

ANADARKO PRODUCTION CO.

IBLA 82-811

Decided August 12, 1982

Appeal from decisions of New Mexico State Office, Bureau of Land Management, requiring compliance with a "No Surface Occupancy" stipulation inadvertently omitted from the lease terms although included in the notice of sale. NM 43732, NM 43734, NM 43735, NM 43736.

Affirmed.

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

Where the notice of a competitive sale of oil and gas leases clearly provided that the leases would be subject to a "No Surface Occupancy" stipulation, by making a bid for the indicated parcel, the bidder was bound to accept the stipulation.

Where, through inadvertence, there was failure to include the "No Surface Occupancy" stipulation recited in the sale notice with the executed lease, BLM is not estopped to require compliance with the omitted stipulation when the omission is discovered after issuance of the lease.

APPEARANCES: S. B. Christy IV, Esq., Roswell, New Mexico, for appellant; John H. Harrington, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Anadarko Production Co. (Anadarko) appeals the New Mexico State Office, Bureau of Land Management (BLM), decisions of April 6, 1982, which made Special Stipulation No. 3 "No Surface Occupancy" a part of competitive oil and gas leases NM 43732, NM 43734, NM 43735, and NM 43736. The leases had been issued effective April 1, 1981, for Parcels 20, 22, 23 and 24, offered at a competitive oil and gas lease sale held December 16, 1980. Anadarko was the high bidder for each of these parcels.

The notice of the competitive sale stated:

Prior to the issuance of the leases, the successful bidders shall be required to execute these special stipulations: All Parcels are subject to (1) Surface Disturbance Stipulation, Form 3109-5 (August 1973), (2) Special Stipulation, Form 3100-5 (November 1973), (3) Stipulation under Section 302 of the Department of Energy Organization Act (42 U.S.C. 7152). Parcels 1 thru 47 are subject to Special Stipulation No. 10, regarding esthetic values. Parcels 1 thru 33 are subject to Special Stipulation Schedule "A" regarding compliance. Parcels 20 thru 24 (in part) are subject to Special Stipulation No. 3, regarding "No Surface Occupancy." Parcels 18 thru 26, 29, and 32 are subject to potash stipulations, Form NMSO-3100-13, and further subject to an additional potash stipulation as follows: "Until it is determined that there will not be an undue waste of potash resources, no vertical oil and gas test wells will be approved on this acreage."

Additional information, required forms and copies of all stipulations may be obtained from the Bureau of Land Management, P.O. Box 1449, Santa Fe, New Mexico 87501. [Emphasis in original.]

Inexplicably, the "No Surface Occupancy" stipulation was not sent to appellant with the decisions of February 17, 1981, which accepted appellant's high bids, called for payment of the remainder of the bonus bid, first year's rental, appellant's share of publication and sale costs, and required execution of the stipulations set forth in the sale notice. Appellant responded timely and completely, paying the required sums and returning the executed stipulations. The leases were issued effective April 1, 1981.

Omission of the "No Surface Occupancy" stipulation apparently came to light when appellant started operations on the leases. By decision of April 6, 1982, BLM declared the "No Surface Occupancy" stipulation was thereby made a part of each lease, and required appellant to conform thereto. 1/ This appeal followed.

1/ Lands embraced in the leases, and the areas subject to "No Surface Occupancy" stipulation:

NM 43732: lots 1, 2, 3, 4, SE 1/4 NE 1/4, E 1/2 SW 1/4, SW 1/4 SW 1/4
sec. 1, T. 20 S., R. 32 E., New Mexico principal meridian

NSO: lots 1, 2, 3, 4, E 1/2 SE 1/4 SW 1/4, SW 1/4 NE 1/4 SW 1/4,
sec. 1

NM 43734: all sec. 10, T. 20 S., R. 32 E.

NSO: E 1/2 SE 1/4 SE 1/4

NM 43735: all sec. 11, T. 20 S., R. 32 E.

NSO: S 1/2, S 1/2 NE 1/4

NM 43736: N 1/2, SW 1/4 sec. 12, T. 20 S., R. 32 E.

NSO: NW 1/4, NW 1/4 NE 1/4 SW 1/4 (NW 1/4 SE 1/4, which is not in
lease)

Appellant argues that the federal oil and gas lease is a contract between the United States as lessor, and Anadarko as lessee, which is governed by the normal laws pertaining to contracts. United States v. Ohio Oil Co., 163 F.2d 633 (10th Cir. 1947). The Government acts both as sovereign and in a proprietary capacity. Union Oil Co. v. Morton, 512 F.2d 743 (9th Cir. 1975). There is no mandatory regulation requiring the imposition of the "No Surface Occupancy" stipulation. 43 CFR 3109.2-1 provides that BLM may require special stipulations. (Appellant's emphasis.) Appellant contends it should be in a position to claim that the United States is estopped from unilaterally modifying the leases. Thompson v. United States, 91 Ct. Cl. 166 (1940); Roberts v. United States, 357 F.2d 938 (Ct. Cl. 1966); Parker Industries, Inc., 4 IBLA 117 (1971).

The Government responded to appellant's statement of reasons, stating that the notice of the sale specifically indicated that Parcels 20 thru 24 (in part) are subject to Special Stipulation No. 3, regarding "No Surface Occupancy." BLM, through oversight, failed to include the Special Stipulation No. 3 with the decisions accepting the high bids of appellant. The leases were executed, effective April 1, 1981, on behalf of the Government without the "No Surface Occupancy" stipulation. The omission came to light when appellant sought to perform surface work on the leased areas. Thereupon, BLM issued the decisions of April 6, 1982, requiring compliance with the "No Surface Occupancy" stipulation. The Government agrees with appellant that the Federal oil and gas lease is a contract, but contends that the Secretary's discretion to lease includes the imposition of special stipulations designed to protect the surface of the land within the lease terms. As the proposal to include the "No Surface Occupancy" stipulation was recited in the sale notice, as required by 43 CFR 3120.2-3, all bids for the subject parcels necessarily included a promise from the bidder to comply with the "No Surface Occupancy" stipulation. Palmer Oil and Gas Co., 43 IBLA 115 (1979). To hold otherwise and excuse appellant from the "No Surface Occupancy" stipulation would violate the equal opportunity for all bidders to compete on a common basis for the leases. Lee E. Loeffler, 33 IBLA 18 (1977). Because BLM inadvertently failed to procure appellant's signature on the "No Surface Occupancy" stipulation does not mean the stipulation was abandoned, as appellant had already agreed to the stipulation by submitting its bid. Appellant may not secure greater rights in the leases than was authorized in the sale notice. 43 CFR 1810.3. BLM is not estopped from requiring compliance with the "No Surface Occupancy" stipulation.

[1] Regulation 43 CFR 3120.2-3 requires that the notice of sale will state the time and place of sale, the manner in which bids shall be submitted, the description of the lands offered, and the terms and conditions of the sale. 43 CFR 3109.2-1 provides that BLM may require such special stipulations as are necessary for protection of lands embraced in any lease or permit issued under the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1976). The Secretary is authorized by 30 U.S.C. § 189 (1976) to prescribe necessary and proper rules and regulations, and to do any and all things necessary to carry out and accomplish the purposes of the Mineral Leasing Act. Given the responsibilities of BLM as a surface management agency, allowing oil and gas leasing to continue yet protecting the surface by the "No Surface Occupancy" stipulation is not unreasonable where the lease does have an appreciable area which is not subject to the stipulation. Cf. John R. Anderson, 57 IBLA 149 (1981); Diane B. Katz, 47 IBLA 177 (1980).

Appellant's contention that it is not contractually bound to the "No Surface Occupancy" stipulation because it was not included with the leases, as originally signed by it, must be rejected. The notice of sale clearly provided that the leases would be subject to the "No Surface Occupancy" stipulation, in part. By making its bid, appellant was bound to accept the stipulations stated in the notice of sale as part of the lease terms. Palmer Oil and Gas Co., supra.

Although appellant postulates the doctrine of merger, discussed in Phillips Petroleum Co. v. McCormick, 211 F.2d 361 (10th Cir. 1954), as supportive of its appeal, we believe the inadvertent failure to include the "No Surface Occupancy" stipulation with the leases distinguishes the present situation from that in Phillips. As the Court said:

[9, 10] It is a well established rule, applicable to conveyances in New Mexico, that where a deed or instrument of conveyance is delivered and accepted as a performance of the contract to convey, the contract is merged in the deed. Although the terms may vary from those contained in the contract, the deed alone must be looked to to determine the rights of the parties. Norment v. Turley, 24 N.M. 526, 174 P. 999. In the absence of fraud or mistake, all stipulations in the antecedent contract which inhere in the subject-matter of the conveyance; those carried over into the deed and of the same effect; and those of which the subject-matter conflicts with the same subject-matter in the deed, are conclusively presumed to be merged in the final deed of conveyance. Only rights and duties collateral to and independent of the deed survive its execution. Continental Life Ins. Co. v. Smith, 41 N.M. 82, 64 P.2d 377; Maldonado v. Arias, 55 N.M. 223, 230 P.2d 249; Annotations 84 A.L.R. 1008.

211 F.2d at 365. The "No Surface Occupancy" stipulation was clearly in the "antecedent contract" (the notice of sale and lease awarding and bidding process), and so must be carried over into the lease. Its omission was simply a mistake, an inadvertence. Clearly, the authority of the United States to protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their neglect of duty or failure to act. 43 CFR 1810.3(a).

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.

Douglas E. Henriques
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge

