

BEARTOOTH OIL AND GAS CO.

IBLA 84-614

Decided January 30, 1985

Appeal from the decision of the Colorado State Office, Bureau of Land Management, adopting a determination of the Craig, Colorado, District Office, requiring mitigation of damages to archaeological site 5RB1463 located on land subject to Federal oil and gas lease C 15230.

Affirmed.

1. Oil and Gas Leases: Stipulations

Where an oil and gas lessee does not protest or appeal a special stipulation added by BLM to a permit to drill within 30 days after notice thereof, the lessee cannot be heard to complain about the stipulation as long as BLM's interpretation of the stipulation is reasonable.

2. Oil and Gas Leases: Stipulations

Where the Board determines that the plain language of a stipulation in a permit to drill is clear and unambiguous in its imposition of liability on the operator if a specified archaeological site is altered, BLM must be affirmed in its enforcement of the stipulation.

APPEARANCES: Gary G. Broeder, Esq., Billings, Montana, and Edward J. McGrath, Esq., Denver, Colorado, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

## OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Beartooth Oil and Gas Company (Beartooth) appeals from the decision of the Colorado State Office, Bureau of Land Management (BLM), dated May 16, 1984, adopting a decision by the Craig, Colorado, District Office, BLM, dated April 26, 1984, requiring Beartooth to mitigate damages to an archaeological site.

The archaeological site in question is a prehistoric rock-shelter in Rio Blanco County, Colorado. Its existence was recorded on April 21, 1980, in the Office of the State Archaeologist, State of Colorado. The site was assigned identification number 5RB1463. 1/

The lands on which site 5RB1463 is situated are subject to Federal oil and gas lease C 15230. On May 7, 1982, Beartooth, the designated operator for this lease, notified the Grand Junction, Colorado, District Office, Minerals Management Service (MMS), 2/ that it wished to stake a wellsite for its Federal Well No. 20-3 at a location near the rock-shelter site. On July 12, 1982, Beartooth filed its formal application for a permit to drill (APD), including a surface use plan, with the Grand Junction District Office.

On August 31, 1982, a "Cultural Resources Inventory Report" was filed with the Craig, Colorado, District Office, BLM, by Grand River Institute

---

1/ Initially, the rock-shelter was given two identification numbers, 5RB1463 and 5RB2246. On Feb. 25, 1983, the Colorado Historical Society requested that BLM use the first listed number only. We do so here.

2/ At this time, oil and gas operations matters were under the aegis of MMS. Subsequent Departmental reorganization transferred supervision of these matters to BLM. 48 FR 8982 (Mar. 2, 1983).

(GRI), following a cultural resources survey of the area surrounding proposed Federal Well No. 20-3, conducted for Beartooth. The cover summary of the report stated:

A cultural resources survey of the re-location of proposed gas well Federal #20-3 and its associated access road in Rio Blanco County, Colorado, was conducted for Beartooth Oil & Gas Company, P.O. Box 2564, Billings, Montana 59103 at the request of the Craig District Office of the Bureau of Land Management (BLM). The survey was undertaken in compliance with Executive Order 11593, the National Historic Preservation Act of 1966, and the National Environmental Policy Act of 1969. A prefield check-in with the White River Area Office was conducted on 11 August, and fieldwork was performed on 12 August 1982 under Antiquities Permit No. 82-CO-347 by Carl E. Conner and Sally M. Crum of Grand River Institute, Grand Junction. A rockshelter site (5RB1463) was found -- 100 feet northwest of the northern boundary of the proposed well pad -- and a flake was observed on the well pad itself. A drainage and rock ledge prohibit encroachment of well pad construction near 5RB1463 so the site will be avoided; however, monitoring is recommended during well pad construction due to the pad's proximity to cultural resources. An isolated pictograph (5RB2371) was identified north of the proposed access road, but it will not be affected by construction activities.

[signature] 8/13/82  
 Carl E. Conner Date  
 Project Archaeologist

The above report was referred to BLM's White River Area Office for review. On September 22, 1982, following a field survey, an archaeologist from the area office, Penny McPherson, reported that the rock-shelter was a significant aboriginal habitation site. She stated that it was doubtful that any cultural resources would be found during the construction of the pad, and that any such resources that were found would not be "in-situ." 3/

3/ The BLM report seems to state that soil conditions at the well pad site were such that any artifacts found there might have been washed away from the area where they were used in antiquity. Cultural resources that are found away from their original locations, that is, not "in situ," are presumably of less archaeological value.

She added that "[i]t would be wise, however, to have a monitor, particularly if the weather is nice, to prevent vandalism to the rockshelter, if further investigation is planned for it."

On September 24, 1982, the White River Area Manager notified the GRI project archaeologist, Mr. Conner, that BLM's archaeologist had conducted a compliance check "to ascertain the necessity of a monitor during the construction of the \* \* \* proposed well pad and access." The letter advised, "[I]n lieu of the monitoring recommendations," BLM will recommend "that [the rockshelter] be completely photo documented prior to the beginning of the construction process." The letter continued, "[t]he BLM will then recommend that the construction company be held responsible for the condition of [the site] through the construction and rehabilitation phases of the access and well pad." In conclusion, the letter advised the project archaeologist to contact BLM's archaeologist if he had any questions.

On September 28, 1982, the Area Manager, White River Resource Area, BLM, advised MMS that it concurred with the surface use plan for well No. 20-3, subject, among other things, to the following condition of approval:

17. Prior to the initiation of construction of the well pad, the BLM will photo document the condition of sites [5RB1463] and 5RB2371. Following rehabilitation of the well pad, BLM will check the condition of the above sites against the pre-construction condition. Should the condition of the sites prove to be altered during this period, the sites will be mitigated and the cost of mitigation will be borne by the operator. The operator shall notify the White River Resources Area archaeologist five working days prior to start of construction.

On October 19, 1982, MMS approved Beartooth's APD. The condition of approval quoted above was included as Stipulation No. 17 to MMS's approval.

In the first week of June 1983, Beartooth commenced construction on the well pad and access road. On June 9, 1983, the rock-shelter and pictograph were photo documented by BLM. On July 22, 1983, Federal Well No. 20-3 was spudded; it was completed for natural gas on August 20, 1983.

On November 15, 1983, an employee of Beartooth discovered that the rock-shelter site had been vandalized by unauthorized excavation. Beartooth notified GRI, which, in turn, notified BLM. A field examination of the site revealed that four pits had been excavated on 5RB1463, the rock-shelter area.

On November 17, 1983, BLM's Area Manager wrote Beartooth that the rock-shelter had been "severely impacted by vandalism, destroying approximately 50% of the estimated site area." The Area Manager further notified Beartooth that it was required under Stipulation No. 17 "to contact a professional archaeologist to perform appropriate mitigation of site 5RB1463 as approved by BLM," and to bear the cost of "this mitigation and subsequent report." Beartooth was given 30 days to notify BLM whom it had chosen to perform this work, so that the "mitigation plan" could be approved by BLM.

By letter dated November 30, 1983, Beartooth requested that the Colorado State Director, BLM, provide technical and procedural review of the Area Manager's November 17 letter, pursuant to the provisions of 43 CFR 3165.3. Beartooth stated, "In our opinion, Beartooth cannot be held responsible for acts of vandalism done by outside parties in no way related to or working for us." Beartooth then asserted, "Nowhere in the approved APD does it state that Beartooth is liable for any damages done by outside parties." The State Office referred Beartooth's request for review to the Craig District

Office, the administrative office next above the Area Office in the BLM organizational hierarchy.

On January 4, 1984, the District Office issued a decision holding Stipulation No. 17 valid and concluding that, since damage to archaeological resources occurred during the time period that Beartooth was active in the area, it was responsible for mitigating this damage. The decision then noted:

These conclusions should not be taken as an accusation that your company's employees or your subcontractors were involved with the vandalism of the cultural resources. Neither the stipulation nor the subsequent correspondence makes reference to whom [sic] may be at fault. We are only recognizing that damage occurred to the resource and that, in accordance with the original agreement (i.e., Stipulation Number 17 of the APD), it is Beartooth Oil and Gas Company's responsibility to mitigate that action.

The stipulation (#17) was used to mitigate a potential impact that, had we not had such a stipulation available to use, would have required (1) relocation of your road and pad, (2) a detailed survey of the cultural site prior to construction, or (3) denial of your APD. We believe Stipulation No. 17 is useful, both to ourselves and industry, in any similar situation.

On January 24, 1984, Beartooth petitioned the District Office to clarify what it meant by "mitigation" and to determine whether BLM regarded it as having "some sort of obligation to protect this archaeological site for the indefinite future." On March 5, 1984, the District Office responded, advising that "mitigation" is defined in the BLM Manual at 8100 as "the alleviation or lessening of possible adverse effects of an action upon a cultural resource by application of appropriate protective measures or adequate scientific study." The response gave extensive guidelines on specific appropriate protective measures; advised Beartooth that its obligation to mitigate lasted only through rehabilitation of the wellsite; and requested that

it submit three limited test excavation proposals no later than March 30. Finally, BLM advised Beartooth that it would review the proposals and road conditions in the area and that Beartooth was to begin work no later than 10 days after it received notification from BLM that work could proceed.

In a letter dated March 16, 1984, Beartooth inquired whether BLM's letter of March 5 was a decision formally requiring Beartooth to mitigate the damages. On April 26, 1984, the District Manager issued a decision requiring Beartooth to bear all costs of the mitigation of damages by vandalism to archaeological site 5RB1463; to submit three proposals by approved archaeological consulting firms within 30 days of Beartooth's receipt of the decision; and to commence the required actions within 60 days thereof. The District Office further held that, should Beartooth fail to begin the archaeological survey by May 15, 1984, an assessment of \$250 per day would be issued beginning May 16 for failure to comply, pursuant to the provisions of 43 CFR 3163.3(a).

On May 7, 1984, Beartooth filed a request with the Colorado State Director, BLM, for technical and procedural review of the April 26 decision. On May 16, 1984, the State Office ruled that it had delegated its review authority to the District Office, and that the latter's consideration culminating in the April 26 decision had provided Beartooth the review to which it was entitled under the regulations. The State Office letter explained the provisions of the District Office's decision, but declined to alter them. On May 17, 1984, Beartooth filed a notice of appeal of the State Office decision to this Board.

On June 15, 1984, in response to a request by Beartooth, this Board vacated BLM's decision insofar as it imposed monetary penalties for Beartooth's failure to take the action specified by BLM, due to the questions presented by the appeal. We also ruled that the effect of BLM's decision was temporarily suspended under 43 CFR 3165.4, since Beartooth had offered to submit a bond which was apparently adequate to indemnify the United States. We held that this temporary suspension would ripen into a full suspension pending final resolution of the appeal unless BLM notified the Board that Beartooth had failed to post the bond. Subsequently, the Board received notice that Beartooth had established an irrevocable letter of credit in favor of BLM.

Beartooth in its statement of reasons argues that (1) the language of Stipulation No. 17 in the drilling permit is unclear and patently ambiguous; (2) BLM's interpretation of the stipulation violates the intent of the parties; and (3) BLM is attempting to enforce the stipulation in an arbitrary and capricious manner.

[1] The Secretary of the Interior, through BLM, has the authority to issue an APD subject to protective stipulations. See Udall v. Tallman, 380 U.S. 1, 4, rehearing denied, 380 U.S. 989 (1965); Copper Valley Machine Works, Inc. v. Andrus, 474 F. Supp. 189 (D.D.C. 1979), vacated on other grounds, 653 F.2d 595 (D.C. Cir. 1981). Beartooth does not question the authority of BLM to insert in an APD a stipulation designed to protect an archaeological site on public lands. Rather, Beartooth asserts that Stipulation No. 17 is unenforceable because it is unclear and ambiguous and that the present BLM interpretation of Stipulation No. 17 violates the intent of the parties.

In oil and gas cases generally, this Board has found that where leases were issued with additional special stipulations without notice to the offeror, this, in essence, amounted to a counteroffer by BLM which the original offeror was free to accept or reject. Frances Kunkel, 75 IBLA 199 (1983); Emery Energy, Inc. (On Reconsideration), 67 IBLA 260 (1982). However, it has been held that the lessees must have objected within 30 days of receipt of the counteroffer where leases have validly issued, or otherwise they are considered as having accepted the counteroffer. Frances Kunkel, supra at 200; Emery Energy, Inc. (On Reconsideration), supra at 264.

In this case, Beartooth submitted an APD to the MMS District Office in Grand Junction, Colorado, on July 12, 1982. The APD was approved October 19, 1982, with stipulations attached as conditions of approval. Beartooth did not object to any of the stipulations. Rather, Beartooth developed the leased lands pursuant to the approved APD, beginning June 13, 1983, some 8 months after approval of its APD. BLM maintains in its answer at page 5 that "Beartooth's failure to object and its commencement of operations pursuant to the APD gave the BLM every reason to believe Beartooth fully understood Stipulation 17 and agreed to be bound by its terms." We agree.

[2] Further, from our review of the provisions of Stipulation No. 17, we find the language therein to be clear and unambiguous. Appellant has made no argument that persuades us otherwise. The terms in question provide that Beartooth must bear the cost of mitigating damages to the site if it is altered at any time from commencement of construction of the well pad through rehabilitation thereof. Appellant says this is ambiguous because, among other things, "the stipulation fails to specify whether it applies only to

damage done to the sites by Beartooth or also encompasses damage done by the world at large."

Statement of Reasons at 5 (emphasis in original).

The plain language of the stipulation does not limit Beartooth's responsibility to damages to the site caused by Beartooth personnel but not others. Appellant attempts to create an ambiguity where none exists. In addition, the administrative record fully supports a finding that Beartooth knew of the cultural resources significance of the area and by acceptance of the stipulation assumed responsibility for damage to the site.

The potential for vandalism to the rock-shelter area, whether perpetrated by Beartooth employees or others, was of obvious concern to Beartooth and BLM. At the request of BLM, a cultural resources inventory report was prepared concerning Beartooth's proposed wellsite and access road. The report recommended monitoring of the well pad, stating: "Proximity of proposed well pad (Federal #20-3) may encourage vandalism" (Inventory Report at 8). BLM's compliance check field report recommended: "[I]t would be wise \* \* \* to have a monitor \* \* \* to prevent vandalism to the rockshelter \* \* ." The BLM Area Manager then wrote the GRI project archaeologist, stating, among other things:

In lieu of the monitoring recommendations, the BLM will recommend that both 5RB1463 and 5RB2371 be completely photo documented prior to the beginning of the construction process.

The BLM will then recommend that the construction company be held responsible for the condition of both sites through the construction and rehabilitation phases of the access and well pad.

(Letter dated September 24, 1982, from White River Resources Area Manager to Carl Conner).

The foregoing position was subsequently adopted by BLM with no question, objection, or protest heard from Beartooth until the necessity for enforcement of the provisions of Stipulation No. 17 arose.

The basis for BLM's decision to require Beartooth to assume full responsibility for archaeological site 5RB1463, and one other site, is summarized in its Answer Brief as follows:

The reason for not limiting the Stipulation is obvious. The archaeological study conducted by Beartooth had discovered a significant site. It was likely that news of the discovery would spread. Beartooth intended to construct a road that would make the site readily accessible. This, plus the presence of workers who had legitimate reasons for being in the area, would make it difficult to monitor activities near the site and increase the possibility of site vandalism not only by employees of Beartooth, but by others. The BLM had choices to make. Among other things, it could have required Beartooth to study the site, including a recovery of any artifacts, prior to construction. It could have required Beartooth to drill in some other location. It could have made Beartooth responsible for the security of the site. It chose the last listed option.

(Answer at 7).

It is not necessary to examine whether Stipulation No. 17 is unclear or ambiguous in ways that are not germane to this case. At issue here are damages indisputably man-made in the immediate rock-shelter area, described at page 2 of the Cultural Resources Inventory Report as "100 feet northwest of the northern boundary of the proposed well pad." The dimensions of the site were found to be "20m x 20m" or "0.1 acres" (Id. at 8), followed by a detailed map depicting the site's location (Id. at 9). Finally, the record contains clear photographic evidence of the rock-shelter area before and

after the unauthorized excavations, revealing a discrete location which all parties obviously understood as constituting the heart of archaeological site 5RB1463.

In summary, it is clear that Beartooth assumed responsibility under Stipulation No. 17 to mitigate damages to the very area in question, the rockshelter site, regardless of whether vandalism was caused by Beartooth employees or other persons. These circumstances having occurred, it was proper for BLM to require remedial action by Beartooth. <sup>4/</sup>

Appellant has requested a hearing in this case. In the absence of a showing of a material issue of fact, we exercise our discretion to deny the request for an evidentiary hearing. 43 CFR 4.415.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Colorado State Director, BLM, dated May 16, 1984, is affirmed.

Wm. Philip Horton  
Chief Administrative Judge

We concur:

Bruce R. Harris  
Administrative Judge

C. Randall Grant, Jr.  
Administrative Judge

---

<sup>4/</sup> It is not appropriate for the Board to delineate what it may regard as appropriate mitigation measures. As noted by BLM: "It is premature for Beartooth to complain about the reasonableness of the costs involved as those costs remain to be determined" (Answer at 8).

