

ROBERT AND FRANCES KUNKEL

IBLA 84-552

Decided December 11, 1984

Appeal from decision of the Nevada State Office, Bureau of Land Management, denying a request to cancel certain noncompetitive over-the-counter oil and gas leases and return first year's rental. N-38860, etc.

Reversed and remanded.

1. Notice: Generally -- Oil and Gas Leases: Noncompetitive Leases --
Oil and Gas Leases: Stipulations

The Surface Disturbance Notice (N-2) is not a stipulation; it is merely notice to the oil and gas lessee that prior to disturbing the surface of the leased lands, it should contact the surface managing agency. Such notice may be included in a noncompetitive oil and gas lease by BLM without the consent of the offeror.

2. 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 relating to cultural resource protection, 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 the offeror files a timely objection within 30 days of receipt of the lease, and seeks cancellation of the lease and return of the first year's rental, it is improper to deny such request.

APPEARANCES: John L. Gallinger, Esq., Billings, Montana, for appellants.
OPINION BY ADMINISTRATIVE JUDGE HARRIS

Robert and Frances Kunkel have appealed from the April 6, 1984, decision of the Nevada State Office, Bureau of Land Management (BLM), denying

their request to cancel certain noncompetitive over-the-counter oil and gas leases and return the first year's rental. 1/

The leases in question were issued by BLM in response to offers filed by the Kunkels in October 1983. All the leases have an effective date of February 1, 1984. On February 29, 1984, the Kunkels filed a letter with BLM requesting that the leases be cancelled and the first year's rental returned. The basis for the request was the inclusion by BLM of two requirements in each of the leases -- a Cultural Resources Protection Stipulation (N-1) and a Surface Disturbance Notice (N-2). The Kunkels claimed that these requirements were added with no actual or constructive notice of their imposition, and as such, they had a right to request cancellation of the leases and return of rentals.

BLM denied that request, stating that N-1 and N-2 are included in leases in accordance with Instruction Memorandum (IM) Nos. 83-333 and 84-160, respectively. BLM further stated that N-1 has been included in all Federal oil and gas leases issued in the "past several years," while N-2 has been used since "about August 1982." BLM cited as an example oil and gas lease N-32125 which it stated was issued to Frances Kunkel with an effective date of January 1, 1984, and which included the N-1 stipulation.

BLM also cited the regulation relating to special stipulations, 43 CFR 3101.1-2, effective August 22, 1983. It stated that the regulation, in essence, requires consent only when a stipulation "would bar exploration and extraction of the resource, i.e. oil and gas." BLM reasoned that because neither N-1 nor N-2 barred exploration or extraction, consent was not required.

Finally, BLM pointed out the Kunkels had filed numerous oil and gas lease offers in October and November 1983 and some leases had issued with N-1 and N-2 included without objection from the Kunkels.

On appeal appellants attack BLM's reliance on its instruction memoranda. Appellants characterize this as "secret law," the use of which they contend is prohibited by 5 U.S.C. § 552(a)(1) (1982). 2/ Appellants argue the

1/ The leases in question are:

<u>Lease Serial No.</u>	<u>Lessee</u>
N-38860	Robert Kunkel
N-38862	Robert Kunkel
N-38866	Robert Kunkel
N-38871	Frances Kunkel
N-38872	Frances Kunkel
N-38878	Frances Kunkel
N-38879	Robert Kunkel

2/ That section provides:

"(a) Each agency shall make available to the public information as follows:

"(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public --

* * * * *

"(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

instruction memoranda are statements of general policy or interpretations of general applicability, and as such they should have been published in the Federal Register in order to be binding on the public. In addition, appellants cite various Board decisions holding that BLM instruction memoranda are not binding on the Board or the general public.

With regard to 43 CFR 3101.1-2 appellants assert BLM improperly interpreted that regulation as negating the principle established by Board decisions that a noncompetitive over-the-counter oil and gas lease issued without notice to the offeror of additional stipulations is without effect in the absence of the offeror's consent thereto. To the contrary appellants argue that the proper interpretation of that regulation is that it is consistent with the Board's pronouncements. Appellants also make certain due process constitutional arguments.

Our analysis in this case turns on the language of the objectionable "stipulations." We will first consider the Surface Disturbance Notice (N-2). It appraises the lessee of the address of the surface managing agency and provides:

[P]rior to disturbing the surface of the leased lands, the lessee should contact the surface management agency to be apprised of procedures to be followed and modifications or reclamation measures that may be necessary. Lessees must comply with the onshore oil and gas operations regulations, Operating Orders, and Notices to Lessees.

IM No. 84-160, cited by BLM as authority for the Surface Disturbance Notice, provides: "Because this notice merely implements rights reserved to lessor under the standard lease form, it may be attached to leases without the signature by the lessees."

Appellants do not contest the contents of this notice; they merely object to its inclusion without their consent. With regard to the Surface Disturbance Notice, we find that BLM properly included it in the leases, and that appellants had no basis for objection because prior notice was not required.

In Emery Energy, Inc. (On Reconsideration), 67 IBLA 260, 263-64 (1982), the Board held that an over-the-counter oil and gas lease offeror could not be bound by leases containing stipulations of which the offeror did not have either constructive notice or actual knowledge before the issuance of the lease, in the absence of the offeror's consent to those terms. However, the Board explained that failure to object to the inclusion of such stipulations within 30 days of receipt of the signed lease constituted an acceptance of the new terms.

"(E) each amendment, revision, or repeal of the foregoing.

"Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

[1] The distinction with regard to N-2, however, is that it is not a "stipulation"; rather it is merely notice to the lessee that prior to disturbing the surface of the leased lands, it should contact the surface management agency. We believe that BLM correctly concluded in IM No. 84-160 that such notice may be included without the consent of the lessee. The notice does not impose any mandatory requirements or obligations on the lessee. It states that the lessee "should" notify the surface management agency. The lessee could proceed without notification; however, it would be doing so at its peril because it might not be complying with proper procedures. Thus, the notice informs the lessee that it should contact the surface management agency prior to surface disturbance. This is a course of action the prudent lessee would pursue, even without the notice. It was not improper for BLM to issue these leases with the N-2 notice, without appellants' consent.

Appellants' arguments need not be considered as they relate to N-2, since N-2 is not a stipulation, and the arguments are, therefore, inapplicable.

[2] We next turn to the Cultural Resource Protection Stipulation (N-1). This stipulation imposes mandatory conditions on the lessee or operator. ^{3/} Appellants complain they had no prior notice of this stipulation.

In numerous decisions the Board has held that an over-the-counter lease offeror must be given notice of lease stipulations or the lease is not binding on the offeror. Any objection to lack of notice, however, is waived if the lessee fails to object within 30 days of lease issuance. William A. Stevenson, 73 IBLA 305 (1983); Harry K. Veal, 73 IBLA 86 (1983); Robert P. Schafer, 71 IBLA 191 (1983); Emery Energy, Inc. (On Reconsideration), supra.

The outcome of this case is controlled by those decisions. The fact that N-1 was required by IM No. 83-333 does not vitiate the necessity for the consent of the potential lessee. The language of the IM does not support in any way the inclusion of the stipulation without the consent of the potential lessee. And even if it did, the Board has held that instruction memoranda are not binding on the Board or the public. Beverly M. Harris, 78 IBLA 251, 252 (1984); Emery Energy, Inc. (On Reconsideration), supra at 261. The Nevada State Office stated that the IM was an attempt at standardizing the cultural

^{3/} The stipulation provides that prior to undertaking any surface disturbing activities on the leased lands the lessee or operator, unless informed otherwise, "shall" contact the appropriate Federal surface management agency to determine if a site specific cultural resource inventory is required. If an inventory is required, the lessee must engage the services of an acceptable cultural resource specialist and must implement mitigation measures required by the agency. The stipulation further requires that if impacts to cultural resources cannot be mitigated to the satisfaction of the agency, "surface occupancy on that area must be prohibited." In addition, if any cultural resource is discovered during the course of approved operations the lessee or operator must immediately contact the agency and must not disturb such discoveries until directed to proceed by the agency.

resource stipulations for all BLM offices. Standardization of stipulation language itself does not relieve BLM of providing notice of that language. ^{4/}

BLM has also relied on 43 CFR 3101.1-2 as support for its position that consent of the lessee is unnecessary unless the stipulation bars exploration and/or extraction. ^{5/} The regulation, however, fails to support this position. As correctly pointed out by appellants, the Board's line of cases has established that over-the-counter oil and gas lease offers are judged on traditional contract analysis. The regulation cited by BLM does not change that approach. The regulation states that the authorized officer may require special stipulations in addition to those contained on the lease form. It further provides that these stipulations shall become part of the lease and the lease issued if either the stipulations do not bar exploration and extraction, or the lease, as stipulated, is otherwise acceptable to the offeror.

The preamble to this regulation provides the following explanation: "This change is designed to preclude the issuance of a lease with stipulations so restrictive as to render the lease useless, unless the offeror does not object to the lease." 43 FR 33650 (July 22, 1983). The apparent intent of this regulation is to insure that an offeror knows when such restrictive stipulations are being attached to a lease and, thus, knowingly accepts such restrictions. While it might be possible to conclude from such a requirement that notice is not a prerequisite under other circumstances, such an interpretation would not be consistent with the previously cited Board cases, and there is no expression of such an intent in the preamble. Thus, we conclude the regulation has not altered the requirement of providing notice to offerors of stipulations included in over-the-counter oil and gas leases. ^{6/}

^{4/} To the extent BLM might be relying on an instruction memorandum as a statement of general policy or an interpretation of general applicability, it would have to be published in the Federal Register in accordance with 5 U.S.C. § 552(a)(1) (1982) in order to be binding on the public. Any standardized stipulation language developed by BLM could be published by BLM in the Federal Register. In that way the public would be given constructive knowledge of such language, and BLM could insert such a stipulation in leases without further notice to the offeror.

^{5/} 43 CFR 3101.1-2 provides as follows:

"The authorized officer may require stipulations in addition to those contained in the lease form as conditions to leasing. These stipulations and stipulations required by an agency other than the Bureau shall become part of the lease and the lease shall be issued only if either: (a) The stipulations do not absolutely bar exploration of the resource and extraction is technically feasible; or (b) the lease as stipulated is otherwise acceptable to the offeror. Stipulations which become part of the lease shall supersede any inconsistent provisions printed in the lease form. This includes among others, the regulations in this group and in 30 CFR Parts 207, 208 and 43 CFR Parts 3160 and 3180."

^{6/} Such an interpretation is consistent with the lease forms involved in these cases. The "Special Instructions" on the back of the form lease offers contain a description of the types of stipulations that may be added to the lease upon issuance. These instructions further inform the offeror that "[w]henver other stipulations are necessary, lessee will be required to agree to them before the issuance of the lease." Emery Energy, Inc. (On Reconsideration), *supra* at 263-64.

Appellants also argue that 43 CFR 3101.1-2 as interpreted and applied to them by BLM is unconstitutional. Given our interpretation of the regulation, it is unnecessary to consider this argument.

Although appellants may have accepted other leases containing the cultural resource stipulation, that fact does not negate the notice requirement. There is no evidence that appellants had knowledge, actual or constructive, of the imposition of the stipulation for the leases in question. Therefore, the issuance of these leases with the stipulation did not bind appellants, and in accordance with Board precedents, appellants had 30 days within which to register objection to the stipulation. Appellants made timely objection in this case.

We conclude that the Surface Disturbance Notice is not a "stipulation" for which an offeror is entitled to prior notice. However, the Cultural Resource Protection Stipulation is such a stipulation. BLM failed to provide notice of that stipulation. Appellants timely objected, seeking cancellation of the leases and refund of the advance rental. The leases are without effect and are hereby cancelled, and BLM is directed to return the advance rentals to appellants.

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 cases are remanded for action consistent with this opinion.

Bruce R. Harris
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Will A. Irwin
Administrative Judge

