Oil and Gas Leases: Cancellation -- Oil and Gas Leases: Known Geological Structure

The signing of an oil and gas lease offer by the authorized officer of the Bureau of Land Management is the act that constitutes issuance of the lease and creates a binding contract; such a lease contract is not subject to cancellation by reason of inclusion of leased land in a known geologic structure as of a date subsequent to lease issuance.

Nola Grace Ptasynski, Barbara C. Lisco, 19 IBLA 125 (1975), vacated in part.

APPEARANCES: S. B. Christy IV, of Jennings, Christy & Copple, Roswell, New Mexico, for appellant; Gayle E. Manges, Field Solicitor, Santa Fe, New Mexico, for respondent Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

On November 1, 1973, the New Mexico State Office, Bureau of Land Management, issued noncompetitive oil and gas lease NM 19618 to Barbara C. Lisco. The lease covered land posted as Parcel No. 72 in the September 1973 New Mexico drawing of simultaneously

filed oil and gas lease offers. The State Office signed and issued the lease November 1, 1973, and stated that the lease was effective December 1, 1973. On November 27, 1973, the State Office issued a decision canceling NM 19618 in part, to exclude NE 1/4 and E 1/2 SW 1/4 sec. 10, T. 23 S., R. 31 E., N.M.P.M. The partial cancellation was triggered by a letter received by the State Office on November 20, 1973, from the Area Geologist, United States Geological Survey (Survey), which reported that all of section 10, T. 23 S., R. 31 E., was placed in an undefined addition to the James Ranch Field known geologic structure (KGS), effective September 9, 1973.

On appeal to this Board, appellant Lisco argued: (1) that the Survey's KGS determination was in error; and (2) that the KGS determination was illegally back-dated to September 9, 1973, although the actual determination was not made until November 9, 1973, subsequent to lease issuance. In addition, appellant requested a factual hearing to demonstrate that the KGS determination was erroneous.

By decision styled Nola Grace Ptasynski, Barbara C. Lisco, 19 IBLA 125 (1975), the Board affirmed the cancellation decision. The Board denied the hearing request and ruled that appellants had not shown any basis for reversing the KGS determination itself. Pertinent to the issue in the present cause, the Board held that the KGS determination was properly dated September 9, 1973, the date on which the existence of the KGS was ascertained, citing 43 CFR 3100.7-3. On this basis, the Board found that cancellation of the lease issued subsequent to the ascertainment of the KGS was proper.

The Board relied on Skelly Oil Co., 16 IBLA 264 (1974), and a long line of Departmental precedent in construing "ascertainment" of a KGS as it did for the purpose of determining the Department's authority to issue a noncompetitive oil and gas lease under section 17 of the Mineral Leasing Act of 1920 (the Act), as amended, 43 U.S.C. § 226 (1970). ^{1/} The Board noted that September 9, 1973,

^{1/} Section 17(b) of the Mineral Leasing Act of 1920 (the Act), as amended, 30 U.S.C. § 226(b), provides, "If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding * * *."

Section 17(c) of the Act, 30 U.S.C. § 226(c), provides, "If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding. * * *"

was the date on which the Belco No. 4 well was completed in section 6 of the same township at issue. The Board held that the ascertainment of the KGS was properly dated from September 9, even though Survey made the formal determination on November 9, 1973, and the State Office learned of the designation November 20.

Appellant Lisco filed a suit for judicial review, Lisco v. Hathaway, et al., Civil No. 75.281 (D. N.M., filed May 23, 1975). In the Memorandum Brief in support of plaintiff's Motion for Summary Judgment in the case, plaintiff pointed out that the Department's definition of the date of ascertainment had been rejected by the District Court for the District of New Mexico in Skelly Oil Co. v. Morton, Civil No. 74-411 (D. N.M., July 16, 1975), rev'g, 16 IBLA 264 (1974).

In Skelly Oil Co. v. Morton, supra, the District Court set aside the Department's cancellation of a noncompetitive lease issued for land which the State Office was later notified was in the same undefined addition to the James Ranch Field KGS involved here. The Court held that the date on which the Survey determines the existence of the structure, rather than the date on which the physical facts were learned that results in the KGS determination, is the "date of the ascertainment" of the KGS within the meaning of regulation 43 CFR 3100.7-3, which governs the authority of the Department to issue a noncompetitive oil and gas lease under sec. 17 of the Act, 30 U.S.C. § 226 (1970). The Court then found that the KGS affecting Skelly Oil Co. (and appellant herein) was "ascertained" within the meaning of the regulation not on September 9, 1973, but on November 9, 1973.

In Lisco v. Hathaway, the District Court, by Order of March 3, 1976, remanded the cause to the Department "for a determination of the fact situation in this case as examined in the light of the Memorandum Opinion issued in Skelly Oil Co. v. Rogers C. B. Morton, et al. * * *." Pursuant to this Board's order of May 24, 1976, issued under 43 CFR 4.29, the parties have appeared and argued the merits of the case.

Appellant Lisco argues that the Skelly Oil Co. opinion and order conclusively dispose of this case, and that the Board should set aside the cancellation decision of November 27, 1973. Appellant points out that the regulations of the Department make the date of issuance, i.e., the date the lease offer is signed by the authorized officer, the date determinative of rights to a noncompetitive lease. 43 CFR 3110.1-8 and 43 CFR 3111.1-1(c). Appellant further points out that the lease on its face twice indicated that the lands were leased subject to the condition that the lands were not within a KGS at the date of lease issuance or signing. Thus, appellant concludes, the December 1 effective date is irrelevant to the issue at

hand, the November 9 date of ascertainment of the addition to the James Ranch Field KGS did not affect appellant's lease NM 19618, and the Department was neither required nor authorized to cancel the lease in part as it did.

Respondent in its reply argues that a title interest in real property, such as a federal oil and gas lease, does not vest until delivery of the instrument conveying title. Respondent points out that the executed lease was not sent to the lessee until November 12, 1973, after November 9, the date on which, as the District Court in Skelly Oil Co. found, the KGS determination had been made. In the alternative, respondent argues that the effective date of the lease, December 1, 1973, is the date determinative of rights. In this respect, respondent points out that the cancellation decision issued prior to the effective date of the lease. Respondent does not in any way, however, challenge the November 9, 1973, date of "ascertainment" of the KGS at issue.

[1] For the following reasons we conclude that the date of issuance, *i.e.*, the date of signing, rather than the date of delivery is the date determinative of rights in this case. Prior to 1967, the Department followed the practice of issuing noncompetitive oil and gas leases for lands within a KGS as long as the lease offer had been filed prior to ascertainment of the KGS. George C. Vournas, 56 I.D. 390 (1938). In 1967 Vournas was overruled and the Solicitor ruled that since a lease offer vests no rights in the applicant, the date determinative of rights is the date of lease issuance. Solicitor's Opinion (Issuance of Noncompetitive Oil and Gas Leases on Lands within the Geologic Structures of Producing Oil or Gas Fields), 74 I.D. 285 (1967). ^{2/} In conjunction with this Opinion, Secretary Udall promulgated 43 CFR 3123.3(c) (1968), now 43 CFR 3110.1-8 (1975), which provides:

^{2/} In support of the argument that title does not vest until delivery of the lease, respondent asserts the discretionary authority of the Secretary (30 U.S.C. § 226(a) (1970)) to lease or not to lease: "The decision to cancel the lease because it should not issue noncompetitively need be upheld as a reasonable exercise of discretion if not a requirement of law. Udall v. Tallman, [380 U.S. 1 (1965)]." Respondent's Argument at 3. We do not think the Secretary's discretion applies here. If the land was in a status KGS while the offeror had no property rights, then the Secretary was required to reject the noncompetitive lease offer. The Solicitor's Opinion, supra, emphasizes that this posture is mandated by the terms of the Act. Conversely, if the lease issued, and the offeror was a lessee at the time of ascertainment of the KGS, the Secretary's discretion to lease or not to lease had already been exercised, and properly so, by the decision to lease land not at issuance known to be in

If, after the filing of an offer for a noncompetitive lease and before the issuance of a lease pursuant to that offer, the land embraced in the offer becomes within a known geological structure of a producing oil or gas field, the offer will be rejected and will afford the offeror no priority.

Issuance of a lease is accomplished by the signature of the appropriate officer. 43 CFR 3111.1-1(c). This same regulation provides that a copy of the executed lease will be sent to the lessee, but it does not nor does any other relevant regulation invest mailing/delivery with any legal significance.

A federal oil and gas lease may be an interest in real property, but that does not invoke the common law of vesting of title to real property in aid of respondent's position. As the Solicitor's Opinion, supra at 290, indicates, the terms of the Mineral Leasing Act of 1920 require the interpretation made therein, namely, that the date of issuance is the date determinative of the Secretary's authority to lease noncompetitively. Congress has plenary authority to establish the manner and conditions of the disposition of public resources, Constitution of the United States, Art. IV, sec. 3, cl. 2. Congress having so provided in the Mineral Leasing Act of 1920, we are not free to amend the statute by reimposing the common law of property conveyancing.

The Department has recognized that upon signature of a lease by both parties, it becomes a binding instrument and cannot be vitiated by unilateral action, all else being regular. Charles D. Edmondson, et al., 61 I.D. 355, 363 (1954). See Stephen P. Dillon, et al., 66 I.D. 148, 150 (1959); R. S. Prows, 66 I.D. 19, 21 (1959). 3/

fn. 2 (continued)

a KGS. The cases cited by respondent are not to the contrary. United States ex rel. McLennan v. Wilbur, 283 U.S. 414 (1931); Pease v. Udall, 332 F.2d 62 (9th Cir. 1964); Thor-Westcliffe Development, Inc., 314 F.2d 257 (D.C. Cir.), cert. denied, 373 U.S. 951 (1963).

3/ "The Government's rights and obligations as lessor of public lands are no different from those of any other lessor. United States v. General Petroleum Corp., 73 F.Supp. 225, 234 (S.D. Cal. 1946), aff'd, Continental Oil Co. v. United States, 184 F.2d 802 (9th Cir. 1950). The rules of construction applicable to Government contracts are the same rules applied to contracts between private parties. * * * Standard Oil Co. of California v. Hickel, 317 F. Supp. 1192, 1197 (D. Alaska 1970), aff'd per curiam, 450 F.2d 493 (9th Cir. 1971).

Thus a signature is sufficient to establish the contract, create the lease, and take the case outside of the regulation, 43 CFR 3110.1-8, requiring rejection of offers to lease. ^{4/} On this record there was no legal impediment to leasing at the time of lease issuance.

At the time this lease was issued, the addition to the James Ranch Field KGS had not been ascertained, and the Department was authorized to issue the lease, as it did, noncompetitively. The lease, which was neither void nor voidable for any reason at the time of issuance, was thus not improperly issued.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Board's decision in IBLA 74-175, contained in Nola Grace Ptasynski, Barbara C. Lisco, 19 IBLA 125 (1975), is vacated insofar as it pertains to Barbara C. Lisco, and the State Office cancellation decision dated November 27, 1973, is set aside and the case remanded to BLM.

Frederick Fishman
Administrative Judge

I concur:

Anne Poindexter Lewis
Administrative Judge

^{4/} Respondent informs the Board that the State Office now mails leases on the day of signature/issuance and no longer delays mailing as occurred in this case. Respondent argues that the questionable practice of signing a lease prior to transmittal to the Survey has been discontinued, and that the practice cannot defeat the statutory intent. Whatever prior practice was followed in this case, however, a change in practice does not alter our conclusion that the date of issuance is the determinative date. See Solicitor's Opinion, supra at 290; Franco Western Oil Co., 65 I.D. 427 (1958).

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

In Skelly Oil Co. v. Morton, Civil No. 74-411 (D. N.M., February 6, 1975), involving the same addition to the KGS as this case (an undefined addition to the James Ranch Field), the Court determined that November 9, 1973, was the appropriate date of ascertainment of the addition. The Department of Justice did not appeal Skelly. Therefore, regardless of our views on the soundness of the Court's opinion in that case, and in view of the remand by that Court in this case, we must use November 9, 1973, as the date of the KGS determination. It is this conclusion which compels vacating our previous decision as to Barbara Lisco. I agree with the result in the majority opinion.

However, I wish to point out several matters to clarify the basis for our ruling. First, the record discloses that the BLM Office requested a KGS determination from Geological Survey and received a response prior to the signing of the lease. Thus, we have no question raised concerning a lack of authority and failure of the responsible BLM officers to follow prescribed procedures. Second, the lease was executed with a stamped statement that:

This lease is subject to the determination by the Geological Survey as to whether the lands herein described were on a known geologic structure of a producing oil or gas field as of the date of signing hereof by the authorized officer.

If this is viewed as a conditional acceptance of the offer, it is expressly conditioned upon the determination to be made as of the date the lease is signed by the authorized officer. The result reached in this decision pertains to the date the lease is signed. We are not presented with a question of whether acceptance and issuance of a lease may be conditioned upon a determination to be made as of the date stated on the lease as the "effective date." Therefore, the date of the signing of the lease by the authorized officer is the date contemplated by this conditional acceptance and must be considered as the determinative date for this reason as well as for the reasons stated in the majority opinion compelled by the regulatory language regarding lease issuance. Third, as indicated above, the determinative date of the particular KGS addition here is required by the decision in Skelly and the remand by that Court. The facts in Skelly are peculiar. We are not deciding and need not decide if the

opinion in that case regarding "ascertainment of a KGS" must be extended to other KGS determinations.

Joan B. Thompson
Administrative Judge

