

EXCELSIOR EXPLORATION CORP.

IBLA 85-160

Decided March 3, 1986

Appeal from a decision of the Eastern States Office, Bureau of Land Management, dismissing a protest of noncompetitive acquired lands oil and gas lease offers ES 31947 and ES 32418.

Vacated and remanded.

1. Oil and Gas Leases: Acquired Lands Leases--Oil and Gas Leases: Applications: Six-mile Square Rule

Pursuant to 43 CFR 3110.1-3(b), the land in a noncompetitive oil and gas lease offer may not exceed 6 miles square except when the lease offer is for unsurveyed acquired land described by acquisition tract number and less than 50 percent of the tract lies outside the 6-mile square area. More than one tract may be included in the lease offer; however, less than 50 percent of only one tract in the offer may extend outside the 6-mile square area.

APPEARANCES: Leon F. Scully, Jr., President, Excelsior Exploration Corporation, Houston, Texas, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Excelsior Exploration Corporation (Excelsior) appeals the October 10, 1984, decision of the Eastern States Office, Bureau of Land Management (BLM), dismissing Excelsior's protest of two noncompetitive over-the-counter oil and gas lease offers. Excelsior protested lease offers ES 31947 and ES 32418; each lease offer described the same tracts: 3094Bp (27.30 acres), 3094Bq (149.10 acres), 3094Br (196.50 acres), and 3094Bs (7128.02 acres). John R. Chitwood filed lease offer ES 31947 on October 15, 1982. William Moser filed lease offer ES 32418 on March 31, 1983. On April 4, 1983, Excelsior filed lease offer ES 32423 for tracts 3094Bp, 3094Bq, and 3094Br and lease offer ES 32424 for tract 3094Bs. The tracts are unsurveyed acquired land in the Daniel Boone National Forest in Leslie and Clay Counties, Kentucky. Excelsior's protest was dated May 13, 1983. Therein, it challenged the Chitwood and Moser offers as violating the 6-mile square limit of 43 CFR 3110.1-3(b). In its October 10, 1984, decision BLM found no such violation. ^{1/}

^{1/} On Oct. 22, 1984, Moser filed a letter with BLM stating that only he and Chitwood were "viable applicants for the leased tracts in question," because BLM had dismissed Excelsior's protest. Moser then challenged Chitwood's lease offer.

On appeal, Excelsior renews its objection that Chitwood's and Moser's lease offers violate the 6-mile square rule. The 6-mile square rule states that: "The lands in an offer or parcel shall be entirely within an area of 6 miles square or within an area not exceeding 6 surveyed sections in length or width measured in cardinal directions." 43 CFR 3110.1-3(b). An exception to the rule is found in 43 CFR 3110.1-3(b)(1) and (2) which state:

A parcel or an offer to lease acquired lands may exceed the 6 mile square limit if:

(1) The lands are not surveyed under the rectangular survey system of public land surveys and are not within the area of the public land surveys; and

(2) The tract desired is described by the acquisition tract number assigned by the acquiring agency and less than 50 percent of the tract lies outside the 6 mile square area.

Tract 3094Bs, measured east to west is greater than 6 miles wide, according to appellant. Excelsior also states that tracts 3094Bq, 3094Br, and 3094Bs together, measured north to south, are greater than 6 miles long. Therefore, Excelsior contends that a noncompetitive oil and gas lease offer containing tract 3094Bs must fall within the exception to the 6-mile square rule in order to be valid. Excelsior argues that the exception to the 6-mile square rule contemplates only one tract per lease offer. Chitwood and Moser included three tracts, in addition to tract 3094Bs, in their lease offers. Accordingly, appellant argues, their lease offers are invalid.

Excelsior offers several arguments to support its conclusion that only one tract per lease offer is permitted under the exception to the 6-mile square rule. Excelsior argues that the 6-mile square rule is intended to promote compactness and that allowing multiple tracts per lease offer defeats that compactness objective. Appellant states:

To have the exception apply to several tracts would mean that if you filed Tract 3094 Bs herein in Clay and Leslie Counties,

fn.1 (continued)

Effective Jan. 1, 1971, Fordson Coal Company (Fordson) issued to National Petroleum Inc., of which Moser was president, a 5 year ("and so long as the Premises are operated in the production of oil and gas") oil and gas lease which included the lands in question. On September 27, 1967, Fordson deeded this land to Red Bird Timber Company with a 15-year coal, oil, and gas reservation. Once the oil and gas reservation expired, the status of the lease became unclear, according to Moser. He reasonably believed that his lease would continue except that rents and royalties would be paid to BLM, he states. Moser asserts it was not until he received a Mar. 1, 1983, letter from the U.S. Forest Service, stating that the fee lease expired Sept. 27, 1982, because the term of the lease was coterminous with the expired oil and gas reservation, that he had reason to file a Federal lease offer. Accordingly, Chitwood's lease offer was premature, according to Moser. BLM has apparently taken no action on Moser's objection. BLM should consider Moser's Oct. 22, 1984, letter as a protest.

Kentucky you could then file another 3,110 acres anywhere outside of the rectangular survey system. If you filed 5,121 acres which was within a six mile square you could then file any tract up to 5,119 acres anywhere in the thirteen colonies. Once you filed acreage which was within the six mile square you could include up to that amount again in the offer regardless of distance. This would be contrary to the plain meaning of the exception and do violence to the intent of the rule.

(Statement of Reasons at 4).

Appellant states that the only purpose of the exception to the 6-mile square rule is to permit a single tract which exceeds 6 miles square to be described by acquisition number rather than by metes and bounds description, which is burdensome. The exception was not created to "permit the inclusion of multiple tracts more than 6 miles apart when they could be filed simply by acquisition tract number in separate offers," Excelsior argues (Statement of Reasons at 5). Therefore, Excelsior concludes, the exception to the rule is available only to a single tract in excess of 6 miles square.

Excelsior also states that "tract" is singular not plural in 43 CFR 3110.1-3(b). Therefore, Excelsior argues, the Department intended that the exception to the 6-mile square rule apply only to a single tract per lease offer.

[1] The exception to the 6-mile square rule first appeared in the regulations effective June 16, 1980. 45 FR 35156, 35163 (May 23, 1980). According to the Department, the exception is intended to provide flexibility for leasing certain acquired lands. In the preamble to the final rulemaking for 43 CFR 3110.1-3, the Department states:

Several comments suggested that the six mile square rule, as opposed to the four mile square rule set forth in the proposed rulemaking, be retained. The comments suggested that a four mile rule was unnecessarily restrictive, particularly with the increase in maximum lease acreage.

After a careful analysis of the comments, the four mile square rule has been abandoned in the final rulemaking in favor of the six mile square rule. Additional flexibility has been added through an amendment of the final rulemaking for leasing of certain acquired lands outside a six mile square.

45 FR 35158 (May 23, 1980).

It is apparent from the preamble to the rulemaking that the exception to the 6-mile square rule should provide flexibility in leasing certain acquired land. In addition, although "tract" is used in the singular in 43 CFR 3110.1-3, the plural construction is also appropriate. Except where the content of the regulation or the appropriate statute indicates otherwise, the words in 43 CFR importing the singular apply to the plural, as well. 43 CFR 1810.1(a).

Excelsior's argument that permitting multiple tracts per lease offer would permit an offeror to file 5,121 acres which was within a 6-mile

square and then "file up to 5,119 acres anywhere in the thirteen colonies," thus defeating the compactness purpose of the 6-mile square rule, is completely without basis. The regulations do not support such a result. Clearly, acreage in a particular tract may be outside the 6-square mile limit only if less than 50 percent of that tract lies outside the limitation area.

While the plural construction may be applied to allow the inclusion of multiple tracts in an acquired lands oil and gas lease offer, the purpose of the 6-mile square rule (to promote compactness) must not be abandoned in interpreting the exception. The exception itself provides flexibility. Appellant urges a restrictive interpretation of that exception. He argues it is available only to a single tract in excess of 6 miles square. BLM's interpretation, as set forth in its decision, is that the offer may include multiple tracts and less than 50 percent of each tract may lie outside the 6-mile square area. This represents a more liberal interpretation, since more acreage could lie outside the 6-mile square area.

We find appellant's interpretation more in keeping with the 6-mile square rule. Therefore, an offer to lease acquired lands may exceed the 6-mile square limit if, under 43 CFR 3110.1-3(b)(2), the tracts are described by acquisition tract numbers assigned by the acquiring agency and less than 50 percent of only one tract in the offer extends outside the 6-mile square area.

BLM's rejection of Excelsior's protest was improper. Excelsior correctly pointed out ES 31947 and ES 32418 violated the 6-mile square rule. We note, however, that prior to taking any further action BLM should investigate the status of the lands in question. On August 23, 1985, the Board received a letter from one Richard Counts, Esq., 2/ stating that the land involved in this case "is subject to a valid oil and gas lease which has been held by production since 1972." BLM should determine whether this statement is true and, if this land is subject to federal lease, whether or not it must be leased competitively in accordance with 30 U.S.C. § 226(b) (1982). Moreover, a note in case file ES 31947 indicates that coal lease ES 12847 was issued for tracts 3094Bp and 3094Bq effective March 1, 1975, at a time when the coal, oil, and gas rights were in private ownership.

Accordingly, 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 Eastern States Office, BLM, is vacated and the case remanded.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier James L. Burski
Administrative Judge

Administrative Judge

2/ It does not appear from the record that Counts represents any of the parties in this appeal.

