

LARRY E. CLARK

IBLA 82-540

Decided July 23, 1982

IBLA 82-541

Appeal from separate decisions of the Utah State Office of the Bureau of Land Management which, respectively, rejected oil and gas lease offer U-46752 and canceled lease U-46753 in part.

Affirmed.

1. Mineral Leasing Act: Generally--Mineral Leasing Act: Combined Hydrocarbon Leases--Mineral Leasing Act: Lands Subject to--Oil and Gas Leases: Applications: Generally --Oil and Gas Leases: Cancellation--Oil and Gas Leases: Competitive Leases--Oil and Gas Leases: Lands Subject to--Tar Sands

The Combined Hydrocarbon Leasing Act of 1981, P.L. 97-78, 95 Stat. 1070, amended the Mineral Leasing Act of 1920, sec. 17(b), 30 U.S.C. § 226(b) (1976), to require competitive bidding in the leasing of lands within special tar sand areas, and a noncompetitive oil and gas lease offer for a parcel within a designated tar sand area must be rejected after enactment of the amendment, notwithstanding the fact that the offer was filed prior to the passage of the legislation. A noncompetitive lease improvidently issued after enactment of the amendment and in violation of its requirements is properly canceled upon discovery of the error.

2. Federal Employees and Officers: Authority to Bind  
Government--Mineral Leasing Act: Generally--Mineral Leasing Act:  
Combined Hydrocarbon Leases--Oil and Gas Leases: Application:  
Generally--Oil and Gas Leases: Competitive Leases--Oil and Gas  
Leases: Discretion to Lease--Secretary of the Interior--Tar Sands

An applicant for a noncompetitive Federal oil and gas lease has no rights in the land or its minerals until the lease is lawfully issued to him. The Secretary of the Interior has discretionary power to lease or refrain from leasing those Federal lands which are otherwise available on a noncompetitive basis. Where the Assistant Secretary directs that leases be issued in response to certain pending noncompetitive offers, but the status of the subject lands is subsequently altered by new legislation which requires that they be leased only by competitive bidding, the discretionary authority to lease such land noncompetitively is vitiated, and the Bureau of Land Management is legally disabled to implement the directive thereafter. Federal officers and employees cannot bind the Government to create any rights not authorized by law.

APPEARANCES: Van L. Butler, Esq., Salt Lake City, Utah, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

On August 22, 1980, Larry E. Clark filed two noncompetitive oil and gas lease offers "over the counter" at the Utah State Office of the Bureau of Land Management (BLM). The two offers were given consecutive serial numbers, U-46752 and U-46753. Each embraced lands in Emery County, Utah, in what is known as the San Rafael Swell tar sands area. However, at that time, the presence of tar sands deposits did not preclude noncompetitive oil and gas leasing because the Mineral Leasing Act provided for the leasing of tar sands as a separate and distinct substance from oil and gas, so that a lease of lands for the production of native asphalt, solid and semisolid bitumen, and bituminous rock (including oil-impregnated rock or sands from which oil is recoverable only by special treatment after the deposit is mined or quarried) could issue notwithstanding the existence of a lease issued pursuant to some other provision of the Act. 30 U.S.C. § 241(c) (1976).

Nevertheless, on August 26, 1980, just 4 days after the subject oil and gas lease offers were filed, then Under Secretary Joseph ordered a halt to the issuance of over-the-counter and simultaneous oil and gas leases in the tar sands area identified on Map 47, Utah Department of Natural Resources. This action was taken, among other reasons, in anticipation of the enactment of H.R. 7242, a bill which would amend the Mineral Leasing Act with particular reference to oil and gas and tar sands. Pursuant to Under Secretary Joseph's order, the barrier against issuance of oil and gas leases in the designated tar sands areas (DTSA's) was to continue in effect "until two months after the enactment of H.R. 7242 or similar legislation or the adjournment of this Congress sine die, whichever is earlier."

The next event of significance to this matter was a memorandum dated May 28, 1981, from Assistant Secretary Carruthers to the Director, BLM. <sup>1/</sup> The memorandum discussed the August 26, 1980, directive of former Under Secretary Joseph to suspend issuance of noncompetitive oil and gas leases in DTSA's, and indicated general continuing support for that policy and its objectives. However, the last paragraph of the Assistant Secretary's memorandum addressed the disposition of one particular group of oil and gas lease offers which had not been specifically dealt with in the directive by former Under Secretary Joseph. That paragraph states:

We continue to remain interested in preserving the opportunity to issue tar sand leases without encumbering oil and gas leases in the same acreage. Even so, there are a small number of oil and gas lease applicants whose offers were submitted prior to August 26, 1980, but whose leases have not been issued because of the Under Secretary's directive. In the interests of equity, <sup>[2/]</sup> please direct the Utah State Office to proceed with issuance of oil and gas leases in DTSA's applied for prior to August 26, 1980. Disposition of applications received on or after that date will await further policy review.

Clark's oil and gas lease offers, having been filed on August 22, 1980, would have been included in the group to be issued leases pursuant to this instruction. However, before any action was taken by BLM with respect thereto, the Congress enacted H.R. 3975 as the Combined Hydrocarbon Leasing Act of 1981 (P.L. 97-78, 95 Stat. 1070), which was signed by the President on

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<sup>1/</sup> The distribution list shows that a copy of this memorandum was sent to BLM's Utah State Director.

<sup>2/</sup> It is apparent that the Assistant Secretary's employment of the term "equity" in this context was synonymous with conceptual "fairness" rather than an acknowledgment of any equitable interest, title, claim, or right which could be recognized by a court. A long history of Departmental and judicial precedent has firmly established that the mere filing of an oil and gas lease offer or application does not invest the applicant with any judicially cognizable equitable claim to receive a lease. See discussion in text, infra.

November 16, 1981. That legislation amended numerous sections of the Mineral Lands Leasing Act of 1920, so as to provide for the issuance of "combined hydrocarbon leases" in designated special tar sands areas, such leases to encompass as "oil" all "nongaseous hydrocarbon substances other than those leaseable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons)." The amendment also required that lands in special tar sand areas "shall be leased to the highest responsible qualified bidder by competitive bidding."

Six weeks after the Combined Hydrocarbon Leasing Act was enacted into law, BLM accepted Clark's noncompetitive lease offer U-46753 and issued the lease with the effective date of January 1, 1982. Inexplicably, BLM attached a stipulation which provided that the lease included all deposits of nongaseous hydrocarbon substances other than coal, oil shale, or gilsonite, thereby granting Clark a noncompetitive combined hydrocarbon lease in a special tar sands area. In transmitting this lease to Clark, BLM appended a notice explaining that the additional substances had been included in the lease because of the passage of the Combined Hydrocarbon Leasing Act. There is nothing in the record to suggest that in so doing BLM believed it was implementing the earlier instruction of the Assistant Secretary.

Having issued the lease on Clark's offer U-46753, BLM then proceeded to consider his offer U-46752. <sup>3/</sup> By its decision of February 3, 1981, BLM rejected that offer, explaining that the issuance of noncompetitive oil and gas leases in DTSA's had been halted at Secretarial direction on August 26, 1980, and that the enactment of the Combined Hydrocarbons Leasing Act on November 16, 1981, precluded issuance of noncompetitive oil and gas leases within special tar sands areas. No mention was made of the Assistant Secretary's memorandum of May 28, 1981. Clark filed his notice of appeal from that decision.

On February 25, 1981, BLM issued a decision canceling lease U-46753 as to 4,706 acres within the San Rafael Swell DTSA because, "The Combined Hydrocarbon Leasing Act of 1981 (Public Law 97-78, November 16, 1981) provided that lands within a designated tar sand area can only be leased by competitive bidding." The lease remained in effect as to 640 acres, presumably because that land was outside the DSTA. The decision stated that a refund of the excess first year rental in the amount of \$4,706 would be authorized when the decision became final. Clark filed his notice of appeal from this decision as well.

Clark (appellant) has filed a single statement of reasons in support of both appeals. It is appellant's position that he is entitled to the subject leases by reason of the directive contained in the Assistant Secretary's memorandum of May 28, 1981, to issue leases on oil and gas offers filed prior

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<sup>3/</sup> No explanation appears in the record as to why two consecutively numbered offers by the same person were adjudicated by BLM in reverse serial order several weeks apart.

to August 26, 1980, for lands in DSTA's. Appellant offers the following argument:

Since Appellant's applications, U-46752 and U-46753, were filed on August 22, 1980, it is clear that Appellant is one of the "small number of oil and gas lease applicants whose offers were submitted prior to August 26, 1980," which the directive of the Memorandum was intended to benefit. It is also clear from the language of the MEMORANDUM quoted above that the Utah State Office of the Bureau of Land Management was not merely being allowed to resume issuing leases on such applications, but was being directed to issue such leases. In other words, the Utah Bureau of Land Management was not given discretion whether or not to issue such leases, but was simply being told to issue such leases.

Instead of promptly issuing leasing on Applicant's applications as it had been directed to do, the Utah Bureau of Land Management failed all together to ever issue a Lease with respect to Lease Offer U-46752, which it ultimately rejected, and only belatedly issued the Lease with respect to Lease Offer U-46753, which it then turned around and cancelled as to all lands in the Designated Tar Sand Area.

In support of its DECISIONS, the Utah Bureau of Land Management cited the Combined Hydrocarbon Leasing Act of 1981 (PL 97-78) which abolishes noncompetitive oil and gas leasing within designated tar sand areas. However, the effective date of this Act is November 16, 1981; more than a year after Appellant's Lease Offers were filed and several months after the Utah Bureau of Land Management should have issued leases on Appellant's applications pursuant to the directive it had been given.

[1, 2] The Secretary of the Interior is invested by the Mineral Leasing Act of 1920 with discretionary authority to lease or not to lease Federal public land which is otherwise available for oil and gas leasing. 30 U.S.C. § 226(a) (1976); Udall v. Tallman, 380 U.S. 1, 4, rehearing denied, 380 U.S. 989 (1963); Schraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1969); Haley v. Seaton, 281 F.2d 620, 624-25 (D.C. Cir. 1960); Natural Gas Corp. of California, 59 IBLA 348 (1981), and cases cited therein. The delegation of authority to the Assistant Secretaries of the Interior is set forth in the Departmental Manual at page 210 DM 1.2, which, inter alia, provides that "the Assistant Secretaries severally are authorized to exercise all of the authority of the Secretary." Thus, given the status of the public lands at issue at that time, the Assistant Secretary was entirely within the scope of his delegated discretionary authority on May 28, 1981, when he directed that leases be issued in response to these offers. Had BLM acted immediately to issue the leases they would have been prima facie valid instruments and, having been issued at the direction of the Assistant Secretary, beyond the review jurisdiction of this Board. Blue Star, Inc., 41 IBLA 333, 335 (1979).

However, in the present posture of the case, it is not the order of the Assistant Secretary which is the subject of this appeal but, rather, the decisions of officials of BLM, concerning which this Board has specific jurisdiction. 43 CFR 4.1(b); 43 CFR 4.410.

The failure of BLM to act on the subject noncompetitive oil and gas lease offers until after enactment of the Combined Hydrocarbon Leasing Act precluded the Bureau from lawfully issuing the leases thereafter. The Act changed the status of the land within the special tar sand areas designated, and foreclosed their availability to the issuance of noncompetitive oil and gas leases as a matter of law.

This case is indistinguishable in its legal principle from the long line of cases in which noncompetitive oil and gas lease offers were filed for lands at a time when those lands were not identified as being within a known geologic structure (KGS) of a producing oil or gas field, but were subsequently so designated while the offers were pending. If lands embraced within a noncompetitive lease offer are determined to be within a KGS before a lease issues, the offer must be rejected because the law requires that such lands may be leased only by competitive bidding. McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974); Juanita H. Mayer, 60 IBLA 391, 393 (1981), and cases cited therein; 30 U.S.C. § 226(a), (b), and (c) (1976). Similarly, we have held that the Department has no authority to issue an oil and gas lease for lands which are expressly precluded from leasing by statute. See, e.g., Fred R. Cerminaro, 52 IBLA 116 (1981).

The mere filing of an oil and gas lease offer at a time when the land is open to leasing does not invest the offeror with any legal or equitable title, claim, interest, or right to receive the lease where, during the pendency of the offer, the land becomes unavailable to such leasing either by reason of the exercise of Secretarial discretion or by operation of law. The offer to lease is a hope, or expectation, rather than a valid claim against the Government. Udall v. Tallman, supra; McTiernan v. Franklin, 508 F.2d 885, 888 (10th Cir. 1975); Schraier v. Hickel, supra; D. R. Gaither, 32 IBLA 106 (1977), aff'd sub nom. Rowell v. Andrus, Civ. No. 77-0106 (D. Utah Apr. 3, 1977); Duncan Miller, 20 IBLA 1, appeal dismissed, Miller v. Secretary of the Interior, Civ. No. 75-0905 (D.D.C. Sept. 2, 1975).

The subject appeal is closely related to the circumstances encountered in the appeal of Daniel A. Engelhardt, wherein appellant's oil and gas lease application earned first priority for a parcel of land listed by BLM for the filing of simultaneous applications to lease. While the application was pending, the land was classified as KGS, and therefor subject to leasing only by competitive bidding. Engelhardt appealed the rejection of his noncompetitive offer and this Board, perceiving a meritorious factual issue, ordered a hearing to resolve the propriety of the KGS determination. However, prior to the conduct of the hearing, the Office of the Solicitor petitioned the Board to reconsider, asserting that the enactment of the Combined Hydrocarbon Leasing Act of 1981 had obviated the issue of whether a noncompetitive lease

might issue, as the land concerned was in a designated special tar sand area. This Board took notice of the fact that the land had not been designated a tar sand area until several weeks after the drawing of noncompetitive oil and gas lease offers at which the application of Engelhardt was drawn with first priority, but we held that fact to be irrelevant. In the decision Daniel A. Engelhardt (On Reconsideration), 62 IBLA 93 (1982), we added:

Moreover, beyond the question of Secretarial discretion, ultimate control of the disposition of public lands and resources belongs to Congress, and the responsibility of the Interior Department is to administer them in accordance with the dictates of the legislative branch. Since appellant's lease application was still pending on the date CHLA [Combined Hydrocarbon Leasing Act] took effect, and was nonconforming thereunder, it must be rejected. <sup>3/</sup> No oil and gas lease may issue to Engelhardt on his simultaneous oil and gas lease application, because parcel UT 128 is within a special tar sand area, which is leasable only through competitive bidding.

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<sup>3/</sup> It might be argued that because the special tar sand area including parcel UT 128 was not so designated until after Engelhardt's success in the simultaneous drawing, CHLA should not have effect in this case and the Board's initial decision should remain in force. But sec. (4) of CHLA, supra, militates against such an argument by distinguishing all leases issued or to be issued "in a special tar sand area pursuant to section 17 [of MLA] after the date of enactment of" CHLA as "combined hydrocarbon lease[s]," indicating no deference for successful lease applications drawn before the designation of the tar sand areas. Sec. 8 of CHLA also clearly implies that CHLA applies to all leases not outstanding on Nov. 16, 1981. Likewise, sec. (6)(a) of CHLA cannot reasonably be read as affording appellant any relief: "(2) If the lands to be leased are within a special tar sand area [regardless of whether the area's designation or the simultaneous drawing had priority in time, so long as the lease had not issued before the enactment of CHLA], they shall be leased to the highest responsible qualified bidder by competitive bidding \* \* \*."

62 IBLA at 97, 98.

We conclude that lease U-46753 was improvidently issued as to those lands within the special tar sands area after enactment of the Combined Hydrocarbon Leasing Act of 1981; and, being contrary to statute at the time of issuance, the lease was a nullity as to those lands. See Oil Resources, Inc., 14 IBLA 333 (1974). Accordingly, BLM's decision canceling the lease as to those lands unlawfully included was the appropriate action.

Likewise, BLM's decision rejecting lease offer U-46752 was correct, notwithstanding the earlier contrary instruction by the Assistant Secretary.

As noted above, although the Assistant Secretary had full discretion to decide to issue the subject leases at the time, the subsequent enactment of the statute intervened and vitiated his discretionary authority as to these lands, and thereafter BLM was legally disabled to implement his directive. Federal officers and employees cannot bind the Government to create any rights not authorized by law. Palmyra Mines, Inc., 53 IBLA 89 (1981).

Therefore, 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.

Edward W. Stuebing  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

