

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting simultaneous oil and gas lease application W 100606.

Affirmed.

1. Oil and Gas Leases: Applications: Drawings

BLM may properly reject a simultaneous oil and gas lease application filed on behalf of a limited partnership if the applicant has not disclosed the identity of any partners on the application. Pursuant to the Notice issued under the authority of 43 CFR 3102.5, and published at 48 FR 37656 (Aug. 19, 1983), a limited partnership must submit, with its simultaneously filed oil and gas lease application, the names of all general partners and limited partners who own or control more than 10 percent of the partnership.

APPEARANCES: Joyce Colson, Esq., Houston, Texas, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Santa Fe Energy Operating Partners, L.P., has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated May 23, 1986, rejecting its simultaneous oil and gas lease application W 100606 selected with first priority for parcel WY-115 in the April 1986 simultaneous oil and gas lease drawing. BLM rejected the application because the application indicated the applicant was a partnership, and it had failed to list the names of any partners on the application or provide a separate list of partners. The BLM decision relied on 43 CFR 3102.5, which authorizes the submission of such information, and a rule related Notice which requires it, 43 FR 37656 (Aug. 19, 1983).

Part B of appellant's simultaneous oil and gas lease application form (Government form 3112-6a (April 1984)) was signed, as nearly as it is possible to discern, "J Budwell." 1/ In the space provided on the form for "FULL NAME

1/ The signature line instructions on the application provide: "SIGNATURE IN INK AND RELATIONSHIP TO APPLICANT." The regulations provide at 43 CFR 3112.2-1(c) that if the application is "signed by someone other than the

OF OTHER PARTIES IN INTEREST (IF APPLICABLE)," the applicant entered the word "none." The instructions for Part B of the application form require that filing by partnership applicants be accompanied by a complete list of individual members.

On appeal, appellant asserts that the structure of the partnership renders it unduly burdensome for it to disclose all limited partners on an oil and gas lease application. Appellant explains the partnership structure as follows:

Organization of Operating Partnership

The Operating Partnership is a Delaware limited partnership which has two general partners and one limited partner. Its special general partner is Santa Fe Energy Company, a Texas corporation ("SFE"), and its managing general partner is Santa Fe Pacific Exploration Company, a Delaware corporation ("SPX"). SFE and SPX are wholly-owned subsidiaries of Santa Fe Natural Resources, Inc., a Delaware corporation ("SFNR"). The single limited partner of the Operating Partnership is Santa Fe Energy Partners, L.P., a Delaware limited partnership (the "Public Partnership"). The two general partners have a combined one percent (1%) interest in the Operating Partnership, and the limited partner has a ninety-nine percent (99%) interest in the Operating Partnership.

The Public Partnership has two general partners and thousands of limited partners. Its special general partner is SFE and its managing general partner is SPX, which together have a combined one percent (1%) interest in the Public Partnership.

The limited partners, which own a ninety-nine percent (99%) interest in the Public Partnership, consist of the following two groups: (a) Santa Fe companies and (b) public investors. The Santa Fe companies that are limited partners are SFNR and SFELP, Inc., which is a Delaware corporation and a wholly-owned subsidiary of SFE. SFNR and SFELP, Inc., own approximately five percent (5%) and seventy-four percent (74%), respectively, of the outstanding limited partnership units that represent the limited partners' interest in the Public Partnership. The remaining twenty-one percent (21%) of the outstanding limited partnership units is owned by public investors. The limited partnership units held by the public investors are traded on the New York Stock Exchange, and as of July 2, 1986, there were approximately

fn. 1 (continued)

applicant, the application shall show the relationship of the signatory to the applicant." The signatory in this case did not reveal his or her relationship to the applicant. However, that failure did not provide an independent ground for rejection of the application. See Corinth Partnership (On Remand), 83 IBLA 277 (1984).

3,600 unitholders of record. Based on the lack of filings pursuant to Section 13(d) of the Securities Exchange Act of 1934, no public investor beneficially owns five percent (5%) or more of the outstanding limited partnership units.

The Public and Operating Partnerships were formed in October 1985 following the decision of SFE to reorganize a portion of its oil and gas properties into what is commonly referred to as a master limited partnership. In January 1986, these properties were transferred by SFE to the Operating Partnership and limited partnership units in the Public Partnership were sold to public investors.

The basic purpose of a master limited partnership is to provide for a structure in which public investors can own equity interests in an oil and gas company and have a market (e.g., the New York Stock Exchange) through which their interests can be readily bought and sold. The partnership form rather than the corporate form is used in order to provide tax advantages to the public investors. A two-tiered partnership structure is used because certain states require a limited partnership doing business in the state to maintain on file a list of its limited partners. Since the limited partners of the first-tier partnership (e.g., the Public Partnership) change every day with the trading of its units, it is necessary to have a second-tier partnership whose limited partners do not change (e.g., the Operating Partnership) to own and operate the oil and gas properties. As you may know, SFE is one of several companies in recent years to form a master limited partnership.

(Statement of Reasons at 2-3).

Appellant concedes that the Operating Partnership's general partners (SFE and SPX), and its single limited partner (the Public Partnership), should have been listed on the application and appellant requests that the Board allow it to amend its application to correct the oversight. Alternatively, appellant proposes listing these three partners in the applicant Operating Partnership plus any beneficial owner of over 5 percent of the Public Partnership (or some other minimum percentage), rather than listing the many public investors in the Public Partnership. Appellant compares the role of the limited partners who hold publicly traded limited partnership units to corporate stockholders, who are not holders of an "interest" in a simultaneous oil and gas lease application, according to the definition of "interest" found at 43 CFR 3000.0-5(1). Appellant asserts that the purpose of the disclosure regulations, i.e., the prevention of illegal multiple filings, would not be served by a burdensome requirement that thousands of public limited partners who have no voice in the management of the partnerships or in the preparation of the simultaneous oil and gas lease applications be listed by the Operating Partnership.

[1] The BLM decision relied on 43 CFR 3102.5, which provides:

Submission of an application for, offer for or request for approval of an assignment of a lease issued under the [Mineral Leasing Act of 1920, 30 U.S.C. § 181 (1982)], constitutes certification of compliance with the regulations of this group and the act. Compliance means that the potential lessee, all other parties who hold an interest (as defined in § 3000.0-5(k) of this title) and all persons who are members of an association in the application, offer, assignment or lease and all parties who hold or control more than 10 percent of the instruments of ownership or control in a lessee which is a corporation or association are: (a) Citizens of the United States or qualified stockholders in a domestic corporation (see § 3102.2 of this title); (b) in compliance with the Federal acreage limitations (see § 3101.2 of this title); (c) not minors (see § 3102.3 of this title); and (d) not participants in any agreement, scheme, plan or arrangement prohibited in relation to simultaneous oil and gas leasing (see § 3112.5-1(b) of this title). Anyone seeking to acquire, or anyone holding, a Federal oil and gas lease or interest therein, shall upon demand submit additional information to show compliance with the regulations of this group and the Act * * *. [Emphasis supplied.]

BLM also based its decision on the requirements set out in a rule related Notice which called for disclosure of members of associations, including partnerships. 48 FR 37656 (Aug. 19, 1983). 2/ The Notice, issued under the authority of 43 CFR 3102.5, provides in part:

After August 22, 1983, applications for simultaneously offered parcels received from associations, including partnerships, must be accompanied by a complete list of individuals who are members thereof. This requirement is authorized under 43 CFR 3102.5. By this notice, the Bureau of Land Management formally interprets and exercises its right of demand for this information at the time application is made. Failure by associations or partnerships to comply with this requirement shall result, at the discretion of the authorized officer, in unacceptability or rejection of the application. Formal statements of qualifications, providing other information that BLM may demand under that subsection, should not be filed with the Bureau unless a specific request for such is made by the Bureau. [Emphasis supplied.]

In a recent decision, TXP Operating Co., 99 IBLA 355 (1987), the Board reviewed the Departmental regulatory history concerning the disclosure in oil and gas lease filings of members of an association or partner in a partnership.

2/ As noted above, this disclosure requirement was also found in the instructions for Part B of appellant's application.

Therein, we concluded:

By its terms, this Notice [Aug. 19, 1983], requires the disclosure of "a complete list of individuals who are members." However, we expressly noted in The Turner Association, [85 IBLA 374] at 376 n.4 (1985) [aff'd, The Turner Association v. Hodel, CV 85-196-BLG-JFB (D. Mont. Sept. 23, 1986)] that this Notice essentially was "merely a resurrection of the previous regulatory requirement" found at 43 CFR 3102.2-4(a) (1981). [3/] As we discussed above, this regulation was expressly limited in scope to general partners.

Admittedly, neither The Turner Association, supra, nor an earlier interpretation of this Notice, Shaw Resources, Inc., 79 IBLA 153, 91 I.D. 122 (1984), examined whether or not this disclosure requirement applied to all partners or only to general partners. However, nothing in those decisions precludes an interpretation limiting the scope of the disclosure requirement to general partners. In any event, the scope of the Notice directing that partnerships file lists of their members could be no larger than the regulation, 43 CFR 3102.5, on which it was based. To the extent, therefore, that we have concluded that the certification applied only to general partners and any other partner holding or controlling more than 10 percent of the partnership, it must follow that the requirement to list such partners is applicable only to such entities. Accordingly, for the reasons set forth above, we find it entirely consistent with the thrust of recent regulatory changes to hold that an association or partnership need only disclose all general partners and any other partner holding or controlling more than 10 percent of the entity at the time of filing its application. [Footnote omitted].

Id. at 360-61.

Thus, a partnership is required to disclose all general partners and any limited partners owning or controlling more than 10 percent of the partnership at the time of filing the application. In this case no partners were listed on appellant's application.

3/ In 1980, only general partners were required to be listed on a partnership's simultaneous oil and gas lease application. 43 CFR 3102.2-4(a)(3) (1981); 45 FR 31157 (May 23, 1980). In Venlease I, 99 IBLA 387, 389 (1987), which the dissenting Judges seek to reargue in this case, the Board found that the Notice merely exercised BLM's previously announced right in 43 CFR 3102.5 to demand information. The Board concluded that such a notice was a procedural mechanism exempt from the formal rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1982). Since this Notice was, itself, published in the Federal Register, all applicants are properly charged with knowledge of its contents. We reaffirm that holding in this case.

The applicant partnership did not comport with the provisions of 43 CFR 3112.2-3, which require compliance with 43 CFR Subpart 3102, when it failed to disclose the identity of any of its partners on the application or on a sheet accompanying the application. Disclosure of partners in a partnership is an integral part of the Department's policing of the simultaneous system to prevent abuses. This is a substantive requirement and failure to comply with the disclosure requirement is not a "de minimis" violation. See KVK Partnership v. Hodel, 759 F.2d 814 (10th Cir. 1985); TXP Operating Co., supra; Satellite 8211104, 89 IBLA 388, 397 (1985), aff'd Satellite 8301123 v. Hodel, 648 F. Supp. 410 (D.D.C. 1986). BLM properly rejected the application because no partners were listed.

Appellant asks the Board to allow it to amend its application to conform to the partnership listing requirement. This cannot be done. This alternative is precluded by statute; 30 U.S.C. § 226(c) (1982) allows a noncompetitive oil and gas lease to be awarded only to the first qualified applicant. Where a partnership simultaneous oil and gas lease application is rejected for failure to comply with applicable regulations, the applicant cannot be given priority over other applicants because the rights of third parties have intervened. See generally Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976). ^{4/}

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 Wyoming State Office is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

John H. Kelly
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

^{4/} Previously, the intervening rights involved were those of the second and third priority applicants in the simultaneous drawing. Under present regulations, however, only one application is selected for each numbered parcel, and there are no second and third priority applicants. 43 CFR 3112.4-1(a). However, if the selected application is rejected for any reason, 43 CFR 3112.4-1(a) requires that there be a reselection from the remaining applications. Therefore, under the present regulations all other qualified applicants in the drawing have intervening rights. Kerogen Crushers, 95 IBLA 63, 67 (1986) (Burski, J., concurring).

ADMINISTRATIVE JUDGE GRANT CONCURRING:

As the author of the opinion in The Turner Association, 85 IBLA 374 (1985), cited by the majority, which upheld rejection of a simultaneous oil and gas lease application where the applicant partnership failed to submit the names of the partners, I find it appropriate to explain why I feel compelled to reaffirm my conclusion that the Federal Register notice requiring advance disclosure of partners is properly enforced notwithstanding the cogent concerns raised by the dissenting opinion. 48 FR 37656 (Aug. 19, 1983).

Part of the problem in considering the propriety of the August 19, 1983, Federal Register notice at issue in this case is the result of the historic dichotomy under BLM regulations governing qualifications of lessees between stockholders in corporations and partners in partnerships, on the one hand, and "other parties in interest" (meaning undisclosed parties in interest other than partners in a partnership application or shareholders in a corporate application) on the other hand. See The Turner Association, *supra* at 376. Thus, we concluded in Turner that rather than viewing the partners as other parties in interest required to be disclosed under 43 CFR 3112.2-3, the notice was properly viewed as a requirement to submit the names of partners in a partnership which BLM is clearly entitled to demand to verify applicant's qualifications pursuant to 43 CFR 3102.5. Thus, in Turner Association, we quoted the provision from the Federal Register notice explaining that BLM was requiring disclosure of names of partners pursuant to its authority to audit qualifications under 43 CFR 3102.5 and, further, that it was exercising its right to demand this information at the time the application was filed, on pain of rejection. 85 IBLA at 376. Contrary to our conclusion in Turner Association, I now believe a notice attempting to amend the regulation at 43 CFR 3102.5 in this manner, *i.e.*, to require advance disclosure on pain of rejection, would constitute such an amendment of the regulation at 43 CFR 3102.5 as to require compliance with the rulemaking requirements of the Administrative Procedure Act for the reasons cited by the dissent.

However, the Federal Register notice also cited, as grounds for the advance disclosure requirement, the obligation of an applicant to disclose "other parties in interest" under the regulation at 43 CFR 3112.2-3. Thus, the notice states in part:

Amended § 3112.2-3 requires that an applicant (including an association, partnership, or corporation) filing a simultaneous oil and gas lease application must designate on the lease application or on a separate accompanying sheet, the names of all parties who hold an interest (as defined in § 3000.0-5(k)) in the application, or the lease, if issued. "Party in interest" as defined in § 3000.0-5(k) means a party who is or will be vested with any legal or equitable rights under the lease.

48 FR 37656 (Aug. 19, 1983). Requiring disclosure of partners is a reasonable interpretation of the requirement at 43 CFR 3112.2-3 which obligates an applicant to disclose the "names of all other parties who hold an

The definition of "party in interest" at 43 CFR 3000.0-5(k), meaning any "party who is or will be vested with any legal or equitable rights under the lease," is clearly broad enough to encompass partners.

Contrary to the assertion in the dissent, this does not entail any change in the definition of parties in interest or any novel interpretation which would require invocation of the rulemaking procedures. I recognize that the requirement to disclose partners as other parties in interest was essentially mooted prior to the February 1982 regulation changes by the requirement to disclose partnership qualifications, including the names of partners. The elimination of this requirement for advance qualifications information in favor of the system of qualifications audits under 43 CFR 3102.5 leaves undisturbed the requirement to disclose other parties in interest. The requirement to disclose this information on the application is supported by the express provisions of 43 CFR 3112.3 without need to resort to any regulatory amendments of 43 CFR 3102.5 requiring Administrative Procedure Act compliance.

C. Randall Grant, Jr.
Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

The majority allow BLM to reject an oil and gas lease application for failure to disclose membership in a partnership, despite the absence of a duly promulgated regulation requiring such disclosure at the time of filing or authorizing rejection of appellant's application for that reason. While the majority analyzes the issues presented on appeal in terms of the reasonableness of a regulatory requirement that partnership lease applicants must disclose their constituent membership, this approach obscures the real issue presented by this appeal. In actuality, the issue before the Board is whether there was any basis in Departmental regulations for rejection of appellant's application.

In taking action to reject appellant's application, BLM did not rely principally upon the regulation codified at 43 CFR 3102.5. That rule requires an applicant or holder of an oil and gas lease to submit information (including the members of a partnership applicant) that shows compliance with the regulations and the Mineral Leasing Act "upon demand" by BLM. Instead, BLM found the authority to reject appellant's application in a publication described as a "Rule related notice of requirement to indicate filing assistance, and for submission of evidence of qualification from associations, including partnerships, filing simultaneous oil and gas applications." This document, which was published on Friday, August 19, 1983, was made effective the following Monday, August 22, 1983, and provided pertinently:

After August 22, 1983, applications for simultaneously offered parcels received from associations, including partnerships, must be accompanied by a complete list of individuals who are members thereof. This requirement is authorized under 43 CFR 3102.5. By this notice, the Bureau of Land Management formally interprets and exercises its right of demand for this information at the time application is made. Failure by associations or partnerships to comply with this requirement shall result, at the discretion of the authorized officer, in unacceptability or rejection of the application.

48 FR 37656. The effect of this notice, as shown by BLM's action on appellant's application, was to amend 43 CFR 3102.5 by making disclosure of partnership members at the time of filing a lease application a mandatory requirement. The rule codified at 43 CFR 3102.5, however, has continued to be published in the Code of Federal Regulations unchanged, so that a lease applicant consulting the most recent editions of the CFR still finds a rule requiring an applicant to furnish such information only after a demand has been made by BLM.

The dissent in Venlease I, 99 IBLA 387, 392-96 (1987), analyzes the August 19, 1983 notice as follows:

It is not a matter of doubt that the August 19, 1983, notice is a "rule" within the recognized scope of the definition in 5 U.S.C. § 551(4) (1982). It has particular applicability to association and partnership applicants for oil and

gas leases, had a future effect (4 days after it was published), and implemented the Mineral Leasing Act * * *. Nor is it doubted that BLM did not publish notice of its contents as a proposed rulemaking, provide an opportunity for interested persons to submit their views about it, or publish it not less than thirty days before its effective date. 5 U.S.C. § 553(b)-(d) (1982).

It is, however, also clear that the notice does not fit within any of the exceptions to section 553 rulemaking procedures. Although it is labelled a "rule related notice" and says it "formally interprets" 43 CFR 3102.5, it imposes a new requirement on association and partnership applicants, namely, to submit lists of their members with their applications, and also imposes a sanction for failure to comply with this requirement, namely, the unacceptability or rejection of such applications. In the language of the cases reviewed above, the notice "creates law," "imposes new duties," "establishes a standard of conduct which has the force of law," and "alters the rights and interests of parties." Before it was published, BLM could demand (as it still can) that an applicant submit additional information to show compliance with the regulations and the Act under 43 CFR 3102.5; afterwards it could reject any application not accompanied by the required list without making any demand. (Footnotes omitted.)

Id. at 395.

The decision in Venlease I, the decision in TXP Operating Co., 99 IBLA 355 (1987), (also relied on by the majority in this case), and the preceding decisions discussed in those cases, make it clear that those decisions are all based on an uncritical acceptance of the August 19, 1983, notice as the equivalent of an amendment to a regulation. We have said, however, that we are not bound by invalidly promulgated regulations. See, for example, Garland Coal & Mining Co., 52 IBLA 60, 88 I.D. 24 (1981); George E. Krier, 92 IBLA 101, 103 (1986) (concurring opinion). But if we are not bound by invalidly promulgated regulations, then a fortiori we cannot be bound by decisions based on invalidly promulgated regulations.

In Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 625 (1981), we held that BLM could not amend a regulation by issuing an instruction memorandum in order to define an imprecise regulation limiting the form of payment which BLM could accept from lease applicants. In Rydzewski, the Board reversed rejection of oil and gas lease applications made in reliance upon the defectively amended regulation, stating:

Subsequent to issuance of the regulation identifying "bank money orders" as an acceptable form of remittance, BLM attempted by internal memorandum to make this distinction in specifying what type of bank money order is acceptable. Instruction Memorandum No. 80-635, change 2, dated Nov. 3, 1980, asserts that the characteristics of bank money orders are similar to cashier's checks in that they are: drawn on

a bank, issued by the drawee bank, and signed by an authorized bank employee. The instruction memorandum further states that personal money orders, even if issued by a bank, are not acceptable. Unfortunately, the governing regulation was not amended to reflect this clarification.

A regulation should be sufficiently clear that there is no reasonable basis for an oil and gas applicant's noncompliance with the regulation before it is interpreted to deprive an applicant of a preference right to a lease. Bill J. Maddox, 34 IBLA 278 (1978); A. M. Shaffer, 73 I.D. 293 (1966). The regulation simply does not specify what types of money order issued by banks are acceptable. Therefore, personal money orders issued by a bank should be accepted and rejection of appellant's remittance and drawing entry cards was improper. [Emphasis supplied.]

(55 IBLA 378-79, 88 I.D. at 627-28).

The circumstances of the Rydzewski case and this appeal are indistinguishable but for the fact that here there was a publication in the Federal Register of the document which was said to be "rule related." This raises the question whether publication of the "rule related notice" in the Federal Register is sufficient to distinguish this appeal from the Rydzewski situation.

The question of the effect to be given publication of an agency statement in the Federal Register which was not later codified in the Code of Federal Regulations was considered in Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533 (D.C. Cir. 1986), where the Court created a bright-line test for cases such as the one now before us. The Court held that if a matter published in the Federal Register is to be given effect as a regulation it must also be published in the Code of Federal Regulations. The Court explains this holding, stating that:

Failure to publish in the Federal Register is indication that the statement in question was not meant to be a regulation, See Brennan v. Ace Hardware Corp., 495 F.2d 368, 376 (8th Cir. 1974), since the Administrative Procedure Act requires regulations to be so published. See 5 U.S.C. §§ 552(a)(1)(D), 553(d) (1982). The converse, however, is not true: Publication in the Federal Register does not suggest that the matter published was meant to be a regulation, since the APA requires general statements of policy to be published as well. See 5 U.S.C. § 522(a)(1)(D). The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations, which the statute authorizes to contain only documents "having general applicability and legal effect," 44 U.S.C. § 1510 (1982) (emphasis added), and which the governing regulations provide shall contain only "each Federal regulation of general applicability and current or future effect," 1 C.F.R. § 8.1 (1986) (emphasis added).

Id. at 539.

The distinction drawn by the Cathedral Bluffs court has clear application in this case: not only does it provide a definite standard for determining the intention of the agency, it provides the opportunity to persons affected by a rule to know with certainty the standards by which the agency is going to judge their applications. Because the codification of 43 CFR 3102.5 following publication of the August 19, 1983, notice gives no indication that the notice amended the rule, to give that notice binding legal effect defeats not only the Administrative Procedure Act, for the reasons explained by the dissent in Venlease I, but also defeats the practical purposes served by having a codification of Federal regulations. See Cathedral Bluff, supra.

As the Attorney General's Manual on the Administrative Procedure Act (1947) observes,

* * * the purpose of section 4 [5 U.S.C. § 553] is to guarantee to the public an opportunity to participate in the rule making process. With stated exceptions, each agency will be required under this section to give public notice of substantive rules which it proposes to adopt, and to grant interested persons an opportunity to present their views to it.

Id. at 26. Contrary to this purpose, the procedure employed when the August 19, 1983, notice was published operated to prevent interested persons from presenting their views. Indeed, the "virtually unanimous" public approval for the elimination of the disclosure rule had previously been cited by the Department in comments supplied with those rule changes which ended the requirement for disclosure of partnership information at the time of filing a lease application. See 48 FR 33648 (July 22, 1983).

It is both confusing and deceptive to permit a duly promulgated regulation, such as that found at 43 CFR 3102.5, which has been codified in the Code of Federal Regulations, to be somehow amended by a notice which has never been published as a rule or declared to be a regulation. Indeed, we have held that a regulation must be amended to reflect current practice or policy. Marathon Oil Co., 90 IBLA 236, 244, 93 I.D. 6, 11 (1986). It is not difficult to determine what effect should be given to the "rule related notice": it clearly was not effective to amend 43 CFR 3102.5; it can only be interpreted as a defective attempt to do so, and must be disregarded. Cf. Cathedral Bluffs, supra; Garland Coal, supra; Venlease I, supra at 395.

The history of Departmental regulation of partnership lease applications from 1979 to 1983 was analyzed in TXP Operation Co., supra, an opinion which focussed upon rule changes leading to the "rule related notice", only to limit application of that "notice" to "general partners", after having assumed the "notice" was a valid exercise of the rulemaking power. What the Department's rulemaking shows us about regulation of partnerships during this 5-year period is revealing in quite another way, as well. A desire was expressed by explanatory remarks prefatory to rulemaking in 1982 to "reduce the regulatory burden on the public" and to "speed the process of lease issuance", a process which was to be accomplished in part by "elimination of the

requirement that documents relating to qualifications be submitted in conjunction with lease applications." See 47 FR 8544 (Feb. 26, 1982). To insure compliance with limitations imposed upon lessees by the oil and gas leasing act, the Department committed itself to a program of "selective audits" and substituted for the prior disclosure provision the requirement that lease applicants "certify their compliance" with the law. Id. It was made unmistakably clear that the past practice of requiring partnerships to submit documents at the time of filing (See 43 CFR 3102.2-4(1980)) was abandoned: henceforward, certification, to be used in connection with auditing, was the regulatory tool of choice to insure that partnerships (among others) were kept in compliance with the leasing laws. Id. Contrary to the 1982 policy of deregulation, the "notice" subsequently printed in the Federal Register sought a return to the past regulatory practice of regulating partnerships at the time of filing lease applications, and it did so in a way that permitted avoidance of public comment and the requirement for publication of a changed rule. Publication of the August 19 notice, therefore, can only be viewed as a subterfuge used to avoid admission that the past practice, which had been abandoned by duly promulgated regulatory amendment, was being reinstated without an opportunity for comment. Because the August 19, 1983 "notice" violated both the letter and the spirit of the APA it should be considered invalid, and given no effect. 1/

I would find that the rejection of this application was erroneous, since it was done without giving appellant an opportunity to provide information concerning its members to BLM within a reasonable time following demand, as provided in 43 CFR 3102.5. I would reject the notion that the August 19, 1983, notice could be relied upon to require appellant to disclose its membership at the risk of rejection of its lease application. For these reasons, I dissent.

Franklin D. Arness
Administrative Judge

We concur:

R. W. Mullen
Administrative Judge

Will A. Irwin
Administrative Judge

1/ Administrative Judge Grant's concurrence cannot rescue BLM from its failure to comply with APA rulemaking requirements. If, as he suggests, BLM intended to include partners and members of associations in the definition of "party in interest" found at 43 CFR 3000.0-5(k), then that too would require an amendment of that regulation by rulemaking because, as he points out, partners and association members were historically treated as not falling within that definition.