

EMERY ENERGY, INC.

IBLA 82-662

Decided June 4, 1982

Appeal from issuance by the Nevada State Office, Bureau of Land Management, of noncompetitive oil and gas leases containing stipulations. N 34737 and N 34738.

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 at the time of filing, 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 CHIEF ADMINISTRATIVE JUDGE PARRETTE

Emery Energy, Inc. (Emery), has appealed from the issuance by the Nevada State Office, Bureau of Land Management (BLM), of two leases, dated February 24, 1982, and March 18, 1982, purportedly accepting appellant's non-competitive oil and gas lease offers, N 34737 and N 34738, but imposing stipulations previously unseen by the offeror.

Specifically, on November 5, 1981, appellant filed two 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 Clark County, Nevada, pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976). On February 24 and March 18, 1982, BLM signed the lease offers,

thereby issuing the leases, effective March 1 and April 1, 1982, respectively, but stamped on the face of the leases that they were "subject to the attached stipulations." The stipulations referred to were appended to the executed lease forms and returned to appellant, which had not previously seen them. They are entitled "Protection of the Environment" (Form N-1) and "Wilderness Protection" (Form N-2).

By notice dated March 29, 1982, Emery appealed BLM's execution of the lease offer with the addition of the above-mentioned stipulations and, in its statement of reasons, has requested revocation of the leases and a refund of its rental. 1/

On 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" 2/ and that the appropriate procedure, where BLM sought to include additional stipulations in the leases, would have been to present them to the offeror for its consent; and if appellant refused to consent, then BLM should not issue 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."

[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 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 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

1/ This case is virtually identical with two other appeals filed by Emery in connection with four leases issued by the Arizona State Office of BLM, IBLA 82-77, 64 IBLA 175 (1982), and two leases issued by the Oregon State Office of BLM, IBLA 82-685, remanded by order dated June 2, 1982. The three cases are being decided almost simultaneously.

2/ 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., through publication in the Federal Register.

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 its issuance, 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. 3/

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.

3/ 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 citation is 43 CFR 3109.4-2. However, the substance of the regulation is the same, 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 as follows:

"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.)

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, and where the public had not been informed by a duly promulgated regulation or other notice published in the Federal Register as to the stipulations required, we find that appellant did not have 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 cancel the leases and refund the 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.

Bernard V. Parrette
Chief Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

