

CHEVRON U.S.A. INC.

IBLA 85-811

Decided March 26, 1987

Appeal from a decision of the California State Office, Bureau of Land Management, dismissing protest of oil and gas lease sale. CA 17346.

Affirmed.

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

The Board will affirm BLM's dismissal of a protest of an oil and gas lease sale where the protestant's allegations that the winning bidder enjoyed an unfair advantage and that BLM was remiss in its duties in conducting the sale are unsupported by the record.

APPEARANCES: Carl N. Down, Esq., San Ramon, California, for Chevron U.S.A. Inc., Stephen E. Roady, Esq.; Washington D.C., for Arkoma Production Company of California; Stephen M. Brown, Esq., Office of the Solicitor, United States Department of the Interior, Washington D.C., for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Chevron U.S.A. Inc., appeals from a decision dated July 3, 1985, by the California State Office, Bureau of Land Management (BLM), dismissing its protest of an oil and gas lease sale.

Arkoma was high bidder among seven, bidding \$502,250 for parcel 34 in the competitive oil and gas lease sale held April 30, 1985. Chevron, with a bid of \$70,000, was second highest bidder. The notice of sale, dated March 25, 1985, contained the following paragraph:

The leases issued for Parcels 34 and 35 will include the following stipulation:

No occupancy or disturbance of the surface area of the leased lands is allowed. The method of exploration of the leased lands will be by directional drilling from locations that the lessee is able to obtain that are outside the surface area of the leased lands.

The surface owner of parcel 34 is the State of California. A portion of the surface of the parcel is administered by the California Department of Health Services (CDHS) which operates the Fairfield Animal Research Facility on the land. BLM made the no-surface-occupancy (NSO) stipulation a condition of the sale in part based on CDHS' analysis of the impacts of oil and gas operations on its animals and experiments (BLM answer, attachment 3).

On May 20, 1985, after bid opening and before lease issuance, Arkoma petitioned BLM for removal of the NSO stipulation. Arkoma's petition indicated that, after discussion with CDHS officials, surface access for drilling was available.

By letter of June 13, 1985 (received by BLM on June 21), Chevron filed its protest objecting to Arkoma's attempts to have the NSO stipulation removed. Chevron contended that, if Arkoma were allowed to drill "in violation of the stipulation then BLM is placing the other bidders at an unfair disadvantage and is not providing an 'equal opportunity' for those bidders to compete on a common basis."

On June 14, 1985, BLM issued Arkoma a decision modifying the NSO to provide that no occupancy of the surface would be allowed without the express permission of the surface owner. On the same date BLM issued lease CA 17346 to Arkoma with an effective date of July 1, 1985. <sup>1/</sup> Arkoma submitted an application for permit to drill (APD) dated June 14, 1985, which was approved by BLM on July 3, 1985. <sup>2/</sup> BLM issued its decision dismissing Chevron's protest on July 3, 1985, resulting in the instant appeal.

The record reveals the following circumstances leading to the modification of the NSO stipulation. On March 28, 1984, a meeting was held between BLM officials and representatives of the two California State agencies with interests in the land embraced by parcel 34, CDHS and the California Department of Forestry. The latter agency was interested in locating a work camp on the parcel. In a letter to BLM's Ukiah District Office dated April 13, 1984, CDHS stated its position as follows:

The Department of Health Services requests that access to any drilling site be located along the southern boundary of the property. This limited access is necessary to ensure the security of the Department's buildings and operations. The Department also requests that the drilling contractor and subsequent operations,

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<sup>1/</sup> By decision dated June 21, 1985, BLM changed the effective date of the lease from July 1 to June 1, 1985.

<sup>2/</sup> Arkoma completed the well on July 29, 1985.

[\*274] if any, be confined to the space available outside of the Department's existing security fence.

As was discussed in our March 28, 1984 meeting, the drilling site may have to be located outside of the property boundary if noise and other disturbance cannot be mitigated to tolerable levels.

Subsequently, the Ukiah District Office Realty Specialist met onsite with Dr. Glenn Bissell, Director of the Fairfield Animal Research Facility and Jim Wagner, Conservation Camp Coordinator, Department of Forestry. In his August 9, 1984, feasibility report, the Realty Specialist stated that State officials "have requested that should we lease the premises that we allow no surface occupancy whatsoever by the lessee" and concluded that the parcel should be leased subject to the NSO stipulation. (Emphasis in original.)

On May 20, 1985, Arkoma filed with the BLM State Office a petition to remove the NSO stipulation. On the same date, the BLM State Office received a letter from the Senior Land Agent, California Department of General Services, advising that Arkoma had made inquiries concerning access to the subject land for oil and gas drilling. Referring to the April 13 letter to the Ukiah District Office, supra, the agent notified BLM that "the State is agreeable to surface access, based upon the guidelines set forth in the referenced letter, and advises your agency accordingly." In view of the Ukiah District Office's recommendation against surface occupancy, the State Office, on May 21, 1985, requested the Senior Land Agent to verify whether the California Department of General Services was now agreeing to the outright grant of drill sites, and, if so, to identify the sites and applicable conditions. By memorandum of the same date, the BLM State Office advised the Ukiah District Office that Arkoma had petitioned for removal of the NSO stipulation and asked for a report as to whether or not the stipulation should be modified.

On June 7, 1985, representatives of CDHS and the California Department of Forestry executed letter agreements with Arkoma, granting Arkoma permission to occupy the surface of the subject parcel pursuant to the guidelines in CDHS' April 13, 1984, letter. By telephone conversation on June 12, 1985, the Ukiah District Office recommended that, in view of the signed agreements Arkoma obtained from the State, the lease should be amended to remove the NSO restriction. 3/ On June 14, 1985, BLM issued its decision modifying the NSO stipulation.

BLM's July 3, 1985, decision denying Chevron's protest stated that since Arkoma had submitted its bid based on the NSO stipulation, as did the other bidders, no bidder was at a disadvantage. The decision further stated:

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3/ This recommendation was confirmed by letter dated June 24, 1985, received by the State Office on June 26, 1985.

Because Arkoma was the high bidder for Parcel 34, because it attached no preconditions to its bid, and because the no surface occupancy stipulation was modified subsequent to bid opening, only after evidence was submitted, that the reason for the stipulation as originally worded no longer existed, the protest of Chevron against issuing Arkoma a permit to drill is denied.

In its statement of reasons, Chevron asserts that BLM either did not timely contact CDHS prior to the sale to accurately determine the stipulations it would impose, or that BLM independently determined that the stipulation was needed despite the surface owner's willingness to allow access. Chevron questions whether Arkoma's bid was made with a presale agreement that the NSO stipulation would be modified to allow surface access. As relief, Chevron requests that the lease be cancelled.

In its answer, Arkoma states its contacts with State representatives prior to the sale did not result in any presale agreement, and submits affidavits from its General Counsel and Land Manager, and State officials stating that no such agreement existed (Arkoma Answer, Exhibits 5, 6, and 7). Arkoma contends that the sale was fairly conducted and that it at all times acted in accordance with BLM procedures.

BLM's answer asserts that Chevron offers no evidence that a presale agreement existed. BLM argues that its determination of the conditions and stipulations as stated in the Notice of Sale and its removal of the NSO stipulation after the bids had been opened were proper.

[1] The regulations at 43 CFR Part 3120 govern competitive lease sales. Chevron has not shown that any of these regulations were violated in the sale at issue. Chevron's allegation that BLM was remiss in its obligations is contradicted by the record. The record indicates BLM properly described the conditions of the lease in the notice of sale as required by 43 CFR 3120.4-1 and diligently attempted to ascertain the true intent of the surface owner at all pertinent times, especially in May 1985, after being informed by the Senior Land Agent that the State was agreeable to surface occupancy. Prior to that time, BLM properly relied on the recommendation of the Ukiah District Office, whose officials had been in direct communication with representatives of the surface owner. There is no indication that BLM at any time misapprehended the surface owner's intent, insofar as that intent was made known to it, or that it independently decided to impose the NSO stipulation. The documents of record do not indicate the existence of a presale agreement.

While Chevron has made general allegations concerning irregularities in the lease sale, it has shown neither how any laws or regulations were breached nor how it was deprived of some legal right so as to entitle it to the relief sought. Cancellation of a lease is improper when the lease was not issued in violation of any statute or regulation. John Bloyce Castle, 81 IBLA 53 (1984). Chevron's appeal is similar to that in B. H. Northcutt, 75 IBLA 305 (1983), where we held that general unsupported complaints made against an oil and gas lease sale were inadequate to support an appeal. Unless allegations on appeal are supported by evidence showing error, an appeal cannot be afforded favorable consideration. Howard J. Hunt, 80 IBLA 396 (1984). We conclude Chevron's allegations are not supported by evidence showing BLM erred.

Therefore, 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 affirmed.

John H. Kelly  
Administrative Judge

I concur:

Wm. Philip Horton  
Chief Administrative Judge.

## ADMINISTRATIVE JUDGE HARRIS CONCURRING IN THE RESULT:

I agree with the result reached by the majority in this case. The record, as supplemented by the parties on appeal, supports the decision denying the protest. However, I must raise certain concerns I have regarding the modification of conditions set forth in a notice of a competitive oil and gas lease sale following bid opening and before lease issuance.

In this case notice of sale issued March 25, 1985. It alerted potential bidders that parcel 34 would be burdened with a no-surface-occupancy (NSO) stipulation. As a potential bidder, Arkoma Production Company approached the surface owner - the State of California - seeking to have the stipulation removed. <sup>1/</sup> There was no change in the status of the stipulation at the time of the bid opening on April 30, 1985. Arkoma submitted the high bid of \$502,250 for parcel 34. Arkoma then actively pursued its negotiations with State officials, and on May 20, 1985, BLM received a letter from Arkoma requesting removal of the stipulation and a letter from the State agreeing to surface occupancy. On May 21, 1985, BLM sought clarification from the State concerning to what it would agree. On June 7, 1985, the State confirmed it would allow limited surface occupancy to Arkoma. On June 14, 1985, BLM modified the NSO stipulation and issued the lease.

Arkoma and BLM argue that since at the time of sale parcel 34 was offered with the NSO stipulation, all bidders were on equal footing and the competitive nature of the sale was not jeopardized. It is true, of course, that the parcel was offered with the NSO stipulation, and it must be assumed bids were made accordingly. In fact, the Board has held that the terms specified in the notice of a competitive oil and gas lease sale become a part of the lease contract and BLM's failure to include those terms in the lease at the time of issuance does not preclude their subsequent imposition. *Anadarko Production Co.*, 66 IBLA 174 (1982).

However, the implication of another position taken by BLM on appeal is troublesome to me. In its answer, BLM argues at length that it properly included the NSO stipulation in the notice of sale, but upon being informed the State was willing to modify it, BLM was obligated to change the stipulation. BLM states:

BLM originally included the NSO stipulation on parcel 34 based on its assessment that this stipulation was the only one which would adequately protect the use of the tract by both Health Services and Forestry. However, when it became evident after bid opening that Health Services and Forestry were willing

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<sup>1/</sup> Contrary to the allegation of Chevron U.S.A. that Arkoma had a presale agreement with the State regarding modification or removal of the stipulation, the affidavits of Arkoma's general counsel and certain State officials, submitted on appeal, support a contrary finding.

to allow surface occupancy based on the location of Arkoma's proposed drill site and Arkoma's willingness to comply with the conditions in the April 13, 1984 letter, it was not only reasonable for BLM to modify the NSO stipulation, BLM was under a duty to modify it. Neva H. Henderson, 31 IBLA 217, 220 (July 6, 1977); Vern K. Jones, et al., 26 IBLA 165, 168 (Aug. 4, 1976).

(BLM Answer at 18-19).

The cases cited by BLM are noncompetitive oil and gas lease cases, and while they stand for the general proposition that a NSO stipulation must be supported by the record, they do not, as asserted by BLM, directly support the action in this case. BLM fails to address the fact that this case involves a competitive sale. The nature of the competitive sale is that the Secretary is seeking to obtain fair market value for the offered lease. There can be no denying that a parcel offered with a NSO stipulation, and surrounded by private lands controlled by an oil company, would be of more value without such a stipulation or with the stipulation modified.

Therefore, the question BLM should ask in circumstances such as presented here is whether the Secretary has received fair market value for the offered lease. This would require that BLM analyze the results of the sale and attempt to determine whether cancellation of the sale and reoffering of the parcel are necessary to ensure the receipt of fair market value. Admittedly, such a determination would be difficult, and perhaps the general rule should be the that sale be cancelled and the parcel or parcels reoffered. BLM's action in the case and its argument on appeal indicate it believed both modification of the stipulation and issuance of the lease to Arkoma were required. Modification was; lease issuance was not. On May 20, when BLM became aware that the State would accept something less than a NSO stipulation, or at least on June 7 when the State clarified its position, BLM should have considered cancellation of the sale of parcel 34, refund of the bonus bids and a reoffering of the parcel for leasing with the modified stipulation.

Here, BLM issued the lease with the modified stipulation. Chevron argues the lease should be cancelled. Arkoma contends that cancellation now, after its completion of a producing well, would be extremely inequitable. Regarding the question of fair market value, Arkoma states:

Arkoma's bid, being substantially in excess of other bids, also resulted in substantial additional consideration to the United States. In fact, the disparity in the bids was so great that it is extremely speculative to assume that any change in the original bid stipulations would have had anything more than an insignificant impact on the outcome of the bidding process. Therefore, if there were any error in the bidding process, it could hardly be deemed prejudicial in view of the gross disparity in the bids.

(Arkoma Answer at 15).

I find that it would have been extremely doubtful that cancelling the sale of parcel 34 prior to lease issuance and reoffering the parcel would have resulted in a higher bonus bid for parcel 34. Arkoma's bid was the highest submitted for any of the 35 parcels offered for leasing in the April 30 sale and was much higher, at \$7,308.64 per acre, than the average per acre bid of \$407.95 for all parcels. While Arkoma and the State deny the existence of any presale agreement, the size of Arkoma's bid reflects that it felt fairly confident that the high bidder for parcel 34 could successfully negotiate a modification of the NSO stipulation. The record reveals persistence and diligence on the part of Arkoma, however, not collusion or improper conduct, as alleged by Chevron.

Nevertheless, allowing the modification of restrictive stipulations set out in notices of sale following bid opening has the potential for undermining the integrity of the competitive leasing system. Such a practice could encourage potential bidders to seek to thwart the competitive bidding system by presale arrangements which could adversely affect the amount of the bonus bid.

Therefore, if subsequent to a sale such as involved here, the surface owner informs BLM that a restrictive stipulation is not necessary, modification of the stipulation and issuance of the lease should not follow automatically. BLM should determine whether the sale has been compromised or whether the lease may issue, and the rationale for its action should appear in the case record. BLM must diligently safeguard the soundness of the competitive leasing system.

Bruce R. Harris,  
Administrative Judge.

