BEARD OIL CO.

IBLA 87-669 Decided October 10, 1989

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, dismissing a protest against the issuance of an oil and gas lease pursuant to oil and gas lease offer NM 058179 (TX).

Set aside and remanded.

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

BLM instruction memoranda are merely for internal use by BLM employees. Such documents are not regulations and do not have 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.

APPEARANCES: 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; James W. McDade, Esq., Washington D.C., for Respondent, Foster Minerals, Ltd.; Margaret C. Miller, Esq., Office of the Solicitor, Southwest Region, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Beard Oil Company (Beard) has appealed from a June 9, 1987, decision of the New Mexico State Office, Bureau of Land Management (BLM), dismissing Beard's protest against the issuance of a lease to Foster Minerals, Ltd.

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(Foster Minerals) pursuant to lease offer NM 058179 (TX).  Foster Minerals filed lease offer NM 058179 (TX) on December 19, 1983, for an oil and gas future interest lease, describing 3,818.25 acres in Tract J2-I in the United States on January 2, 1985, on which date Beard filed offer NM 60928 (TX) to lease the United States' present interest in the oil and gas in Tract J2-I in its entirety.

On June 5, 1986, Beard protested the issuance of any lease pursuant to lease offer NM 058179 (TX), asserting (1) that Foster Minerals' offer called for a lease of 3,818.25 acres, but that the metes and bounds description did not close within permissible limits, and (2) that the rental submitted with the offer was deficient by more than $200.  BLM dismissed Beard's protest by decision dated June 9, 1987, stating that it had determined the error of closure to be acceptable, and that Foster Minerals had paid the correct rental.  Beard filed a timely appeal from BLM's decision dismissing its protest.

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. 87-611, dated July 24, 1987, which allows future interest lease applicants the right to "...perfect any application rejected due to errors in the description of the applied for lands..." * * * Accordingly, upon remand, the agency proposes to re-evaluate the land description at issue, offering Foster Minerals the opportunity to correct any errors which may be discovered 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 land or advance rental deficiencies attendant thereto.  If the future interest application is not submitted until after the date of vesting, the 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 Instruction Memorandum (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 No. 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, Foster Minerals filed its response supporting the BLM request for remand, asserting that these applications are not "competing applications" under the same applicable regulations in that one application is filed for a future interest lease and the other for a present interest lease. Foster Minerals also argues that IM No. 87-611 should not be considered substantive rulemaking since it "contains instructions, and nothing more."

By order of January 28, 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 hereby set aside and remand this case to BLM for further consideration of the accuracy of the acreage and the legal description of the lands applied for within NM 058179 (TX) for reasons other than suggested by BLM in its memorandum of October 9, 1987.

Our review of the record on appeal suggests that BLM has not yet verified, in the first instance, whether or not the metes and bounds description submitted by Foster Minerals for 3,818.25 acres within Tract J2-I in San Jacinto County, Texas, is adequate and whether or not the computation of the total acreage is correct. The record shows that after receiving Beard's initial protest challenging the accuracy of this description, and alleging the computed area was, in fact, 4,372.10 acres, the Chief of the Mineral Leasing Unit, by memorandum of July 9, 1986, requested the Chief of the Title Records Unit to run a computer plot of the description and report as to its adequacy. No apparent response was made to this inquiry.

The record does contain a verification by the Acting Chief, Automated Records Unit, dated May 28, 1987, for the metes and bounds description of a 224.5-acre tract of land excepted from lease offer NM-A58179 (TX) because of prior reserved mineral rights. This report was submitted in response to a separate request of May 13, 1986, for review of Foster Minerals' description of the excepted area and concluded that the description submitted for this limited excepted area was acceptable. The report included a computer printout and a worksheet for verification of the 224.5 acres, but did not purport in any way to analyze the metes and bounds description for the entire lease tract of 3,818.25 acres. From our review we can find no other information in the record that BLM could have relied on to respond to the Beard protest or to substantiate the accuracy of the computation of the total acreage of the applied-for area. Accordingly, we conclude that the BLM decision should be set aside and the case returned for the initial technical review and verification of the accuracy of the metes and bound description of the entire lease offer tract.

[1] Although we are remanding this case for examination of the land description as indicated above, we must note that BLM's issuance and
reliance on IM No. 87-611 is not a proper basis for allowance of Foster Minerals to amend its original future interest lease offer in any manner should BLM find the Foster Minerals lease offer deficient under 43 CFR 3112.2-2(b), because of inadequacies in the description of the applied-for lands.

As noted in our January 28 order, BLM's IMs 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 IM, 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 Foster Minerals' future interest lease offer was adjudicated. The Foster Minerals' offer was found to be acceptable and BLM apparently determined in its review of the Beard protest and request for reconsideration of its dismissal that there was no need for a detailed technical examination of the description of the offer. 1/ In view of this determination on the Foster Minerals' lease offer, BLM's request for a remand of the case appears totally inconsistent with its earlier findings. However, the issuance of the IM cannot be deemed to have altered the significance of the regulatory requirements. Regulations cannot be amended by an IM. Cf. Charles J. Rydzewski, 55 IBLA 373, 88 I.D. 675 (1981).

[2] As Beard has correctly noted in its appeal, the new procedures set forth in IM No. 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 Foster Minerals 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 under similar circumstances in a recent case has held that it would be improper to allow defective offers to be "cured" where Beard also appeared as a conflicting present lease offeror in competition with a prior filed, but defective future interest lease offer. In The Joyce Foundation, 102 IBLA 342 (1988). BLM first found the future interest lease offer to be deficient under 43 CFR 3112.2-2(b) because of errors in the description of the applied-for lands. While the case was on appeal to this Board, BLM also requested a remand of the case based on IM No. 87-611 to allow Joyce to correct errors in the description. We held that where the deficiencies in

1/ In a July 7, 1987, response to Beard's request for reconsideration dated June 9, 1987, BLM indicated it would not review the land description stating: "Our current work load and absences of critical personnel presently do not allow us to again review the description of the subject offer until sometime during the latter part of July."
the description were not corrected prior to either the date of vesting of the mineral estate or the date of filing of the conflicting present inter-est lease offer, the future interest lease offer affords no priority in the face of the conflicting present interest lease offer. While examining the relative positions of the future interest lease offeror versus the present interest lease offeror at great length in that case we specifically stated:

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 3111.31(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 3111.301(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.

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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.

Id. 348-49.

In the instant case, Beard is in a similar position in conflict with the Foster Minerals' lease offer. However, BLM has not rejected the Foster Minerals' future interest lease offer for a defective description. If after re-examining the metes and bounds description of the Foster Minerals' offer BLM determines that the description is inadequate, BLM may not at that juncture permit Foster Minerals to take any curative action to correct the description at the expense of the rights of Beard, the intervening third party. Consistent with Joyce, after vesting of the mineral estate in the United States, both these lease offers were on the same footing, and BLM could not properly allow a retroactive amendment of the Foster Minerals' offer because Beard's rights had intervened. See Joyce Foundation, supra at 349.

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 set aside and the case remanded for further action consistent herewith.

John H. Kelly
Administrative Judge

I concur:

Wm. Philip Horton
Chief Administrative Judge

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