

TURNER C. SMITH, JR.

SIGNE D. SMITH

IBLA 82-574

Decided July 23, 1982

Appeal from decision of Montana State Office, Bureau of Land Management, rejecting application for competitive oil and gas lease. M 54149.

Reversed and remanded.

1. Oil and Gas Leases: Generally--Oil and Gas Leases: Competitive Leases

Oil and gas leases may be acquired and held only by citizens of the United States, associations of citizens (including partnerships), corporations, and municipalities. The Mineral Leasing Act does not prohibit the creation of joint tenancies when oil and gas leases are issued. Where the two offerors are designated on a competitive oil and gas lease bid as "Turner C. Smith, Jr. and Signe D. Smith, husband and wife, as Joint Tenants, DBA Turner Smith & Associates" and the bid is signed by each person individually, the bid is acceptable in that form since it is possible to determine the full names of the offerors.

2. Oil and Gas Leases: Generally--Oil and Gas Leases: Applications:
Sole Party in Interest--Oil and Gas Leases: Competitive Leases

Although, under the Departmental regulations in effect at the time of the sale, a competitive bidder in an oil and gas lease sale, where there are other parties in interest, was required to submit the signed statements required by 43 CFR 3102.2-7 (1981), failure to comply with the regulation does not require rejection of the bid. Whereas, in noncompetitive offerings, the critical element is determining the first qualified offeror, in competitive bidding, the amount of the bid replaces priority of filing as the dominant factor.

Solicitor's Opinion, M-36434 (Sept. 12, 1958), overruled to extent inconsistent.

APPEARANCES: James S. Holmberg, Esq., Denver, Colorado, for appellant; David C. Knowlton, Esq., Denver, Colorado, for Koch Industries, Inc.

OPINION BY CHIEF ADMINISTRATIVE JUDGE PARRETTE

Turner C. Smith, Jr., and Signe D. Smith have appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated February 4, 1982, which rejected appellants' high competitive oil and gas lease bid for parcel 17, serial number M 54149. BLM rejected the bid because appellants filed their application as joint tenants, which BLM states is not authorized by the Mineral Leasing Act of February 25, 1920 (the "Act"), 30 U.S.C.A. § 181 (West Supp. 1982). BLM asserts that it may issue leases to two persons only in equal proportions with no right of survivorship. The decision states that the offerors also did not comply with 43 CFR 3102.2-7

because the bid was accompanied by a statement signed only by Turner C. Smith, Jr., setting forth other parties in interest in the bid. The other parties submitted citizenship and acreage holding statements but failed to sign the statement detailing their interests in the bid.

Appellants' bid was submitted in connection with the competitive lease sale held by BLM on January 13, 1982. Examination of the form submitted by appellants reveals that on the line designated "Signature of Bidder," both Turner C. Smith, Jr., and Signe D. Smith signed individually. Above the line designated for the typed or printed name of the bidder they had typed, "Turner C. Smith, Jr. and Signe D. Smith, husband and wife, as Joint Tenants, DBA Turner Smith & Associates." A cover letter signed by Turner Smith listed the parties in interest in the bid as Samuel Gary; Turner C. Smith, Jr., and Signe D. Smith, HWJT, d.b.a. Turner Smith & Associates; and Ronald W. Williams. It also showed percentages of ownership. In addition to the bid itself, two additional copies of the competitive oil and gas lease bid form were attached, containing the signatures of Gary and Williams, in order to indicate their compliance with the mandatory age, citizenship, and maximum acreage requirements.

In their statement of reasons, appellants argue that they are citizens of the United States and that the "Mineral Leasing Act authorizes the issuance of leases to citizens of the United States and associations of citizens. Appellants cite Edward Lee, 51 I.D. 299 (1925), the headnote of which states that "An application for a permit or lease by two or more persons jointly under the act * * * is prima facie an application by an 'association' within the meaning of section 27." Thus, they contend that if they are disqualified

as individuals, they should be considered as an association. Appellants further contend that the application and statement setting out parties in interest were submitted together as one document and that the regulations do not require that the statement of interest be executed on a separate document.

On May 3, 1982, Koch Industries, Inc., the second highest bidder, filed an answer to appellants' statement of reasons. Koch urges that appellants are attempting to undermine Solicitor's Opinion, M-36434 (Sept. 12, 1958), which states that issuance of the lease to joint tenants is prohibited, and that the Secretary is without authority to issue leases to persons or parties other than to those parties which the Mineral Leasing Act specifically mentions. Koch further states that even if appellants were considered an association under Edward Lee, supra, they failed to submit the instruments required by 43 CFR 3102.2-4, an omission which would still require rejection of their bid.

[1] Under the Mineral Leasing Act, oil and gas leases may be issued only to citizens of the United States, associations of such citizens, corporations, or municipalities. 30 U.S.C.A. § 181 (West Supp. 1982). Departmental regulation 43 CFR 3102.1 1/ provided:

§ 3102.1 Who may hold interests.

(a) General. Leases may be acquired and held only by citizens of the United States; associations (including partnerships) of such citizens, corporations organized under the

1/ On Feb. 26, 1982, 43 CFR Subpart 3102--Qualifications of Lessees--was revised. 47 FR 8544 (Feb. 26, 1982). This revision did not redefine who may hold leases, a matter defined by statute.

laws of the United States or of any State or territory, thereof, or municipalities.

Thus, the initial question is whether appellants, who submitted their high bid in their individual names, but as joint tenants, d.b.a. Turner Smith and Associates, fall within one of the acceptable classes of lessees.

If appellants had submitted the bid either individually or in their own names, including a "d.b.a. Turner Smith and Associates" designation without further qualification, they could have been considered an informal association of citizens, and BLM could have issued the lease, all else being regular. See 43 CFR 3102.3-1(b). See also McClain Hall, 61 IBLA 202 (1982), and Edward Lee, supra.

Our focus, therefore, must be upon the effect of their use of the term "joint tenants."

A joint tenancy is defined as "[a]n estate in fee-simple, fee-tail, for life, for years, or at will, arising by purchase or grant to two or more persons." It is a "[t]ype of ownership of real or personal property by two or more persons in which each owns an undivided interest in the whole and attached to which is the right of survivorship"; a "[s]ingle estate in property owned by two or more persons under one instrument or act." Black's Law Dictionary 1313 (5th ed. 1979). A joint tenancy, then, is clearly not a citizen, corporation, or municipality. Is it an association of citizens to which an oil and gas lease may be issued in the name of the joint tenancy as such?

Is it a sufficient legal entity to make the required certifications and enter into a contract?

By definition, a joint tenancy does not have a separate legal identity apart from the property granted. ^{2/} As recognized by Solicitor's Opinion, M-36434, it is a type of ownership created by purchase or grant. The distinction, though a fine one, is that an estate is not transferred to an entity called a joint tenancy; rather, joint tenancy is the form in which an estate is transferred to two or more individuals. Those individuals become joint tenants as a result of the conveyance specifying that form of holding. They do not become a new entity but remain an association for the purposes of Federal oil and gas lease law.

The real issue that appellants' bid raises is whether the Secretary of the Interior can utilize the joint tenancy form in issuing an oil and gas lease. The problem, as BLM has noted, is the 1958 opinion by the Acting Solicitor that the Act "does not provide for the issuance of leases to tenancies as such" and that, therefore, the Secretary is without authority to issue a lease to two or more persons as joint tenants. Solicitor's Opinion, M-36434 (Sept. 12, 1958).

We are certainly in agreement with the Acting Solicitor that the Act authorizes the issuance of Federal oil and gas leases to only three categories of private persons: citizens, associations of citizens, and domestic corporations. No other private entity is authorized to hold such leases. However,

^{2/} A tenancy is the relationship of the tenant to the property he holds. 31 C.J.S. Estates § 1 (1964).

we find it difficult to conclude that there is therefore no authority in the Secretary to issue leases either to two or more citizens or to an association of citizens in more than one form. As the appellants have pointed out in their statement of reasons:

The Mineral Leasing Act authorizes the issuance of leases to citizens of the United States and associations of citizens. Appellants are citizens of the United States. Nowhere in the Act is joint tenancy mentioned, either to be proscribed or permitted. The decision cites a 1958 memorandum opinion of the Acting Solicitor * * * which concludes, upon dubious and strained reasoning but no authority, that the Congress did not intend that leases be issued to "tenancies". These appellants are individual citizens of the United States doing business under a particular legal form of ownership. Anyone who holds an interest in land in any form is a tenant. Black's Law Dictionary. No leases would ever be issued if not issued to some form of tenancy.

The adverse party, in its answer to appellants' statement of reasons, also recognizes that "the Solicitor's Opinion does not conclude that Federal oil and gas leases cannot be issued to generic, black letter law 'tenancies,' for as both the appellants and Solicitor's Opinion point out, any holding of an interest in land in any form is technically a 'tenancy.'"

We believe, on balance, that appellants should be allowed to take the lease as joint tenants since, as recognized by both parties, there is nothing inconsistent with the Act in permitting citizens or associations of citizens to hold property in one form of tenancy rather than another. ^{3/} If particular forms of holdings were actually contrary to the Act, as the Acting Solicitor's

^{3/} We note that in at least one case a court has concluded that interests created after issuance of a Federal lease may be held in joint tenancy. See Chevron Oil Co. v. Clark, 432 F.2d 280, 286-87 (5th Cir. 1970).

discussion seems to suggest, then there would be no authority for the Department to allow such longstanding variations as guardians and trustees holding leases on behalf of minor children, as permitted by 43 CFR 3102.2-3, or executors and administrators holding leases on behalf of estates of deceased offerors, as permitted by 43 CFR 3102.2-8. ^{4/} Such limitations are clearly not contained in the Act or in its legislative history, and we see no reason to read them into the law with respect to joint tenancies alone.

[2] While 43 CFR 3120.1-4 specifically requires bidders for competitive leases to comply with the regulations in subpart 3102, this Board has repeatedly held that failure to comply fully with such requirements does not necessarily require rejection of a competitive high bid. In competitive lease offers, price is the primary criterion, rather than priority of filing as in noncompetitive lease offers. See, e.g., Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd, B.E.S.T., Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976). The Board has consistently held that some deviations from mandatory regulatory requirements, such as the failure to certify citizenship or acreage holdings or to submit statements of interest or corporate qualifications, are curable defects in competitive bidding situations. Eurafrep, Inc., 55 IBLA 275 (1981); Black Hawk Resources Corp., 50 IBLA 399, 87 I.D. 497 (1980). The criterion used to decide whether a requirement can be cured has essentially been whether the defect gives one bidder an advantage over another, or is destructive to the orderly conduct of lease sales. Eurafrep, Inc., supra at 276. The failure of all the parties in interest to sign the statement of

^{4/} See also 43 CFR 3102.3 and 3106.1-3 (47 FR 8544 (Feb. 26, 1982)).

interest in this case is not such a defect. Thus it was improper for BLM to reject appellants' bid based on a failure to comply with 43 CFR 3102.2-7. BLM should have afforded appellants an opportunity to cure the deficient filings. 5/

Accordingly, 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 reversed and the case is remanded to BLM.

Bernard V. Parrette
Chief Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

5/ Contrary to the argument of Koch Industries, Inc., a similar result would pertain even if appellants had been treated as an association of citizens from the outset with respect to compliance with 43 CFR 3102.2-4 or 43 CFR 3102.2-7, whichever was applicable. See 43 CFR 3102.3-1(b).

ADMINISTRATIVE JUDGE BURSKI DISSENTING IN PART AND CONCURRING IN PART:

The majority decision authorizes the issuance of oil and gas leases to individuals as joint tenants. In doing so, it not only overrules a Solicitor's Opinion of more than 20 years vintage, but overturns, as well, a position which, as the Solicitor's Opinion notes, has been a consistent view of the Department since the inception of the Mineral Leasing Act, 30 U.S.C. § 181 (1976). See Solicitor's Opinion, M-36434 (Sept. 12, 1958). This action is clearly not occasioned by a ground swell of protests and agitation over the rule. Indeed, from the date of the Solicitor's Opinion to the present not a single appeal has reached the Departmental level contesting the prohibition against issuance of leases to joint tenancies. ^{1/} Considering the incredible amount of litigation that has surrounded virtually every other aspect of oil and gas leasing this silent acquiescence is eloquent testimony to the broad acceptance of the rule.

Nor is the action of the majority needed to enable it to award the lease to the appellants. As the appellants point out, if their offer cannot be accepted as joint tenants they are willing to accept the lease as members of an association. Since, as I understand the Solicitor's Opinion, supra, this was exactly the result which the prohibition on issuing leases to individuals as joint tenants was designed to effectuate, I would grant their request. It seems relatively clear that appellants are indifferent to the form in

^{1/} In fact, with the exception of a single decision by the Land Office Manager of the Colorado Land Office in 1961, Elmer M. Novak, C-020722 (Aug. 10, 1961), which denied an assignment of record title interest to two individuals as joint tenants, it appears that there is not a single decision, reported by any source, on this question at any level of the Department.

which they acquire the lease, so long as they acquire it. It is unfortunate that the majority nevertheless proceeds to overrule the prohibition because, though there has been a paucity of applications for leases by individuals who wish to hold as joint tenants in the past, I am sure that the Board will discover, once having abrogated the rule, that many more individuals will avail themselves of this method of holding a lease. As they do, the question of apportionment of chargeable acreage becomes increasingly difficult.

Assuming that a husband and wife filed for a parcel as joint tenants, under 43 CFR 3101.1-5(d), the chargeable acreage is each party's proportional share of the total lease acreage, or 50 percent. If, however, the husband dies during the lease term the chargeable acreage to the wife increases to 100 percent, via the right of survivorship, but there exists no regulation which would necessitate informing the Government of this fact. While a regulation requires that an heir or devisee file information as to its acreage holdings (43 CFR 3106.1-6) before the right to hold interest in the lease acquired by death can be recognized, this regulation would not, by its terms, apply to a joint tenant who acquires the entire interest through the death of the other joint tenant. Of course, regulations could be drafted to cover this contingency, but the majority never explains why we should go to this trouble. This rule does not limit who may file but merely establishes how they may file.

Part of the problem rests with the Solicitor's Opinion itself. Though recognizing that the past practice of the Department had been to refuse to issue leases to individuals in joint tenancy form, the Acting Solicitor

apparently felt obligated to rest the rule, at least in part, on the statutory language. I agree with the majority that on this ground it is hard to sustain the result. I do not believe, however, that it was necessary to base this prohibition on the express language of the Act. Rather, as the Solicitor's Opinion implicitly recognized, it could be based on the general authority of the Secretary to issue rules controlling the manner of leasing. ^{2/}

This rule is not an attempt to limit, contrary to the statute, the entities who may hold oil and gas leases. Rather, it merely prohibits a type of holding. I think the Department clearly has the authority to do this, just as courts have recognized its authority to issue the 640-acre rule, which also has no express statutory basis. See Boesche v. Udall, 373 U.S. 472 (1963).

I recognize that, to the extent the prohibition is based on policy rather than statutory interpretation, the Solicitor's Opinion is subject to the complaint that it was not "published" as provided by 5 U.S.C. § 552(a)(2) (1976), and thus, by itself, may not be utilized to deprive appellants of a statutory preference right. But, as was pointed out above, appellants would not be adversely affected by applying this rule since they could still obtain the lease, being treated as an association. Moreover, since the Board's decisions are published and made available for purchase, our affirmation herein would serve to establish the rule and notify the public at large. See, e.g.,

^{2/} Thus, the Acting Solicitor noted: "It is for the United States acting through Congress and its nominee, the Secretary, to specify the terms and conditions subject to which a lease will be issued and the manner which the estate will be held."

McDonald v. Watt, 653 F.2d 1035 (5th Cir. 1981); Runnells v. Andrus, 484 F. Supp. 1234 (D. Utah 1980).

It may well be that the changes effectuated by the majority will have minimal adverse effects. But a great deal of the history of changes in policy surrounding mineral leasing have involved the making of "minor" changes which have ultimately led to unforeseen "major" problems. I think we are well advised to follow the old saw, "If it ain't broke, don't fix it." In any event, to the extent that this rule is a matter of policy, I believe it is properly a matter of revision by those in the Department who are vested with policymaking responsibility. Insofar as the majority authorizes issuance of leases to individuals holding as joint tenants, I dissent.

James L. Burski
Administrative Judge

