

THE JOYCE FOUNDATION ET AL.

BEARD OIL CO.

IBLA 86-1243

Decided June 8, 1988

Appeals from a decision of the New Mexico State Office, Bureau of Land Management, rejecting in part oil and gas lease offer NM-A 58202 (TX).

Affirmed.

1. Administrative Authority: Generally--Regulations: Force and Effect as Law

A BLM instruction memorandum is merely a document for internal use by BLM employees. Such documents are not regulations and have no legal force or effect.

2. Oil and Gas Leases: Acquired Lands Leases--Oil and Gas Leases: Applications: Description--Oil and Gas Leases: Future and Fractional Interest Leases

Under 43 CFR 3111.2-2, an offeror may perfect a noncompetitive over-the-counter future interest lease offer for acquired lands by correcting a defective description of the lands sought. If, however, a proper description is not submitted prior to the time of filing of a present interest lease offer, filed after vesting of the mineral estate in the United States, the offer affords no priority in the face of the conflicting present interest lease offer.

3. Oil and Gas Leases: Applications: Description--Oil and Gas Leases: Acquired Lands Leases--Oil and Gas Leases: Description of Land

BLM is without jurisdiction to alter, modify, or correct an over-the-counter noncompetitive oil and gas lease offer in order to provide an acceptable description or to construe ambiguities in an offer to make it acceptable. A noncompetitive over-the-counter future interest lease offer for acquired lands which incorrectly describes the lands sought because the description fails to close, is properly subject to rejection. The

incorrect description renders the face of the offer subject to corrections absent which a lease could not issue.

APPEARANCES: Dale E. Zimmerman, Esq., and James W. McDade, Esq., Washington, D.C., and Thomas B. Campbell, Esq., Houston, Texas, for appellant, The Joyce Foundation et al.; John R. Brown, Assistant Vice President, Beard Oil Company, Oklahoma City, Oklahoma, and Richmond F. Allan, Esq., Washington, D.C., for appellant, Beard Oil Company; Margaret C. Miller, Esq., Office of the Solicitor, Southwest Region, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

On April 16, 1986, the New Mexico State Office, Bureau of Land Management (BLM), issued a decision rejecting in part oil and gas lease offer NM-A 58202 (TX) of The Joyce Foundation et al. (Joyce), which had been filed as a future interest lease offer with BLM on December 30, 1983, for certain described lands within the Davy Crockett National Forest, Trinity County, Texas. BLM rejected the lease offer in part because of unavailability of a portion of the applied-for lands and because of errors in the descriptions of certain other areas of the applied-for lands specifically stating:

The offer is rejected in part because the description for Tract K2-I by courses and distances is not considered adequate because it does not meet the standards for limit of closure as defined in the Manual of Surveying Instructions (1973 ed. at 3-124). The error of closure was computed to be 48.584 chains. Amoco Production Co., 81 IBLA 323 (June 19, 1984).

Additionally, the offer indicates that Tract K2-I has an excepted area (Exception No. 1 containing 640.00 acres). The offer did not contain a description by courses and distances for the excepted area as required by the regulations in Title 43 CFR 3111.2-2(b) which also require that an exclusion within the boundary of the tract desired must be excluded by showing the course and distance between its successive angle points starting from a point on the boundary of the tract sought. Chevron U.S.A., Inc., 67 IBLA 266 (September 27, 1982); Sam P. Jones, 45 IBLA 212 (January 30, 1980); Katherine C. Thouez, 69 IBLA 391 (January 4, 1983).

A portion of Tract K2Ap has been exchanged to another party by exchange deed entered into between the United States of America and Matt Kendrick, et ux, and G. D. Rothrick, et ux, on January 18, 1968, and recorded in Book 185, page 125, filed February 20, 1968, Trinity County, Texas. The oil and gas deposits in the land exchanged are not owned by the United States. The remaining land in K2Ap is available for lease and is included in the enclosed lease.

After the United States acquired the mineral rights on January 1, 1985, Beard Oil Company (Beard) filed a conflicting present interest lease offer. Beard subsequently filed a protest on July 24, 1985, against the issuance of a lease to Joyce. BLM's decision denied Beard's protest in part stating:

The description provided by offer, NM-A 58202 (TX), follows the description in the deed as acquired by the United States including the meander call between corners 24 and 25. Although contrary to what protestant stated, that a distance was not provided, it was. The description in the offer thus satisfied the pertinent regulation under 43 CFR 3111.2-2(b) which requires that the description in the offer conform to the description in the deed or acquisition document by which the United States acquired title to the lands or minerals.

Whether the deficiency contained in the acquisition document ultimately contributes to an error in closure of the survey, is another matter. The offeror is considered to have complied with the requirements of the regulation; therefore, as to this item of contention, the protest is dismissed.

Both Joyce and Beard appealed the decision to the Board and their appeals were consolidated because of the interrelationship of facts and issues. ^{1/}

On October 9, 1987, BLM filed a request that the case be remanded to the agency for further consideration, stating:

The agency has recently received Instruction Memorandum No. [IM] 87-611, dated July 24, 1987, which instructs that a " * * future interest filer may perfect any application rejected due to errors in the description of the applied for lands....(see Exhibit A, attached)." Accordingly, upon remand, the agency proposes to re-evaluate the Joyce Foundation lease offer, issuing a decision which would give Joyce the opportunity to correct any errors in accordance with Instruction Memorandum No. 87-611.

The pertinent text of the cited memorandum states:

Specifically, the future interest applicant has a preferential right to apply for the oil and gas lease on lands for which he owns the substantial majority of the operating rights. No other applicant may top file an application. As a result, the future interest filer may perfect any application rejected due to errors in the description of the applied for lands or advance rental deficiencies attendant thereto. If the future interest application is not submitted until after the date of vesting, the

^{1/} Beard did not appeal from the rejection of its protest in relation to the available portion of K2Ap.

application is in effect a current interest application with no preference pertaining to it. The Bureau does not seek to threaten the preferential rights involved. To ensure preservation of such rights, the Bureau will grant any future interest applicant, whose application is properly submitted at least 30 calendar days prior to the vesting date, a period of 30 calendar days from the time the Bureau notifies the applicant of the results of its review of the application for the applicant to correct deficiencies.

On October 23, 1987, Beard filed its statement of opposition to BLM's Motion to Remand, requesting the Board to examine the legality of the IM. Beard asserts, *inter alia*, that this and other similar cases pending at various levels of the Department must be determined in accordance with the regulations and decisions applicable at the time the rights of the parties attached; that the BLM instructions in IM 87-611 constitute an invalid attempt to make substantive rules without complying with the Administrative Procedure Act (APA); and that even if they had been properly promulgated under the APA, they could not be applied retroactively.

On December 3, 1987, Joyce filed its response supporting the BLM request for remand, asserting these applications are not "competing applications" under the same applicable regulations in that one application was filed for a future interest lease and the other for a present interest lease. Joyce also argues that IM 87-611 should not be considered substantive rulemaking asserting it "contains instructions, and nothing more."

[1] By order of January 26, 1988, the Board declined the request for remand pending a further examination of the merits of these arguments. After our full consideration of the record before us, we deny that request, finding that BLM's issuance and reliance on IM 87-611 is not a proper basis for a change in its initial approach to this case, *i.e.*, a reversal of its rejection in part of Joyce's future interest lease offer.

As noted in our January 26 order, BLM's instruction memoranda are not binding on this Board. Nor are they binding on the public at large. Pamela S. Crocker-Davis, 94 IBLA 328, 332 (1986); Thunderbird Oil Corp., 91 IBLA 195 (1980). We have repeatedly held that duly promulgated regulations have the force and effect of law. An instruction memorandum, however, is a document for internal use by BLM employees. Such documents are not regulations, have no legal force, and only serve as a guide for actions of subordinate officials of BLM. Thunderbird Oil Corp., *supra* at 204; Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982).

BLM initially decided this case by application of the governing regulations and precedents of the Department in full force in effect at the time the Joyce future interest lease offer was adjudicated. The Joyce lease offer was found to be deficient under 43 CFR 3112.2-2(b), because of errors in the description of the applied-for lands. The deficiencies in the description were not corrected prior to either the date of vesting or January 2, 1985, the date Beard filed its conflicting offer. The issuance

of an instruction memorandum cannot be deemed to have altered the significance of the regulatory requirements. Regulations cannot be amended by instruction memoranda. Cf. Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 675 (1981).

As Beard has correctly noted, the new procedures set forth in IM 87-611 would present a substantive change in the manner in which BLM adjudicates future interest lease offers. The procedure set out in the memorandum would afford Joyce the opportunity to correct the deficiencies in its future interest lease offer at the expense of the intervening rights of a third party. The Board has previously held that it would be improper to allow defective offers to be "cured" and restored to efficacy by the submission of new material subsequent to the date BLM has adjudicated and properly rejected the offers. To do so would be contrary to efficient administration, and to the public interest. See Burk Properties, 93 IBLA 117 (1986); Gian R. Cassarino, 78 IBLA 242, 91 I.D. 9 (1984). If we were to remand the case to BLM, the agency has specifically stated in its request that it "proposes to re-evaluate the Joyce Foundation lease offer issuing a decision which could give Joyce the opportunity to correct any errors in accordance with Instruction Memorandum No. 87-611." Therefore, we deem it necessary to now address the merits of the appeal rather than remand. A remand would only serve to further delay the ultimate disposition of the case.

[2] We turn now to the propriety of BLM's rejection of the Joyce lease offer. Joyce, as owner of the present operating rights, filed a noncompetitive future interest oil and gas lease offer pursuant to the Mineral Leasing Act for Acquired Lands of August 7, 1947, 30 U.S.C. || 351-359 (1982). The Mineral Leasing Act for Acquired Lands, at 30 U.S.C. | 359 (1982), provides the Secretary of the Interior with the authority to promulgate regulations stating: "The Secretary of the Interior is authorized to prescribe rules and regulations as are necessary and appropriate to carry out the purposes of this chapter, which rules and regulations shall be the same as those prescribed under the mineral leasing laws to the extent they are applicable."

The regulation cited by BLM, 43 CFR 3112.2-2(b), setting forth the specific requirements for the description of lands in an offer for unsurveyed acquired lands provides in pertinent part:

(b) If the lands have not been surveyed under the rectangular system of public land surveys, they shall be described as in the deed or other document by which the United States acquired title to the lands or minerals. If the desired lands constitute less than the entire tract acquired by the United States, it shall be described by courses and distances between successive angle points on its boundary tying by course and distance into the description in the deed or other document by which the United States acquired title to the lands.

Although no specific form of application is required for a future interest lease offer, 43 CFR 3111.3-2 provides that an offer "shall, to the extent applicable, conform to and include the terms of the noncompetitive

lease form currently in use * * *." In addition, 43 CFR 3111.1-1(f) provides for mandatory rejection of offers not filed in accordance with the regulations. 2/

Joyce asserts that the regulatory setting for future interest lease offers indicates the Department's recognition of the preference right due the future interest offeror (Statement of Reasons (SOR) at 6-8). It contends that different regulatory standards are applicable to future interest lease offers as opposed to regular over-the-counter offers. Joyce maintains that future interest offers are subject only to the mandatory requirements contained in 43 CFR 3111.3 and not the more stringent general regulations for all over-the-counter offers (SOR 10-11). We do not agree.

At the time the Joyce lease offer was filed, the applied-for lands were subject only to the filing of a future interest lease offer under 43 CFR 3111.3. Future interest lease offers are governed by the general regulatory requirements for all noncompetitive leases (43 CFR Subpart 3110) and the general requirements for over-the-counter offers (43 CFR Subpart 3111), as well as the special qualifying requirements of 43 CFR 3111.3. A cursory examination of Subpart 3111.3 clearly demonstrates that section of the regulations is not intended to be all inclusive, and does not stand by itself. One must look to other sections of the regulations to ascertain the requirements of filing, filing fees, advance rentals, appeals, etc. This interrelationship is confirmed by 43 CFR 3111.3-2, which specifically incorporates the terms of the general noncompetitive lease forms currently in use "to the extent applicable."

Similarly, the future interest regulations are silent regarding the requirements for land description. As future interest leases apply only to acquired lands, a future interest lease offer applicant must look to and comply with the general description requirements of 43 CFR 3111.2-2 to properly describe lands being sought. Under 43 CFR 3111.2-2(b), a noncompetitive over-the-counter offer for acquired lands describing less than an entire tract must describe the land by courses and distances between successive angle points on its boundary tying by course and distance into the description in the deed or other document by which the United States acquired title to the lands. The Board has previously affirmed BLM's rejection of offers which did not provide such descriptions. Burk Properties, supra; John R. Chitwood III, 84 IBLA 300 (1985). See also Chevron U.S.A., Inc., 67 IBLA 266 (1982). If the offer did not so describe the land it could afford the offeror no priority.

2/ 43 CFR 3111.1-1(f) states:

"(f) Except as otherwise specifically provided in the regulations in this group, an offer which is not filed in accordance with the regulations in this part shall be rejected. An offer filed on a lease form not currently in use shall be acceptable, unless such form has been declared obsolete by the Director prior to the filing, on the condition that the offeror is bound by the terms and conditions of the lease form currently in use."

A future interest lease may be awarded to an offeror who files an acceptable offer and is qualified to do so by reason of owning all or substantially all of the present operating rights in the land, either as an operator, mineral fee holder, or party in interest, prior to the date those minerals are to vest in the United States. 43 CFR 3111.3-1(b). Thus the qualified applicant is afforded an opportunity to gain priority over those who do not have an interest in the minerals by filing an offer during the period the others are barred from filing. That priority is not automatic, and a party qualified to hold a future interest lease must submit an acceptable offer to establish priority. Otherwise, that party could defeat the priority interest of an over-the-counter offeror by filing an offer and claiming priority because he had the right to file a future interest lease offer. Thus, while the law provides an opportunity to gain a priority over all others, no rights to a lease are vested in such persons. A valid future interest lease offer must be filed.

It being clear that one who qualifies under 43 CFR 3111.3-1(b) must file an offer, it is obvious that the offer submitted must be complete and meet the statutory and regulatory requirements in order to establish a priority. 43 CFR 3111.3-1(c). Otherwise, the future interest offeror could establish a priority by filing an incomplete offer. Thus, in order to gain the priority, the future interest offeror must file an offer that is complete and in compliance with the governing laws and regulations. A priority is not established until such time as this is accomplished. See Frank S. Baird, 2 IBLA 52 (1971).

If no valid offer is received prior to the vesting of the mineral estate, a priority may then be established by any qualified party who files an acquired lands lease offer. This would also be the case if the offeror had previously qualified under 43 CFR 3111.3-1(b). However, under the present regulations, the concept of priority of consideration cannot be extended to provide the opportunity for the future interest filer to amend or correct a defective lease offer, and thereby secure a priority over the first-qualified offeror, who has filed an over-the-counter present interest lease offer. After vesting, the status of the person who had qualified under 43 CFR 3111.3-1(b) is exactly the same as a present interest lease offeror. In both cases the first-qualified offeror requirements of section 17(c) of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. | 226(c) (1982), for leased lands, are fully applicable. This is consistent with the Department's application of the present priority regulations. 3/

3/ Compare 43 CFR 3111.3-1(c) with 3150.4-5(a) (1982). The 1982 regulation provided in part that:

"Upon the vesting in the United States of the present possessory interest in the minerals, all applications for future interest leases outstanding at that time will automatically lapse and thereafter only offers for a present interest lease will be considered."

In Henry S. Morgan, 62 I.D. 68, 72 (1955), the Department emphasized that under the regulation then in effect, after vesting, a defective future interest offer could not be cured in order to sustain a present interest lease stating:

To hold that a defective future interest application, which should have been rejected, becomes sufficient to give the applicant a priority to a present interest lease once the present interest vests in the United States would be to give the applicant an unwarranted advantage over other applicants for a present interest lease who properly wait until the present interest vests to file their applications.

Accordingly, in view of the fact that BLM correctly found the Joyce lease offer defective for lack of a proper land description under 43 CFR 3112.2-2(b), the offer was properly rejected for not being filed in accordance with 43 CFR 3111.1-1(f). Moreover, the Board has held that the failure of an oil and gas offeror to comply with a mandatory requirement of a regulation furnishes a basis for rejecting the offer and earns the offeror no priority until he has satisfied the regulation. John R. Chitwood III, *supra* at 302.

In the case at hand, Joyce could only satisfy the regulation by curing the defects. If the defective land description had been cured prior to the date Beard had filed its offer and prior to rejection by BLM, Joyce would have gained priority as of the date that it had been cured. Gian R. Cassarino, *supra*. It was not cured however, and to now permit such curative action would be at the expense of the rights of Beard, the intervening third party. After vesting of the mineral estate in the United States, both lease offers were on the same footing, and BLM could not properly allow a retroactive amendment of the Joyce offer because Beard's rights had intervened.

Joyce's contention that its future interest offer need not meet the standards for limits of closure as defined by the Manual of Surveying Instructions, 1973 ed., is also without merit. BLM has responded

that the needs of administrative efficiency and consistency require that the Agency use a single standard of measurement, that measurement being provided for by the Manual of Survey Instructions 1973 used by the Cadastral Survey. The Agency has no standards for determining whether such critical requirements as closure are met other than those provided in the Manual of Survey Instructions.

(BLM Response of Sept. 18, 1986, at 2). Without proper closure conforming to the Department's long-accepted standards, the description is incorrect and insufficient to determine exactly what land the offer embraced. A description that fails to close is a defective description which does not entitle the offeror to award of a lease. Henry D. Ellsworth, 97 IBLA 74 (1987); Amoco Production Co., 81 IBLA 323 (1984).

In addition, the offer submitted by Joyce describes 6,940.8 acres out of an acquired tract which was described to contain 7,580.8 acres. Having submitted an offer for less than the entire tract, Joyce was required to describe the lands it sought "by courses and distances between successive angle points on [the tract] boundary tying by course and distance into the description in the deed or other document by which the United States acquired title to the lands." 43 CFR 3111.2-2(b). The Joyce offer failed to meet this requirement.

[3] The Board has repeatedly recognized the need for correct and accurate description in the lease offer because the description is the principle source used to delimit the lands sought. Dorothy L. Davis, 88 IBLA 382 (1985). We recently examined these issues at length in Henry P. Ellsworth, *supra* at 76, where we set forth the development of the case law as explained in James M. Chudnow, 70 IBLA 71, 74 (1983):

BLM receives a large volume of oil and gas lease applications and does not have the time and money to spend determining the precise proper description of the lands desired. * * * The burden of submitting an offer which accurately describes the lands sought is placed by the regulations appropriately on those seeking to benefit from Federal lands. Milan S. Papulak, [63 IBLA 16 (1982)]; Sam P. Jones, 45 IBLA 208 (1980). This Board has held that where BLM would have to go outside the offer form itself to determine exactly what land the offer embraced, the offer should be rejected as insufficient. See Leon Jeffcoat, 66 IBLA 80 (1982).

We reemphasized the Board's holding in Bob G. Howell, 63 IBLA 156, 158 (1982), that not only was BLM not required to alter, modify, or correct erroneous descriptions in offers, but it was without authority to do so, or to construe ambiguities therein in such a way as to make them acceptable.

In Ellsworth, we dismissed arguments similar to those raised by Joyce, concluding:

First, as is clear from the Chudnow and Howell cases, the impartial and effective adjudication of oil and gas lease offers is paramount, as BLM may issue a noncompetitive lease only to the first qualified applicant. 30 U.S.C. | 226(c) (1982). The interpretation and/or correction of an offer such as appellant's would compromise these policies as well as the interest of any junior offerors whose land descriptions were correct on the face of their offers. Second, we adhere to the Department's long-standing position that a description that fails to close is a defective description which does not entitle the offeror to award of the lease. Amoco, [81 IBLA 323] at 325.

Henry P. Ellsworth, *supra* at 77.

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 affirmed.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge

102 IBLA 351

