

BARRICK EXPLORATION CO.

IBLA 84-227

Decided August 7, 1984

Appeal from decisions of New Mexico State Office, Bureau of Land Management, vacating prior decisions and rejecting noncompetitive oil and gas lease offers. NM-A 47854 (Okla.), et al.

Affirmed.

1. Oil and Gas Leases: Acquired Lands Leases -- Oil and Gas Leases: Applications: Filing -- Oil and Gas Leases: Lands Subject to

BLM may properly reject an over-the-counter noncompetitive oil and gas lease offer for acquired military lands which were subject to a Secretarial moratorium on noncompetitive oil and gas leasing at the time that the offer was filed, even where the Secretary has thereafter rescinded the moratorium, but has provided that the land will be leased under the simultaneous oil and gas leasing system.

APPEARANCES: James M. Day, Esq., and Mark N. Savit, Esq., Washington, D.C., for appellant; Suzette C. Chafin, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Barrick Exploration Company has appealed from decisions of the New Mexico State Office, Bureau of Land Management (BLM), dated November 22 and 23, 1983, vacating prior BLM decisions and rejecting noncompetitive oil and gas lease offers, NM-A 47854 (Okla.), NM-A 47967 (Okla.), NM-A 47971 (Okla.), and NM-A 49256 (Okla.).

On August 28, 1981, appellant filed four noncompetitive oil and gas lease offers pursuant to section 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1982). The lands described in the lease offers were acquired land situated within the McAlester Army Ammunition Plant, Pittsburg County, Oklahoma. By decisions dated March 3, 8, and 21, 1983, BLM rejected appellant's lease offers because certain of the lands were subject to Public Land Order (PLO) No. 2910, dated January 29, 1963, which transferred jurisdiction over the oil and gas deposits in the land from the Department of the Navy to the Department of the Interior, and because

"such lands may only be leased competitively pursuant to Title 43 CFR 3120 [1981]." 1/

Appellant filed appeals from the March 1983 BLM decisions. Prior to Board consideration of the appeals, BLM, with the concurrence of appellant, filed a request to remand the cases to BLM for further consideration of whether lands subject to PLO 2910 must be leased by competitive bidding and whether certain lands were within a KGS. By order dated July 14, 1983, the Board set aside the March 1983 BLM decisions and remanded the cases to BLM for further consideration.

In its November 22 and 23, 1983, decisions, BLM rejected appellant's lease offers because the land was included in other pending noncompetitive oil and gas lease offers filed prior to September 21, 1978, 2/ and because a Secretarial moratorium on noncompetitive oil and gas leasing on acquired military lands, imposed effective November 1, 1979 (44 FR 64085 (Nov. 6, 1979)), was partially rescinded "as of August 10, 1981," with the exception of lands for which applications were filed prior to September 21, 1978 (46 FR 37250 (July 20, 1981)). Thus, BLM essentially held that the land was unavailable for leasing at the time appellant filed its lease offers. BLM also rejected lease offer NM-A 47971 (Okla.) in part because certain land was already included in oil and gas lease NM-A 14884 (Okla.) issued effective March 1, 1972, to Amarillo Oil Company (now held by Pioneer Production Company and Tom F. Marsh) and because certain land was within a KGS. 3/

---

1/ With respect to lease offer NM-A 47854 (Okla.), BLM rejected the offer as to the SE 1/4 SW 1/4, S 1/2 SE 1/4 and NE 1/4 SE 1/4 sec. 25, T. 4 N., R. 13 E., Indian meridian, Pittsburg County, Oklahoma, because the oil and gas deposits in that land were not included in a reconveyance to the United States dated Nov. 29, 1950. The March 1983 BLM decision purported to reject the lease offer in its entirety, but did not cover the remainder of sec. 25, for which appellant had applied. With respect to lease offers NM-A 47971 (Okla.) and NM-A 49256 (Okla.), BLM rejected the offers in part because certain land was within a known geological structure (KGS), which can only be leased by competitive bidding.

2/ BLM stated that the lands included in lease offers NM-A 47854 (Okla.), NM-A 47967 (Okla.), and NM-A 49256 (Okla.) were also included in "lease offers NM-A 30536 (OK), NM-A 30539 (OK), NM-A 30540 (OK), NM-A 30546 (OK), NM-A 30548 (OK), NM-A 30549 (OK), NM-A 30550 (OK), NM-A 30551 (OK), and NM-A 30552 (OK) filed on May 2, 1977 by Amoco Production Company [(Amoco)], and NM-A 30682 (OK), NM-A 30685 (OK), NM-A 30687 (OK), and NM-A 30717 (OK) filed on May 9, 1977, by Texas Oil and Gas Corporation [(Texas Oil)]."

BLM also stated that the lands included in lease offer NM-A 47971 (Okla.) were also included in "lease offers NM-A 30537 (OK) and NM-A 30553 (OK) filed on May 2, 1977 by Amoco Production Company." These other offers were all pending on Aug. 28, 1981, the date appellant filed its offers.

3/ The land already under lease is described as lots 1 through 4, S 1/2 N 1/2, S 1/2 sec. 1 and lots 1 and 2, S 1/2 NE 1/4, SE 1/4 sec. 2, T. 4 N., R. 12 E., Indian meridian, Pittsburg County, Oklahoma. The land within a

On appeal, appellant recognizes that, at the time its offers were filed the land involved herein was subject to lease offers filed in May 1977 by Amoco and Texas Oil. These offers remained outstanding until rejected by BLM in January and February 1983. Amoco and Texas Oil did not appeal those determinations. Accordingly, appellant contends that, with two exceptions, <sup>4/</sup> at the time of the November 1983 BLM decisions rejecting appellant's applications, appellant had the only outstanding lease offers. Thus, appellant contends that at the time of rejection it was the first-qualified applicant for a lease. Appellant states that Amoco and Texas Oil, by failing to appeal, "abandoned whatever preferential rights they had," citing John Oakason, 23 IBLA 336 (1976).

Appellant argues that the November 1, 1979, moratorium on noncompetitive oil and gas leasing on acquired military lands was declared without effect in Texas Oil & Gas Corp. v. Watt, 683 F.2d 427 (D.C. Cir. 1982), and that, notwithstanding this fact, the moratorium was subsequently rescinded by the Department, with respect to applications filed prior to September 21, 1978, on December 21, 1982 (48 FR 8280 (Feb. 28, 1983)). Appellant states that, although it filed lease offers contrary to the July 1981 Federal Register notice continuing the moratorium with respect to lands where other offers had been filed prior to September 21, 1978, this "defect" was cured by the February 1983 Federal Register notice which rescinded the moratorium. Appellant states that, in addition to being contrary to the statute as found by the Court in Texas Oil, the July 1981 Federal Register notice does not have the binding effect of a regulation. Appellant also contends that issuance of leases pursuant to its offers will not prejudice the rights of third parties or impose an administrative burden on BLM. Appellant also notes that pursuant to the July 1981 Federal Register notice, it participated in a simultaneous drawing held September 1, 1981, with respect to its lease offers and that it acquired first priority either through the selection or by virtue of the withdrawal or rejection of the other priority applicants. Appellant alleges that BLM may not now retract its action according priority to its lease offers.

In response to appellant's statement of reasons, BLM contends that the moratorium on noncompetitive oil and gas leasing on acquired military lands which was continued by the July 1981 Federal Register notice and is applicable herein was not found to be contrary to the statute by the Court in Texas Oil & Gas Corp. v. Watt, supra, and that when appellant's lease

---

fn. 3 (continued)

KGS is described as secs. 2, 11, and 12, T. 4 N., R. 12 E., Indian meridian, Pittsburg County, Oklahoma. Appellant does not challenge rejection of its lease offers with respect to these lands.

<sup>4/</sup> Appellant states that Amoco's lease offers NM-A 30541 and NM-A 30547, which were not rejected by BLM, overlap appellant's lease offer NM-A 47967 with respect to secs. 5 and 18, T. 4 N., R. 14 E., Indian meridian, Pittsburg County, Oklahoma, and that, assuming Amoco's lease offers are valid, they have priority. Therefore, appellant states that it does not appeal BLM's decision to reject its lease offer with respect to those sections.

offers were filed the moratorium precluded leasing. BLM notes that the moratorium was lifted by the February 1983 Federal Register notice but concludes that, at the time appellant filed its lease offers, the moratorium had not been lifted with respect to the lands subject to appellant's lease offers, and thus the lands were not available for leasing at the time of appellant's offers. BLM states that Instruction Memorandum (IM) No. 83-223 and IM No. 83-223, Change 1, are not contrary to the statute or inconsistent with the February 1983 Federal Register notice.

[1] In Bruce Anderson, 77 IBLA 376 (1983), we reviewed a February 1983 BLM decision rejecting a noncompetitive oil and gas lease offer, filed on August 28, 1981, in part because the land was subject to the Secretarial moratorium on leasing on acquired military lands, which was partially rescinded by the July 1981 Federal Register notice but remained in effect where a conflicting application had been filed prior to September 21, 1978, the date the regulations implementing the 1976 amendment to the Mineral Leasing Act became effective. In that case, Texas Oil had filed a conflicting lease offer on May 12, 1977. We concluded that BLM properly rejected the appellant's offer in part because the moratorium "was applicable." Bruce Anderson, *supra* at 378.

In the present case, appellant alleges that the November 1, 1979, moratorium has been declared to be without effect by the Court in Texas Oil. We disagree. The effect of the November 1979 Secretarial moratorium, as amended by the July 1981 Federal Register notice, on future issuance of noncompetitive oil and gas leases on acquired military lands was not considered by the Court in Texas Oil. Rather, the Court considered the November 1, 1979, Secretarial decision which, in addition to imposing the moratorium, canceled Texas Oil's leases and rejected its pending applications filed prior to September 21, 1978, for acquired military lands. The Court concluded that the Secretary of the Interior had acted contrary to the 1976 statutory amendment of section 3 of the Mineral Leasing Act for Acquired Lands when he canceled the Texas Oil leases and rejected the Texas Oil applications. The Court held that the amendment operated to open acquired military lands to noncompetitive oil and gas leasing, despite the absence of any agency action or tracking regulations. The Court noted that Texas Oil had challenged the moratorium but concluded that an "intervening event moots this issue":

Effective August 10, 1981, the Department of the Interior lifted the leasing moratorium with respect to lands for which no applications had been filed prior to September 21, 1978, when the new Department regulation tracking the 1976 statutory amendment went into effect. See 46 Fed. Reg. 37,250 (July 20, 1981). As indicated in an Interior Department memorandum of June 5, 1981, filed with this court, the moratorium remains in place with regard to lands covered by pre-September 21, 1978 applications, pending the outcome of this and any other relevant litigation. At that time the moratorium will be lifted from those lands as well, and noncompetitive leasing will proceed, with priorities to be assigned in accordance with the courts' decisions. Consequently there is no longer any reason to determine whether the moratorium was lawful in the first place. [Emphasis added.]

Texas Oil & Gas Corp. v. Watt, *supra* at 434. In particular, the Court left intact the continuing moratorium with respect to lands where applications had been filed prior to September 21, 1978.

On July 20, 1981, a notice was printed in the Federal Register partially lifting the November 1, 1979, moratorium on the issuance of noncompetitive oil and gas leases for Federal lands acquired for military or naval purposes. *See* 46 FR 37250 (July 20, 1981). The moratorium was lifted as to "all lands except those lands in which applications were filed prior to September 21, 1978. Those lands remain under the moratorium." *Id.* The notice then stated that processing of the lease applications filed between September 21, 1978, and November 1, 1979, would resume immediately. In addition, the notice stated that descriptions of the lands that remain under moratorium would be posted at the State Offices of BLM which have jurisdiction. The notice provided further that, with respect to the lands released, over-the-counter oil and gas lease applications may be accepted for filing beginning with the start of business on Monday, August 10, 1981, and that all applications properly received between that date and the close of business on August 28, 1981, would be considered to have been simultaneously filed. Appellant filed the lease applications in question prior to the close of business on August 28, 1981. As recognized by appellant, the applications were filed contrary to the July 20, 1981, notice, as the lands were then subject to the moratorium and were listed in the descriptions posted in the State Office, BLM. While a drawing was in fact held with respect to the lands which were subject to appellant's lease offer and priorities were established, this drawing and the priorities established thereby were meaningless, as the lands were not subject to leasing at that time. *See Robert W. Piatt*, 73 IBLA 244 (1983).

Appellant argues that, at the time of the November 1983 BLM decisions, the moratorium had been fully rescinded and that there were no longer any other outstanding lease offers. Appellant contends that, in view of this, leases should have issued at that time. We disagree. Appellant's argument raises in part the question of the proper construction of the February 1983 Federal Register notice which fully rescinded the original moratorium and thereby opened the land on which applications had been filed prior to September 21, 1978, to noncompetitive oil and gas leasing. The notice states, in relevant part, that, following rescission of the moratorium:

Lands which were applied for prior to September 21, 1978, are subject to lease to the first qualified offeror. Where no such valid qualified applicants exist, the lands will be leased to the first qualified offeror that filed a valid application between September 21, 1978, and November 1, 1979, or, absent such valid offer, the lands will be offered for oil and gas lease through the simultaneous oil and gas (SOG) leasing system pursuant to the provisions of 43 CFR 3112.1-1.

48 FR 8280 (Feb. 28, 1983). <sup>5/</sup> Appellant's lease offers, which were filed on August 28, 1981, do not qualify as either applications filed prior to

---

<sup>5/</sup> This language was essentially derived from the Dec. 21, 1982, Secretarial decision fully rescinding the original moratorium on noncompetitive oil and

September 21, 1978, or filed between that date and November 1, 1979. See IM No. 83-223, Change 1. The February 1983 Federal Register notice provided that, in cases such as here, where there are no such qualifying offers, the land "will be offered for oil and gas lease through the simultaneous oil and gas (SOG) leasing system, pursuant to the provision of 43 CFR 3112.1-1." Id.

It is appellant's position that BLM should apply the priorities already established by the September 1, 1981, simultaneous drawing, and that it need not engage in another drawing pursuant to the February 1983 Federal Register notice. At the time of the September 1, 1981, drawing, the November 1, 1979, moratorium had been rescinded only with respect to those lands for which there were no applications filed prior to September 21, 1978. In the present instance there were pending applications filed prior to September 21, 1978. These applications were still outstanding on August 10, 1981. Appellant admits that these applications were not rejected by BLM until January and February 1983. Therefore, at the time of the September 1, 1981, drawing, the land involved herein was not open to oil and gas leasing and the results of the drawing as to these lands cannot bind the Department. In addition, it is quite possible that there were potential applicants who did not participate in the September 1, 1981, drawing, because they were aware of the continuing moratorium with respect to the land involved herein. Moreover, it is quite clear from the February 1983 Federal Register notice that in February 1983 BLM intended to offer the land for which applications had been filed prior to September 21, 1978, for leasing pursuant to the February 1983 Federal Register notice and the provisions of 43 CFR Subpart 3112. This was consistent with the fact that until that time the moratorium had remained in effect. The discretion of the Department in this area well stated by the court in Arnold v. Morton, 529 F.2d 1101, 1106 (9th Cir. 1976):

A mere application for a lease vests no rights in the applicant, Haley v. Seaton, 108 U.S. App. D.C. 257, 281 F.2d 620 (1960), except the right to have the application fairly considered under the applicable statutory criteria. Schraier v. Hickel, 136 U.S. App. D.C. 81, 419 F.2d 663, 667 (1969). But even where an application for a lease is both first in time and filed in response to a government notice that it will receive offers, no legal claim against the Government arises. Id. The result is the same where offers were filed long before a determination by the Secretary not to lease. McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), aff'd, 161 U.S. App. D.C. 237, 494 F.2d 1156 (1974). The plaintiffs cannot bind the Secretary when it was the clear intent of Congress to give him discretion. [Emphasis added.]

Therefore, the land involved herein is not subject to leasing pursuant to appellant's "over-the-counter" lease offers, despite subsequent rescission

---

fn. 5 (continued)

gas leasing on acquired military lands. The instruction memoranda, objected to by appellant, offer additional guidance implementing this Secretarial decision, as published in the February 1983 Federal Register notice, and are neither inconsistent with that notice nor contrary to the statute.

of the moratorium on noncompetitive oil and gas leasing on acquired military lands and the apparent substantial rejection of conflicting 1981 applications. We conclude that the lease offers were properly rejected by BLM.

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.

R. W. Mullen  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Franklin D. Arness  
Administrative Judge

