

EMERY ENERGY, INC.

IBLA 82-77

Decided May 26, 1982

Appeal from a decision of Arizona State Office, Bureau of Land Management, denying revocation of noncompetitive oil and gas leases. A 16786 through A 16789.

Vacated and remanded.

1. Notice: Generally -- Oil and Gas Leases: Noncompetitive Leases  
-- Oil and Gas Leases: Stipulations

Where a noncompetitive over-the-counter oil and gas lease is issued without notice to the offeror of an additional stipulation, the lease is not binding on the offeror, and it is without effect in the absence of the offeror's consent to the additional stipulation. Where there is no evidence that an offeror had actual knowledge of the stipulation, the posting of a notice of the stipulation in the public room of the BLM State office is not adequate notice, and the offeror is not bound to accept the lease with the added stipulation.

APPEARANCES: R. Dennis Ickes, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Emery Energy, Inc. (Emery), has appealed from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated September 29, 1981, denying revocation of appellant's noncompetitive oil and gas leases, A 16786 through A 16789.

On May 4, 1981, appellant filed four noncompetitive oil and gas lease offers, entitled "Offer to Lease and Lease for Oil and Gas" (Form 3110-1 (March 1977)), for land situated in Pima County, Arizona, pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976). On September 9 and 11, 1981, BLM signed the lease offers,

thereby issuing the leases, effective October 1, 1981, "subject to the provisions of the offer and on the reverse side hereof [lease terms]." In addition, BLM stamped the offer to lease/lease forms with the following provision: "Subject to attached form 3109-5; ASO form 3100-2 stipulations; & Special Stips-DOE Org. Act." The stipulations referred to were appended to the offer to lease/lease forms, returned to appellant. They are entitled "Surface Disturbance Stipulations" (Form 3109-5 (August 1973)), "Cultural Resources on Lands under Oil and Gas Lease" (Form ASO 3100-2 (December 1979)), and "Stipulations Under the Department of Energy Organization Act."

By letter dated September 15, 1981, appellant objected to imposition of the three above-mentioned stipulations and requested revocation of the leases:

As you are aware, and as we only today became aware, it is the policy of your office to issue leases subject to certain stipulations which are added to all leases issued under your jurisdiction. These stipulations are not deemed special since they are required statewide. However, they are simply added without any attempt to contact the applicant, and the lease is issued. This practice is not followed by any other state in the West Coast or Rocky Mountain areas. In any other state, when any sort of additional stipulation is required, common or not, these stipulations are sent to the applicant prior to lease issuance. It is natural for us to expect this practice to be consistent in all Bureau of Land Management offices.

We were advised that this policy of simply adding stipulations without notice was published in the Federal Register and posted on the wall in your public room. However, it is not reasonable to expect all potential applicants to first read all printed materials on your walls or review the Federal Register daily before filing applications.

At any rate, we find these stipulations unduly restrictive and do not wish the leases if they must be subject to them. Therefore, we request that you revoke the leases and refund our money. [Emphasis in original.]

In its September 29, 1981, decision, BLM denied revocation of appellant's leases stating that it was "without authority to revoke the leases" because the leases had already issued, citing 43 CFR 3110.1-4(a), which provides:

An offer may not be withdrawn, either in whole or in part unless the withdrawal is received by the proper office before the lease, an amendment of the lease, or a separate lease whichever covers the land described in the

withdrawal, has been signed on behalf of the United States. [Emphasis added.]

BLM noted that the disputed stipulations were included in "[a]ll oil and gas leases issued by the Arizona State Office" and that "[a] public notice together with a copy of each of these stipulations has been posted in our Public Room for a considerable length of time to alert the public as to this requirement." Finally, BLM stated:

The concurrence of the lessee is obtained prior to incorporation of any stipulation which would purport to subsequently affect the terms of the lease or possibly negate the terms of the lease such as lands within a proposed wilderness that later could be formally designated as a Wilderness Area closed to mineral leasing. [Emphasis added.]

In its statement of reasons for appeal, appellant argues that BLM "cannot compel an offeror to accept terms which the offeror has no notice of at the time the offer was filed" <sup>1/</sup> and that the appropriate procedure, where BLM sought to include additional stipulations in the leases, would have been to afford appellant an opportunity to either accept the stipulations, appeal the stipulations, or decline the leases, prior to issuance of the leases. Appellant characterizes the leases with the additional stipulations as "counter offer[s] \* \* \* to which Emery could not be bound without first agreeing to the additional terms." Finally, appellant contends that BLM has "inherent authority" to revoke a lease where the lessee rejects "previously undisclosed lease conditions."

[1] Appellant has raised no specific objection to the substance of the disputed stipulations. The only question for decision is whether BLM may properly impose additional stipulations in a lease where the lessee arguably had no notice of the stipulations at the time it filed its lease offers and does not consent to their imposition.

In Duncan Miller (On Reconsideration), 39 IBLA 312 (1979), we affirmed a previous order by the Board, dated August 14, 1978, which held that BLM was required to notify an offeror of an additional

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<sup>1/</sup> Appellant argues that it did not have "actual notice" of the disputed stipulations at the time it filed its lease offers. Appellant notes that while section 2(q) of the offer to lease/lease form contains "provisions for surface disturbance and protection of cultural resources," such provisions are substantially different from the disputed surface disturbance and cultural resources stipulations. Appellant also states that the disputed stipulations are not binding because notice of the stipulations was not afforded to the public pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. § 551 (1976); i.e., publication in the Federal Register.

stipulation, not specifically mentioned in the notice of availability, prior to issuance of the lease:

While it is within the authority of BLM to reserve the right to impose additional stipulations as a condition precedent to the issuance of an oil and gas lease, we think it is obvious that such a stipulation must be presented to the prospective lessee for acceptance prior to the issuance of [the] lease. Where such additional stipulations are not acceptable to the lessee, he has the right either to decline to accept the lease or to seek review of the inclusion of such specific stipulation on the grounds that it is arbitrary, capricious, or represents an abuse of discretion by BLM.

Duncan Miller (On Reconsideration), *supra* at 313, quoting from Order, dated August 14, 1978. The logical extension of such reasoning, therefore, is that a lease issued without notice to the offeror, prior to issuance of the lease, of an additional stipulation is not binding on the offeror and is without effect, in the absence of acceptance of the stipulation.

The question then is whether appellant was adequately notified of the disputed stipulations prior to issuance of the leases. There appears to be no question that the "Offer to Lease and Lease for Oil and Gas" (Form 3110-1 (March 1977)) submitted by appellant in each case made no reference to the disputed stipulations when filed. 2/ BLM, instead, relies on the fact that notice of the stipulations, and copies thereof, were posted in the public room of the BLM State Office. There is no evidence that BLM made any other effort to inform the public of the disputed stipulations.

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2/ Item 5(c) on the face of the offer to lease/lease form provides: "Offeror accepts as a part of this lease, to the extent applicable, the stipulations provided for in 43 CFR 3103.2." This is an outdated reference. The present cite is 43 CFR 3109.4-2. However, the substance of the regulation is no different and its basic content is set forth under the comparable item 5(c) of the "Special Instructions" on the reverse side of the offer to lease/lease form:

"Whenever applicable the stipulations referred to will be made a part of this lease and will be furnished the lessee with the lease when issued. The forms covering them with a brief description are as follows: 3102 Stipulations for lands where the surface control is under the jurisdiction [of] the Department of Agriculture; 3103-1 Lands potentially irrigable, lands within the flow limits of a reservoir site, lands within the drainage area of a constructed reservoir; 3500-1 Lands withdrawn for power purposes; and 3120-3 Wildlife Refuge, Game Range, and Coordination Lands. Whenever other stipulations are necessary, lessee will be required to agree to them before the issuance of the lease." (Emphasis added.)

Reference to additional stipulations in the notice of availability, in the case of simultaneous oil and gas lease applications, and in the notice of sale, in the case of competitive bids, is deemed to be sufficient notice to the public that the leases issued in response thereto will be subject to the stipulations. See Palmer Oil & Gas Co., 43 IBLA 115, 117 (1979); Duncan Miller (On Reconsideration), *supra*. In the case of simultaneous oil and gas lease applications, Departmental regulations specifically provide for the posting of a list of available lands "on the first working day of January, March, May, July, September and November." 43 CFR 3112.1-2. The list "shall include a statement as to, and a copy of, any standard or special stipulation applicable to each parcel." *Id.* Furthermore, in the case of competitive bids, Departmental regulations specifically provide for publishing a notice of the offer of lands for lease "in a newspaper of general circulation in the county in which the lands \* \* \* are situated." 43 CFR 3120.2-2. The notice "will \* \* \* state \* \* \* the terms and conditions of the sale." 43 CFR 3120.2-3.

With regard to regular (over-the-counter) lease offers, however, there is no comparable Departmental regulation providing for notice of the terms of such leases. Accordingly, in the present case, where there is no evidence that appellant had actual knowledge of the stipulations, the posting of the notice of the disputed stipulations in BLM's public room, where the public had not been informed by a duly promulgated regulation or other notice published in the Federal Register as to the posting of such notices, will not be considered to have afforded appellant adequate notice of the disputed stipulations. Accordingly, we hold that the leases issued to appellant were without effect, in the absence of its consent to the additional stipulations. BLM should act to cancel the leases and refund rentals advanced by appellant with its offers.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is remanded to BLM for further action consistent herewith.

Bruce R. Harris  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

