



WILLIAM C. KIRKWOOD
KIRKWOOD OIL AND GAS, LLC

175 IBLA 292

Decided August 15, 2008

Editor's Note: Overruled in part by *Benson-Montin Greer Drilling, Corp., et al.*, 178 IBLA 11



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

WILLIAM C. KIRKWOOD
KIRKWOOD OIL AND GAS, LLC

IBLA 2007-121 & 122

Decided August 15, 2008

Appeals from decisions of the Utah State Office, Bureau of Land Management, vacating prior decisions; sustaining in part and rejecting in part subsequent decisions rejecting in part applications to convert oil and gas leases to combined hydrocarbon leases; granting suspensions; determining rental due; and requiring additional information. UTU-72120; UTU-72405.

Affirmed in part; affirmed as modified in part; set aside and remanded in part; reversed in part.

1. Mineral Leasing Act: Generally--Mineral Leasing Act: Combined Hydrocarbon Leases

The Combined Hydrocarbon Leasing Act of 1981, as codified in part at 30 U.S.C. § 226(n) (2000), amended the Mineral Leasing Act to allow issuance of a lease for both the oil and gas and tar sands mineral resources. Congress provided a right to convert oil and gas leases located within Special Tar Sand Areas that were issued before Nov. 16, 1981, into combined hydrocarbon leases.

2. Estoppel--Federal Employees and Officers: Authority to Bind Government

Estoppel is an extraordinary remedy, especially as it relates to the public lands. Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. In

matters concerning the public lands, estoppel against the Government must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. While estoppel may be invoked where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law.

3. Estoppel--Federal Employees and Officers: Authority to Bind Government

Where appellants or their predecessors were repeatedly advised in written communications from BLM that, in the context of implementing the new Combined Hydrocarbon Leasing Act of 1981, the obligation to pay annual rental pertained only to oil and gas leases in their primary term and no advance rental was due or required for the years following the end of the 10th year of the primary term, that no adverse consequence would attend the failure to pay rental, and that the obligation to pay annual rental would next arise from the new combined hydrocarbon leases, the Government is estopped from demanding past rental amounts for such oil and gas leases and estopped from declaring the leases invalid by reason of not paying rental for past years.

4. Combined Hydrocarbon Leasing Act: Applications--
Mineral Leasing Act: Generally--Mineral Leasing Act:
Combined Hydrocarbon Leases--Oil and Gas Leases:
Applications: Generally

Where the requirement to sign a request to convert existing oil and gas leases into combined hydrocarbon leases appears only in the regulation at 43 C.F.R. § 3140.2-3(a) and neither the Combined Hydrocarbon Leasing Act of 1981 nor the regulation specifies exclusion of qualifying lease(s) for failure to sign the request, and where the record title owners plainly joined in and agreed to the substantive component of that request to convert,

the failure to sign the letter requesting lease conversion is curable.

5. Combined Hydrocarbon Leasing Act: Applications--
Mineral Leasing Act: Combined Hydrocarbon Leases --
Mineral Leasing Act: Generally--Oil and Gas Leases:
Expiration

The Combined Hydrocarbon Leasing Act provides that the owner of an oil and gas lease issued prior to Nov. 16, 1981, and located within a Special Tar Sand Area shall be entitled to convert such lease or claim to a combined hydrocarbon lease upon the filing of an application containing an acceptable plan of operations within 2 years from Nov. 16, 1981. Where appellant's application to convert oil and gas leases was filed on Feb. 25, 1983, and his plan of operations was deemed complete as of Aug. 8, 1983, he complied with the statute and was entitled to the conversion it authorizes.

6. Combined Hydrocarbon Leasing Act: Applications--
Combined Hydrocarbon Leasing Act: Generally--
Combined Hydrocarbon Leasing Act: Notice of Intent
Mineral Leasing Act: Generally--Mineral Leasing Act:
Combined Hydrocarbon Leases

Under the Combined Hydrocarbon Leasing Act, the right to convert an existing oil and gas lease that would expire between Nov. 16, 1981, and Dec. 22, 1982, pursuant to a Notice of Intent was effective only until Dec. 22, 1982. 30 U.S.C. § 226(n)(1)(B) (2000). Where appellant's predecessor filed its application on Feb. 1, 1982, but its plan of operations was not deemed complete until July 19, 1983, BLM properly excluded the leases from the pending conversion application.

APPEARANCES: Thomas F. Tauskey, Esq., Denver, Colorado, for appellants; Richard H. McNeer, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management; Stephen H. M. Bloch, Esq., and David Garbett, Esq., Salt Lake City, Utah, for *amicus curiae*, the Southern Utah Wilderness Alliance.

OPINION BY ADMINISTRATIVE JUDGE PRICE

William C. Kirkwood (Kirkwood) has appealed from the January 29, 2007, decision of the Utah State Office, Bureau of Land Management (BLM), vacating a prior decision dated October 12, 2006, which had purported to extend the time for filing an appeal; sustaining in part and rescinding in part a prior decision dated August 19, 1997, which had rejected Kirkwood's application to convert 35 oil and gas leases to a combined hydrocarbon lease (CHL) in its entirety; granting a suspension; determining rental due; and requiring additional information (Kirkwood Decision).¹ As a result of that decision, the acreage contained in the application was reduced to 8,921.36 acres.² Kirkwood's appeal from that decision was docketed as IBLA 2007-121.

Kirkwood Oil and Gas, LLC (LLC) has appealed a separate decision of the Utah State Office, BLM, also dated January 29, 2007, vacating a prior decision dated October 10, 2006, which had purported to extend the time for filing an appeal; sustaining in part and rejecting in part the LLC's CHL application; granting a suspension; determining rental due; and requiring additional information (LLC Decision).³ As a result of the decision, the application was reduced to 6,278 acres. The LLC's appeal from that decision was docketed as IBLA 2007-122.

We begin with the statute to provide the context for the statement of facts, the parties' arguments, and our analysis.

THE COMBINED HYDROCARBON LEASING ACT

An oil and gas lessee does not have a right to explore for or develop the solid hydrocarbon resources found within his lease, and a solid hydrocarbon lessee does

¹ Although the decision lists 35 individual oil and gas leases, there are 37 leases. The list inadvertently omitted U-32263 and U-44166, which are identified elsewhere in the decision. *Compare* Kirkwood Decision at unpaginated 1 *with* unpaginated 2.

² Noting the acreage for CHLs is limited to 5,120 acres per lease, the decision stated that two CHLs would be issued "if all this acreage goes forward to leasing." Kirkwood Decision at unpaginated 2.

³ The decision was issued to the LLC, Devon Energy Production Co. L.P. (Devon), Pioneer Resources Production L.P., and Prize Energy Resources L.P. Santa Fe Energy Company (Santa Fe) was Devon's predecessor in interest. Altex Oil Company (Altex) assigned 100% of its interest in UTU-72405 to the LLC, and BLM approved that assignment, effective Nov. 1, 2006. Only the LLC appealed.

not have a right to produce oil or gas found within his lease. 43 C.F.R. § 3140.1-1(b); *see also* 43 C.F.R. § 3141.1(d),(e); *Duncan Miller*, 73 I.D. 211, 215-16 (1966). Historically, the Department had been unwilling to issue tar sand leases because “in interpreting the present law [it] ha[d] been unable to draw a clear distinction between the properties of the two chief classes of hydrocarbons, i.e., oil and gas leases issued under section 17 and ‘tar sand’ leases issued under section 21 of the [Mineral Leasing Act (MLA), 30 U.S.C. §§ 226 and 241 (2000), respectively].” S. Rep. No. 97-250, at 3 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1740, 1742. The Combined Hydrocarbon Leasing Act of 1981 (CHLA), as codified in part at 30 U.S.C. § 226(n) (2000), amended the MLA to remove that impediment by allowing the Department to issue leases that covered both types of mineral resources.

[1] The CHLA authorizes issuance of new leases for “all nongaseous hydrocarbon resources other than those substances leasable as coal, oil shale, or gilsonite (including all vein-type solid hydrocarbons).” *See* 30 U.S.C. §§ 181-182, 184, 209, 226, 241, 351-352 (2000). As to previously issued oil and gas leases, the CHLA in material part provides as follows:

(1)(A) The owner of (1) an oil and gas lease issued prior to November 16, 1981, or (2) a valid claim to any hydrocarbon resources leasable under this section based on a mineral location made prior to January 21, 1926, and located within a special tar sand area shall be entitled to convert such lease or claim to a combined hydrocarbon lease for a primary term of ten years upon the filing of an application within two years from November 16, 1981, containing an acceptable plan of operations which assures reasonable protection of the environment and diligent development of those resources requiring enhanced recovery methods of development or mining. . . .

(B) The Secretary shall issue final regulations to implement this section within six months of November 16, 1981. If any oil and gas lease eligible for conversion under this section would otherwise expire after November 16, 1981, and before six months following the issuance of implementing regulations, the lessee may preserve his conversion right under such lease for a period ending six months after the issuance of implementing regulations by filing with the Secretary, before the expiration of the lease, a Notice of Intent to file an application for conversion. Upon submission of a complete plan of operations in substantial compliance with the regulations promulgated by the Secretary for the filing of such plans, the Secretary shall suspend the running of the term of any oil and gas lease proposed for conversion

until the plan is finally approved or disapproved. The Secretary shall act upon a proposed plan of operations within fifteen months of its submittal.

30 U.S.C. § 226(n) (2000).

The Secretary published final rules implementing the CHLA, effective June 23, 1982, which are codified in 43 C.F.R. Part 3140. 47 Fed. Reg. 22478 (May 24, 1982).

STATEMENT OF FACTS

IBLA 2007-121

The essential facts are not in dispute in either appeal. On February 25, 1983, Kirkwood filed an application, serialized as UTU-72120, to convert 37 Federal oil and gas leases representing a total of 34,641.90 acres within the Circle Cliffs designated Special Tar Sand Area (STSA) into a CHL pursuant to the CHLA.

On February 25, 1983, R. B. Edmundson, Kirkwood's agent, filed a plan of operations (PoO) for a proposed combined hydrocarbon unit in the Circle Cliffs STSA, composed of the 37 oil and gas leases. "Letters of concurrence" from working interest owners stating that they concurred in the proposed PoO and wanted their leases in the proposed Unit area were also submitted. Additional letters of concurrence were submitted later.

By letter dated March 23, 1983, U.S. Geological Survey advised Kirkwood that his PoO was not complete. By letter dated May 19, 1983, BLM informed Kirkwood that "letters of approval" from record title holders had not been submitted for certain leases. On August 8, 1983, Kirkwood submitted a revised PoO and provided additional information to supplement the application.

By letter dated September 9, 1983, the PoO was determined to be "complete and acceptable as of the date of filing," or August 8, 1983. Conversion application UTU-72120 was not thereafter processed to a final decision, the record does not contain a notice suspending the terms of the leases subject to the application, and an associated draft environmental impact statement (EIS) prepared in 1984 was never finalized.

On August 19, 1997, the State Office issued a decision regarding conversion application UTU-72120. BLM declared all but one of the leases, which are within the

boundaries of the Grand Staircase Escalante National Monument, expired. BLM rejected application UTU-72120 in its entirety on the basis that “mineral leasing is precluded in National Parks, National Monuments, or other lands where mineral leasing is prohibited by law” under section 1 of the MLA, 30 U.S.C. § 181 (2000). Aug. 19, 1997, Decision at unpaginated 2; *see also* Decision at unpaginated 2.

Kirkwood appealed. Ultimately, on BLM’s motion, the August 19, 1997, decision was set aside by the Board and the case was remanded to BLM by order dated December 3, 1997.

On September 21, 2005, Kirkwood requested issuance of a final EIS so that a CHL could be issued.

BLM issued a decision dated October 12, 2006, in which it adjudicated the same matters that are addressed in the January 29, 2007, decision here reviewed. However, that prior decision purported to extend the time for filing an appeal. Because the parties had erroneously been led to believe that their appeal rights had been extended beyond the 30-day period in which an appeal must be taken, BLM vacated the October 2006 decision and issued the January 2007 decision now before us.

The January 2007 Kirkwood Decision identifies 37 oil and gas leases in the application, 2 of which were rejected because they had expired before the application was submitted.⁴ Decision at unpaginated 1, 2. One lease was rejected because it is outside the STSA.⁵ *Id.* at 2. Two leases were rejected because they had terminated when Kirkwood failed to pay annual rental.⁶ *Id.* The decision rejected 5 leases because they had terminated by operation of law before the plan of operations was deemed complete.⁷ *Id.* Because Edmundson had submitted the conversion

⁴ Lease U-41041 and U-44166 expired on Jan. 1, 1980, and Jan. 1, 1982, respectively.

⁵ *See* lease U-32263.

⁶ Leases U-32264 and U-37314 terminated effective Apr. 1, 1985, and Aug. 1, 1986, respectively. Kirkwood petitioned to reinstate U-32264. The petition was denied on July 17, 1985, and Kirkwood did not appeal. He apparently did not petition for reinstatement or appeal the termination of U-37314, and the decision became final for the Department.

⁷ Leases U-21670, U-21671, U-21673, U-21674, and U-21675 terminated by

(continued...)

application on Kirkwood's behalf, BLM eliminated 18 leases not owned by Kirkwood from the application.⁸ *Id.* at 2-3.

The final 8 leases, all owned by Kirkwood, were declared suspended as of August 8, 1983, the date a complete PoO was filed.⁹ *Id.* at 3. Noting that rental had never been paid for those 8 leases and that rental is required during the suspension period, the decision calculated \$49,280 for annual rental payments for a 7-year period, stating that full payment was required for BLM "to continue processing this application."¹⁰ Kirkwood was given 60 days in which to pay the accrued rentals to the Minerals Management Service, or the leases would terminate for nonpayment of annual rental, and reinstatement information would be provided to Kirkwood. *Id.* The decision advised that a 30-day extension to pay could be requested. Kirkwood timely appealed.

IBLA 2007-122

By joint letter dated December 14, 1982, Santa Fe and Altex requested conversion of numerous oil and gas leases into CHLs pursuant to the CHLA and advised BLM that they planned to form a combined hydrocarbon unit.¹¹ With the

⁷ (...continued)

operation of law when their primary terms expired on Mar. 1, 1983. It appears lease U-22677 also should be included in this group. This lease was on the list of leases in the CHL application as set forth in the decision, but was not further discussed in the decision. The record title holder is the John Oakason Estate, for which a concurrence letter was filed. That lease was issued on Apr. 18, 1973, effective May 1, 1973, so that the primary term of the lease expired on Apr. 30, 1983. Annual rental was paid in the 11th year, however. The individual case file for this lease was not provided on appeal, so we cannot say whether BLM refunded that payment.

⁸ See leases U-8454, U-8455, U-9407, U-21672, U-22122, U-22123, U-23905, U-25857, U-27023, U-29297, U-37316, U-37318, U-37991, U-38508, U-39190, U-45421, U-46640, and U-46643.

⁹ See leases U-25855, U-27491, U-28169, U-28919, U-37312, U-37315, U-37317, and U-43694.

¹⁰ Citing 30 U.S.C. §§ 1724(b)(1) and 1702(25)(B)(ii)(I) (2000), in its Answer BLM explains that 7 years is the maximum period for which it can demand rental under the applicable statute of limitations.

¹¹ The letter, which is contained in a case file labeled only "SANTA FE - ALTEX," was
(continued...)

December 14, 1982, letter, a PoO for the proposed CHL unit was submitted. The application included 48 existing Federal oil and gas leases¹² representing 39,098.50 acres located within the Triangle STSA, and was serialized as UTU-72405. The PoO was twice supplemented on January 18, 1983, and on or about July 8, 1983. The latter was received by BLM on July 19, 1983, and by letter dated August 5, 1983, the PoO was deemed complete as of July 19, 1983.

On October 10, 2006, BLM issued a decision that was virtually identical to the January 29, 2007, decision before us and, like the decision in IBLA 2007-121, it purported to grant an extension of time to comply or to file an appeal.

BLM issued the January 2007 LLC Decision, which vacated the October 2006 decision. In addition, the LLC Decision rejected the CHL application insofar as it included part of lease U-21489, because a portion of that lease was not located within a STSA. BLM determined that 14 leases had terminated by operation of law prior to the filing of a complete PoO, and therefore rejected the application to the extent it included those 14 leases.¹³ The decision rejected 10 leases on the ground that record title owners other than the LLC had not filed the CHL application.¹⁴ The application was rejected with respect to another 3 leases because they were part of a different CHL application, UTU-71309.¹⁵ The LLC Decision determined that 16 leases

¹¹ (...continued)

to be signed by both parties; only Altex signed it, and a handwritten line was drawn above the signature line for Santa Fe's signature. BLM's decision states that the request to convert was filed by Santa Fe and Devon on Dec. 8, 1981, and by Altex on Feb. 1, 1982. Nothing in the record explains how a joint application could be filed on different dates, and we did not find copies of the letters to which BLM referred in the LLC Decision. Altex separately filed Notices of Intent dated Dec. 1, 1981, Jan. 28, 1982, and Jan. 29, 1982, for all the leases here challenged.

¹² The decision states there are 36 leases, but lists 48 leases.

¹³ See leases U-2754, U-17782, U-17783, U-17784, U-18656, U-18657, U-18658, U-18659, U-18660, U-18661, U-20002, U-20292, U-20515, and U-20859.

¹⁴ See leases U-18403, U-20859A, U-21084, U-21084A, U-21241, U-21488, U-33409, U-44334, U-44733, and U-45845.

¹⁵ See leases U-8291G, U-17781, and U-20860.

“are currently in a suspended status and will remain while this application is being further considered.”¹⁶

The remaining 6 leases, including the portion of U-21489 that was located within the STSA, were deemed to have been suspended as of the date of the filing of the complete plan, July 19, 1983. BLM demanded rental payments, calculating \$60,041.50 for a 7-year period, stating that full payment was required for BLM “to continue processing this application.” The LLC was given 60 days in which to pay the accrued rentals to the Minerals Management Service, failing which the leases would terminate for nonpayment of annual rental, and reinstatement information would be provided to Kirkwood. *Id.* The decision advised that a 30-day extension to pay could be requested. This appeal followed.

THE MOTION TO INTERVENE

On February 11, 2008, the Southern Utah Wilderness Alliance (SUWA) moved to intervene in both appeals.¹⁷ By orders dated February 22 and 26, 2008, the Board denied the motion, but granted SUWA leave to file an *amicus curiae* brief not later than March 13, 2008, expressly cautioning that no extension would be granted and indicating that the Board would resume its deliberations forthwith after the filing deadline.¹⁸ BLM responded to SUWA’s *amicus* brief (Response).

ARGUMENTS ON APPEAL

Together, Kirkwood and the LLC (collectively appellants) advance four principal arguments before the Board: (1) Kirkwood questions whether BLM properly required the payment of annual rental as a condition precedent to

¹⁶ See leases U-0108406A, U-0144313, U-934, U-2521, U-2755, U-2756, U-4444, U-4585, U-4659, U-5131, U-7167, U-7648, U-8291, U-8291A, U-8291F, and U-17782A.

¹⁷ In communications with the Board’s Docket Attorney, counsel for appellants expressed a desire to maintain and prosecute the appeals as separate matters. BLM stated no position on the issue and, in fact, the parties filed separate responses in the appeals. Despite counsel’s preference, we now consolidate the appeals for administrative convenience.

¹⁸ Notwithstanding the plain language of the Board’s orders, SUWA did not file its *amicus* briefs until Mar. 17, 2008, ample reason to ignore the submission as untimely. In the future, we may not hesitate to reject or ignore submissions that are delivered after the date specified in an order.

continuing the processing of their CHL applications, thereby reversing its position after almost 25 years; (2) both appellants challenge whether BLM correctly rejected certain leases on the basis that the owners of record had not filed an application to convert their oil and gas leases to a CHL; (3) both appellants contend BLM erred in rejecting certain leases because their primary terms had expired prior to submission of a complete PoO; and (4) both appellants assert they have been prejudiced by BLM's failure to issue the CHL.¹⁹

BLM argues that Kirkwood "has had the right to conduct oil and gas operations continuously from the effective date of the suspension of the terms of their leases" and, "[h]aving the right, and the requirement, to conduct operations and to produce from his oil and gas leases, Kirkwood as the lessee is properly required to pay rentals." Kirkwood Answer at 6. BLM further argues that Kirkwood is properly charged with knowledge of his rental obligation regardless of BLM's "honest mistakes" and "misstatements" in advising him that no rental was due; that Kirkwood has received 16 rent-free years when he could have conducted oil and gas operations and therefore has suffered no harm as a result of BLM's instructions; and that allowing him to retain his leases without paying the rental is contrary to the CHLA and the regulations. *Id.* at 8-9. BLM maintains that it properly rejected appellants' applications to the extent the record title owners did not sign the applications. Kirkwood Answer at 9-11; LLC Answer at 5-6.

¹⁹ The LLC buttresses its articulation of the third argument by challenging the absence of findings of fact to support the conclusion that the leases had terminated "on unspecified date(s) 'by operation of law'" and, based on the perceived absence of critical documents in the case record, including the letter approving the PoO, argues the terms of the leases have been suspended pending a final rejection or approval of the PoO. LLC's Statement of Reasons (SOR) at 3-4.

BLM provided the individual files for each lease on May 3, 2007. Among other things, we located a copy of the PoO, the cover letters for the submission of additional information, and BLM's Aug. 5, 1983, letter determining the PoO was complete as of July 19, 1983. We acknowledge the incompleteness of the files, however. The file labeled SANTA FE - ALTEX includes a copy of the supplemental information dated Jan. 18, 1983. We did not locate anything immediately recognizable as the supplementary information submitted with Santa Fe's letter dated July 8, 1983, although BLM clearly did receive it and acknowledged as much. Not unreasonably, the LLC makes much of the present state of the record, but as Altex's successor, Kirkwood and/or the LLC presumably should have had their own copies of these key documents. The information contained in the individual files puts the LLC's factual contentions to rest and will not be addressed further.

In its *amicus* brief, SUWA argues that the affected leases never were suspended and thus terminated; that appellants' failure to timely pay annual rentals resulted in automatic termination; that if the leases were suspended, only the lease term was suspended so that the obligation to pay rental remained; and that BLM lacks authority to retroactively suspend or reinstate the leases and to do so assertedly constitutes illegal new leasing decisions, because lands within the Grand Staircase Escalante National Monument and designated wilderness study areas are closed to oil and leasing and development.

Analysis

I. Whether BLM Properly Required the Payment of Accrued Annual Lease Rentals as a Condition Precedent to Continuing the Processing of the CHL Applications

Relying on agency communications, Kirkwood challenges the requirement to pay 7 years' rentals as a condition to continuing the processing of the CHL applications. Kirkwood contends that for 23 years, the State Office had "consistently and repeatedly advised the Applicant and other parties, that there was no such requirement for payment of rentals as to leases whose primary terms had expired" to maintain the application. Kirkwood SOR at 3. In addition, Kirkwood disputes the logic of BLM's demand for rental, "because (in the absence of issuance of the [CHLs] for which the application has been made) from and after the expiration date(s) of the conventional oil and gas leases the Appellant had no right to conduct operations on the lands subject to his location." *Id.* at 4. Kirkwood thus effectively invokes estoppel to prevent BLM from demanding the payment of rental as a condition to continuing the processing of the CHL applications.²⁰

BLM does not contest the import or consequence of the agency statements on which appellants rely. It instead characterizes those communications as "an incorrect interpretation of the law" and as "misstatements." Kirkwood Answer at 8. BLM argues that lease rentals are payable for suspended operations, because "Congress did not specifically suspend the duty to pay rentals on suspended oil and gas leases in the [CHLA]," *id.* at 6, and that the State Office communications do not meet the requisite criteria to estop the United States from demanding payment of rental, *id.* at 8. In its Response to SUWA's *amicus* brief, BLM contends that the oil and gas leases were suspended by operation of law and did not require a decision document or action on

²⁰ As a result of introducing evidence of the agency's communications with Altex, the LLC's predecessor, described below, Kirkwood's estoppel argument extends to the LLC by implication.

its part to effectuate. Response at 2. It “acknowledges that the proper reading of the CHL Act and the regulations is that rentals are required during the period of suspension prior to BLM’s final action on a CHL application.” *Id.* at 4. BLM retreats from assertions in its Answer to admit that appellants were justified in relying on those agency communications, until they received the decisions here appealed, and that subsequent rentals would not have been accepted. BLM concedes it is estopped from declaring the leases expired, but nonetheless argues that it is not estopped from demanding rentals for the last 7 years. *Id.*

[2] Estoppel is an extraordinary remedy, especially as it relates to the public lands. The Board has stated on a number of occasions, most recently in *Ron Coleman Mining, Inc.*, 172 IBLA 387, 391 (2007), that it looks to the elements of estoppel set forth in *United States v. Georgia-Pacific Co.*, 421 F.2d 92, 96 (9th Cir. 1970), as the initial test in determining estoppel questions presented to the Board. Under *Georgia-Pacific Co.*, four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former’s conduct to his injury. *See also, e.g., Darrell Ceciliani*, 166 IBLA 316, 326 (2005); *Carl Riddle*, 155 IBLA 311, 314 (2001); *FMC Wyoming Corp.*, 154 IBLA 128, 138-39 (2001); *Floyd Higgins*, 147 IBLA 343, 347 (1999); *Santa Fe Minerals*, 145 IBLA 317, 324 (1998); *David E. Best*, 140 IBLA 234, 236 (1997); *Leitmotif Mining Co.*, 124 IBLA 344, 346 (1992).

In matters concerning the public lands, estoppel against the Government must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. *Ron Coleman Mining, Inc.*, 172 IBLA at 391, and cases cited. While estoppel may be invoked where reliance on Governmental statements deprives an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. *Ron Coleman Mining, Inc.*, 172 IBLA at 391; *Darrell Ceciliani*, 166 IBLA at 328, and cases cited; *see also* 43 C.F.R. § 1810(3)(c). Given that their estoppel argument implicates rights authorized by different statutory provisions, it is important to scrutinize the evidence of record on which appellants rely.

Agency Communications

Kirkwood has provided copies of correspondence from May 1983, January 1984, and May 1986, between himself and Robert Lopez, then Chief of the Minerals Section in BLM’s Utah State Office. *See* Exs. A-C to Kirkwood SOR. Kirkwood filed a Supplemental SOR (Kirkwood SSOR) and provided copies of correspondence from

1982, 1986, 1993, and 1999, between Altex and Lopez. See Exs. U-V to Kirkwood SSOR. That correspondence indisputably demonstrates that Kirkwood (and Altex) periodically sought direction regarding lease rental payments, to which Lopez responded, either in correspondence to Kirkwood or by indicating his agreement by countersigning letters from Kirkwood and Altex, regarding the topic.

By letter dated May 3, 1983, Kirkwood confirmed a telephone conversation he had had with Lopez that day. The letter referred to three leases at issue in the Kirkwood appeal in the Circle Cliffs STSA addressed in the Kirkwood Decision whose primary terms had expired on March 1, 1983.²¹ In that letter, Kirkwood noted that those leases “now fall within a gray area (I.E. [sic] between expiration of the primary term of the conventional oil and gas lease and issuance of a combined hydrocarbon lease(s) covering the same lands.” The letter stated Kirkwood’s understanding:

Any delay drilling rental payments which may hereinafter become due on the lands corresponding to the captioned federal oil and gas lease serial numbers will be accessed [sic] on the basis of \$2.00/acre/year ([43 C.F.R. §] 3140.1-4b); and shall be payable annually in advance of the anniversary date of the new combined hydrocarbon leases(s). Accordingly, *no delay drilling rental payments, as they pertain to the lands covered by the captioned federal [lease] serial numbers, shall become due or payable until this office has received notification that the subject lands will be included under new combined hydrocarbon lease(s), and said leases have been forwarded to this office for approval of the terms contained therein, execution of the lease, and payment of the delay rental payment in advance of the lease(s) issuance.*

Kirkwood SOR, Ex. A (underlined emphasis in the original, italicized emphasis added). The letter requested that Lopez sign, date, and return a copy if he agreed the letter accurately stated the conversation. Lopez signed and dated the letter on May 16, 1983.

In a three-sentence letter from Lopez to Kirkwood dated January 25, 1984, in which no specific lease was referenced, Lopez acknowledged a recent telephone request “regarding rental requirements.” In the letter Lopez stated that “[n]o rental payment is required on expiring oil and gas leases where a proper application to convert such leases to Combined Hydrocarbon Leases has been timely filed. *If an oil and gas lease is still in its primary term, rentals must be timely paid.*” Kirkwood SOR, Ex. B (underlined emphasis in the original, italicized emphasis added).

²¹ See leases U-21673, U-21674, and U-21675.

A letter from Kirkwood to Lopez dated May 21, 1986, followed a telephone conversation regarding 18 listed leases that included 8 leases involved in the Kirkwood appeal. Those 8 leases were still in their original terms.²² However, another 5 on the list were leases in the Kirkwood appeal that had expired before the PoO was deemed complete.²³ In the letter Kirkwood stated “I would like to confirm that no rental payment is required on expiring oil and gas leases where a proper application to convert such leases to combined hydrocarbon leases has been timely filed. *If an oil and gas lease is still in its primary term, rentals must be timely paid.*” Kirkwood SOR, Ex. C (emphasis added). Lopez signified his concurrence with “the foregoing” by signing and dating the letter as “Read and Approved” on May 28, 1986. *Id.* This letter is the basis for BLM’s concession that rental payments would not have been accepted after a lease expired at the end of its primary term. *See* Response at 4. While we do not agree that Ex. C contains anything that suggests that attempts to tender rental payments would be refused, our review of individual case files confirms BLM’s assertion.

For example, the case file for U-21671, a lease that had expired, showed that the concurring lessee had paid advance rental for the upcoming 11th year. By letter dated September 13, 2002, Lopez advised the lessee:

On February 22, 1983, you filed a rental payment, in this office, of \$640 for Federal oil and gas lease U-21671. The oil and gas lease term for U-21671 expired on February 28, 1983.

On February 25, 1983 you submitted a Notice of Intent to convert the oil and gas lease to a combined hydrocarbon lease. Subsequently, a conversion application was filed on August 8, 1983. This resulted in a suspension of the oil and gas [lease] term pending a decision on the conversion application.

²² *See* leases owned by Kirkwood: U-25855 (8 months and 24 days of the primary term remained), U-27491 (1 year and 24 days), U-28169 (1 year, 2 months, and 24 days), and U-28919 (1 year, 4 months, and 24 days). Leases owned by concurring record title owners: U-21672 (7 months and 24 days), U-22122 (4 months and 24 days), U-22123 (4 months and 24 days), and U-29297 (1 year, 6 months, and 24 days). We have no information regarding the status of the other 11 leases.

²³ *See* leases U-21670, U-21671, and U-21673 through U-21675.

Since rental for the ten year oil and gas lease term has been paid in full, it is hereby authorized that the \$640 be refunded to you. The refund will be sent to you under separate cover.

A refund was processed in 2002 with a handwritten notation on the Receipt and Accounting Advice dated September 13, 2002, stating: "Refund authorized. Oil and gas lease expired February 28, 1983. Suspended by Notice of Intent to convert to a combined hydrocarbon lease filed February 25, 1983. Rental not required after the term of original oil and gas lease has expired." A document behind that Receipt and Accounting Advice, dated June 25, 2002, appears to confirm that BLM processed other refunds of rental payments.

Kirkwood submitted additional documentation of communications between Lopez and Altex with his SSOR. In a letter dated June 21, 1982, the subject of which was "Suspension of Primary Terms and Rental Status of Federal Oil and Gas Leases in Designated Tar Sands Area, Garfield County, Utah," Altex identified 6 leases at issue in the LLC's appeal for which Altex had filed Notices of Intent to convert before implementing regulations had been published.²⁴ The primary terms of those leases were to expire on July 1, 1982, and on August 1, 1982. Altex stated

we are concerned about the status of the rental payments on the subject leases due to the fact that the primary terms will expire shortly after the effective date of the newly promulgated regulations. However, based on Larry Skiffington's recent meeting with you and your discussion with Mr. Edward E. Coggs and Mr. Richard J. Aiken of the Bureau of Land Management in Washington, D.C., who were the primary draftsmen of the newly promulgated regulations, it is our understanding that BLM regards the primary terms of the subject leases as suspended pending BLM's review and decision on the Combined Hydrocarbon Lease Applications (which must be filed along with a complete "Plan of Operation" within six (6) months of the June 23, 1982, effective date of the new regulations.)

As a consequence, it is our understanding that it is BLM's view that *Altex does not and will not owe any rental payments pending BLM's grant or denial of the Combined Hydrocarbon Lease Applications*. You have further indicated that BLM will notify Altex (by Decision letter or adequate notice) at such time the Combined Hydrocarbon Lease Applications have been reviewed and that *Altex will not owe any rentals*

²⁴ See leases U-18656 through U-18661.

under the existing regulations or the new regulations until Altex receives such notice from BLM.

Kirkwood SSOR, Ex. R at 1-2 (emphasis added). Lopez was asked to countersign the letter “[i]f the above information is accurate and you agree with the contents thereof.” *Id.* at 2. Lopez signed and dated the letter on June 23, 1982.

By letter dated February 28, 1986, Randall J. Piserchio, Altex’s Vice President, wrote Lopez concerning a telephone conversation they had had on February 26, 1986, concerning lease U-44733 in the Tar Sand Triangle Area, a lease not involved in these appeals:

During that conversation I asked why Altex Oil Corporation must continue to pay delay rentals on a lease we intend to convert to a new hydrocarbon lease. Mr. Lopez told me that we must maintain the lease, through payment of the delay rentals, to maintain our priority position to the lands contained in this lease.

Altex’s understanding is that under the current oil and gas lease, referenced above, we do not have the right to develop the Tar Sand formation. . . . [T]he tar sand formation is the most valuable formation underlying this lease and . . . if the new Combined Hydrocarbon Leases were issued the operator would have the right to produce not only this zone, but any other formation under the same described lands. Therefore, *by this letter, Altex is proposing that the referenced lease and delay rentals be placed in suspense until such time that the federal government makes a decision on whether to issue the new Combined Hydrocarbon Leases on all of the federal lands within the Tar Sand Triangle Area.* Altex has paid, and will continue to pay, all delay rentals on a timely basis, if it is deemed necessary. We are writing this letter to help us achieve a clear understanding of the situation, but it is our intent not to place our lease position in jeopardy.

Kirkwood SSOR, Ex. S (emphasis added). Lopez was asked to “study this *proposal* carefully and give us written confirmation *if this proposal is acceptable.*” *Id.*

Lopez responded to Piserchio by letter dated March 12, 1986:

Your letter dated February 28, 1986[,] requests suspension of rental payments for oil and gas lease U-44733 and states “. . . the tar sand formation is the most valuable formation underlying this lease and . . .

if the new Combined Hydrocarbon Leases were issued the operator would have the right to produce not only this zone, but any other formation under the same described lands.” There is no authority which allows for suspensions for the reasons stated.

The purpose of leasing is to promote exploration and development of oil and gas and suspensions are granted only when the lessee files an application in accordance with the regulations in 43 CFR 3103.4-1 showing that the lease cannot be successfully operated under the terms provided and the Secretary determines the suspension is necessary to promote development or is in the interest of conservation.

Oil and gas lease U-44733 was issued effective March 1, 1980[,] for a period of ten years. The filing of a conversion application only provides the lessee with the opportunity to convert the oil and gas lease to a combined hydrocarbon lease, if and when, the plan of operation is accepted and approved. *It does not change the status of the current oil and gas lease while it is still in the primary term, rentals are required to keep the lease valid. However, if a lease is beyond its primary term and due to expire, the application will preserve the lessee’s rights to conversion after the expiration date without any further rental requirements until a determination on the conversion application is made.*

Kirkwood SSOR, Ex. T (emphasis added).

By letter dated March 10, 1993, again in reference to lease U-44733, Altex requested Lopez’s response to the following statement: “Due to the fact that Altex has not received notification to indicate otherwise, it is our opinion that the above leases [sic] are still in a suspended status with no rentals due again this year.” The letter offered two options by which Lopez could indicate his position. He could select the option indicating: “Leases are i[n] suspended status and no rentals are due this year,” or he could select “other” and supply a rationale. The first option was selected, but manually altered so that the acknowledgment states: “CHL application is in pending status and no rentals are due this year.” Lopez signed and dated the letter on March 17, 1993. To the right of his signature, the following handwritten notation was added: “This is unnecessary as *no O&G lease exists and only a pending [sic] combined hydrocarbon application is pending. No rental is due on pending applications.*” Kirkwood SSOR, Ex. U (emphasis added).

The final document offered by Kirkwood is a letter from Altex to Lopez dated March 31, 1999, concerning 11 listed leases in the Tar Sands Triangle Area, which

are involved in the LLC's appeal.²⁵ By 1999, the 10th year of all 11 leases had come and gone. The letter states: "Due to the fact that Altex has not received notification to indicate otherwise, it is our opinion that the above leases are still in an 'in limbo' status with no rentals due again this year." That letter again presented Lopez with the option of agreeing that the leases were "in limbo," or electing the option of "other." Lopez signed and dated the letter on April 6, 1999. Both options were selected by a typed "X," but "other" was completed with the following typewritten explanation: "The above leases are not considered to be in a 'limbo status.' They are *awaiting approval of pending conversion application UTU-72405. Rentals continue to be suspended.*" Kirkwood SSOR, Ex. V (emphasis added).

The individual files for each lease show that appellants and the other concurring lessees paid rentals each year for the 10-year primary terms of their leases and then ceased, presumably rendering them "expiring" leases within the meaning of the CHLA and Lopez's statements regarding the subject. For leases still in their primary terms, the characterization of the lease as "expiring" is inconsistent with the effect of the suspension mandated by the CHLA and its implementing regulations²⁶ upon the filing of a complete PoO.

Where the running of the primary term of an oil and gas lease is suspended before the end of the 10th year thereof and remains suspended, such lease is not and cannot be deemed an "expiring" lease. 43 C.F.R. § 3103.4-4(c) ("no lease shall be deemed to expire during any suspension"). The lease remains in its primary term, and a period equal to the length of the suspension is added to the time that is left of the original 10-year primary term. 43 C.F.R. § 3103.4-4(b). Lopez's statement that the rental obligation applied to leases in their primary terms therefore was entirely correct. However, his statement that the obligation to pay annual rental would not apply to expiring leases included in a CHLA application was not correct, because once

²⁵ See leases U-2754, U-17782 through U-17784, U-18656 through U-18661, and U-44733.

²⁶ The relevant regulation, 43 C.F.R. § 3140.2-3(g)(1), mirrors the CHLA and provides:

Upon determination that the plan of operations is complete, the supervisor shall notify the authorized officer who shall then suspend the term of the Federal oil and gas lease(s) as of the date that the completed plan was filed until the plan is finally approved or rejected. *Only the term of the oil and gas lease shall be suspended, not any operation and production requirements thereunder.* (Emphasis added). Operations and/or production are not an issue in these appeals.

suspended as of August 8, and July 19, 1983, respectively, none of the leases was an expiring lease for any purpose. Accordingly, all 26 leases in Kirkwood's appeal and the 1 lease in the LLC's appeal should have remained subject to annual rental payments during the suspension period, which continues to this day.²⁷

Despite the correctness of Lopez's basic statement, a different official position evolved where, as stated, rentals were paid only through the 10th year to preserve the right to convert such lease. This conclusion at times was couched or recognized as some kind of suspension, but without distinguishing between leases that had expired as of the dates of the correspondence (Kirkwood SOR, Ex. A, and Kirkwood SSOR, Exs. U, V), leases still in their original primary terms as of the dates of the correspondence (Kirkwood SOR, Ex. C, Kirkwood SSOR, Exs. S, T), and leases that were nearing the end of their 10th year within 60 days of the date of the correspondence (Kirkwood SSOR, Ex. R), and with no apparent consideration of the well established impact of a suspension on the terms of a lease or the statute's criteria for an *expiring lease*. The lack of analysis in the correspondence and shifts in perspective regarding the MLA principles that should control any such analysis are an uneasy basis upon which to predicate estoppel, particularly when one provision in the MLA mandates automatic termination by operation of law for the failure to pay annual rental and provides a right to petition for reinstatement for a limited period that appellants cannot now invoke, and Congress has also enacted other provisions to ensure that holders of existing eligible oil and gas leases would not be disadvantaged by the change in the mineral leasing law.

Our questions regarding the proper import of the parties' communications as a basis for estoppel are answered by other documents of record. The case file for lease U-2754, part of the LLC's appeal, contains other highly relevant correspondence. Altex had submitted a Notice of Intent to convert four leases²⁸ by letter dated December 1, 1981, addressed to the Secretary, before the Department had promulgated rules to implement the CHLA. Asserting that the primary term of the four leases would expire on February 1, 1982, Altex requested prompt action on its Notices of Intent. In a letter regarding the conversion of the four leases to Altex's

²⁷ The individual lease files show that as of Aug. 8, 1983, the time remaining of the primary terms of Kirkwood's 8 leases ranged from 8 months and 24 days (lease U-25855) to 4 years, 5 months, and 24 days (lease U-43694), and for the 18 concurring lessees, the time remaining ranged from 1 month and 24 days (lease U-23905) to 8 years, 1 month, and 24 days (lease U-46640). In the LLC's appeal, as of July 19, 1983, 7 years, 2 months, and 15 days remained on lease U-44733.

²⁸ See leases U-2754, U-17782, U-17783, and U-17784. The first lease would expire on May 31, 1982; the last three leases would expire on Jan. 31, 1982.

president, Cecil C. Wall, dated December 22, 1981, Dale E. Zimmerman, Assistant to the Deputy Director of BLM, stated:

Our Utah State Office is aware of your request and has recorded your leases. This action ensures that *on the normal expiration date of your existing leases, no action will be taken to revoke the leases or consider the tracts for competitive leasing at the present time.* Your leases will be converted to CHLs if you take action in conformance with the regulations once they take effect. [Emphasis added.]

By letter dated January 12, 1982, Altex confirmed a telephone conversation with Lopez in the Utah State Office regarding lease U-2754, in which copies of the Notice of Intent and “a letter we have received indicating that our lease will not be revoked on its termination date” were enclosed. The letter states: “It was my understanding from our conversation that *Altex additionally is not required to pay any lease rentals to insure our ownership* of this lease. I would appreciate written verification of this for our files.” (Emphasis added.) At the bottom of the letter the following statement appeared, below which Lopez signed his name:

This constitutes verification that *no rentals are due* on May 1, 1982[,] in connection with Federal Oil and Gas Lease U-2754, and further that *said lease will not expire of its own terms on said date, but will remain in full force and effect* being owned by Altex Oil Corporation until and after its conversion into a [CHL] as authorized by Public Law 97-98. [Emphasis added.]

Consistent with the communication from the BLM Director’s office regarding the status of the four leases, in a letter to Altex dated January 20, 1982, Lopez stated that the *“leases and annual rentals due will be considered suspended at the end of their primary term, pending implementation of regulations governing such conversion rights. We will notify you when rentals will be due.”* (Emphasis added.)

[3] BLM made no effort until recently to question, explain, or correct appellants’ understanding or to timely demand subsequent rental payments, even taking the early step of showing in its Serial Register Pages²⁹ that operations and

²⁹ Serial Register Pages are part of BLM’s “Case Recordation (MASS)” system. They are not part of the land status records for purposes of ascertaining the applicability of the notation rule, which is not an issue in these appeals. See 43 C.F.R. § 2091.0-5(e) (definition of *public lands records*); *David Cavanagh*, 89 IBLA 285, 305-06, 92 I.D.

(continued...)

production and payments for the affected leases in the application had been suspended as the result of the CHL applications and the approval of their PoO.³⁰ The record confirms that, consistent with its interpretation and communications, BLM would not have accepted advance rentals after the 10th year of each lease. We find, therefore, that in this instance, the record abundantly demonstrates that appellants and their predecessor were repeatedly advised in written communications from BLM that, in the context of implementing the new CHLA, the obligation to pay annual rental pertained only to existing oil and gas leases in their primary term, that no advance rental was due or required for the years following the end of the 10th year of the primary term, that no adverse consequence would attend the failure to pay rental, and that the obligation to pay annual rental would next arise from the new combined hydrocarbon leases. In such circumstances, the Government is estopped from demanding rentals for the period during which the lease terms have been suspended, and estopped from declaring the leases terminated by reason of not doing so.³¹ The Decisions are reversed to the extent they held otherwise.

²⁹ (...continued)

564, 575-76 (1985) (Burski, A.J., concurring), *aff'd*, Civ. No. A86-041 (D. Alaska Mar. 18, 1988), dismissed for lack of prosecution, No. 88-3844 (9th Cir. Dec. 13, 1988). Regardless of the weight ultimately accorded the Page entries, they are properly accepted as evidence of record bearing on the parties' contentions.

³⁰ The "Act Date" is shown as Aug. 8, 1983, code 676; under Action, the notation "SUS OPS & PROD/NO PMT" appears and, under Action Remarks, "CHL Conversion" is noted. The run date is Aug. 18, 2002. Neither party has addressed the Serial Register Pages or how those entries can be squared with the fact that only a section 39 suspension under the MLA, 30 U.S.C. § 209 (2000), could suspend operations and production and the obligation to pay annual rental, and such a suspension must be ordered or assented to in the interest of conservation. 43 C.F.R. § 3103.4-4(a), (d). Nothing in the record shows or suggests the requisite finding of a conservation interest. *See also* Kirkwood SSOR, Ex. T (Mar. 12, 1986, letter from Lopez to Altex explaining the proper basis for a suspension of payments); *River Gas Corp.*, 149 IBLA 239, 244 (1999).

³¹ After this decision, appellants have no basis in estoppel to avoid paying rental in the future as required by the MLA and their oil and gas leases.

II. *Whether BLM Correctly Rejected Certain Leases on the Basis That the Owners of Record Had Not Filed an Application to Convert Their Oil and Gas Leases into CHLs*

The Kirkwood Decision identified 19 concurrence letters, and the LLC Decision identified 10, 1 of which (U-44773) is at issue in the LLC's appeal. Except for identifying the different proposed STSA and unit areas, each such letter of concurrence states:

We have reviewed the proposed Circle Cliffs Unit Area and the plan of operations which were supplied to us under cover letter dated February 3, 1983, from Edmundson, Inc.

We hereby concur with said plan of operations and wish it to be applied to our leases within the Circle Cliffs Unit Area for purposes of converting said oil and gas leases to combined hydrocarbon leases.

BLM's decisions rejected the applications to the extent they include the leases owned by such concurring lessees. Kirkwood and the LLC challenge that action, arguing that the letters of concurrence adequately expressed an intent to join in the conversion applications. Kirkwood suggests that Lopez acknowledged the adequacy of the letters as an indication of an intent to join in the application in a letter to Kirkwood dated May 19, 1983. *See* Kirkwood SOR, Ex. N.

BLM argues on appeal that it acted properly because those owners did not sign the application as required by 43 C.F.R. § 3140.2-3(a), and that the concurrence letters fail to state an intention to join in the application or accept subsequent modifications of the PoO. Answer at 9-11.

It is well established that a statutory requirement may not be treated as a curable defect. *Larry G. Andrus, Jr.*, 169 IBLA 353, 357 (2006); *N.T.M., Inc.*, 128 IBLA 77, 79 (1993); *Harvey Clifton*, 60 IBLA 29, 39 (1981). While the CHLA states that only the owner of an oil and gas lease in a STSA is entitled to convert such lease, it does not contain any provision requiring the signature of every record title holder on the application (simply letters in these appeals), nor does it specify that an application shall be rejected if all the record title holders do not sign it.

No special form is required to request conversion of an oil and gas lease. 43 C.F.R. § 3140.2-1. The regulation provides that "[t]he applicant shall submit . . . a written request for a [CHL] signed by the owner of the lease" accompanied by three copies of the PoO, but there is no provision specifying that a failure to sign the

written request results in exclusion of otherwise qualifying leases from the application. 43 C.F.R. § 3140.2-3(a). In fact, the consequence of failing to sign the application was neither raised in comments on the proposed rulemaking nor broached by BLM in the regulatory preamble. *See* 47 Fed. Reg. 8734, 8735 (Mar. 1, 1982); 47 Fed. Reg. 22474, 22476 (May 24, 1982).

We generally agree that concurrence could have been articulated more completely and more precisely, but we do not agree that the letters should be dismissed as signifying nothing. Appellants led the initiative to unitize numerous leases and convert them to CHLs, and submitted the applications for themselves and for the other lessees. They prepared the required PoO (or caused it to be prepared) for the combined lease acreage, and it is the PoO, which must support that request or application, that provides the true substance of the request to convert existing oil and gas leases. *See* 43 C.F.R. § 3140.2-3.

Here, affected record title owners stated in their letters of concurrence that they had reviewed and concurred in the PoO and unambiguously stated that they “wish it to be applied to our leases within the Circle Cliffs Unit Area *for purposes of converting said oil and gas leases to combined hydrocarbon leases.*” Although undated, each letter identifies the specific CHL application by referring to the STSA and unit area. And though BLM now questions whether the record title owners also concurred in the revisions to the PoO, we observe that none of them withdrew their concurrence, subsequently questioned any aspect of the application or PoO, or otherwise indicated that they no longer agreed to be included in the proposed units. Nor would they have been likely do so, given the nature of the plan modifications in the record (in Kirkwood’s PoO they pertain to access roads and air pollution during drilling, and in the LLC’s PoO the plan modification, which is no longer in the record, concerns a technical plan for illustrating how and when each lease in the proposed Tar Sand Triangle Unit would be developed). More to the point, BLM never communicated or indicated that the concurrence letters were fatally deficient and, in fact, appeared to accept them for the purpose for which they were submitted, as Kirkwood argues and as Lopez’s May 19, 1983, letter to Kirkwood, in which he listed the lessees for whom no “letter of concurrence” had been received and requested the submission of same, implicitly admits. Kirkwood SOR, Ex. N.³²

³² There is other evidence of BLM’s acceptance of the concurrence letters as adequately expressing an intent to be included in, and bound by, the CHL application Kirkwood filed. A two-page list of leases included in the application appears on the left side of the case file. Page 2 consists of two lists: “Concurrence For Conversion On File” and “No Concurrence For Conversion On File.” We are unable to determine
(continued...)

[4] Where the requirement to sign the application appears only in the regulation and neither statute nor regulation specifies rejection of the lease(s) from the pending CHL conversion application, and where the record title owners plainly joined in the substantive component of that application — a complete PoO — the failure to also sign the letters requesting conversion is curable and, accordingly, we set aside the decision to the extent that BLM determined otherwise and remand the cases so that the concurring lessees (or their successors) may be provided a reasonable opportunity to cure the perceived deficiency.

III. Whether BLM Correctly Rejected Certain Leases Because Their Primary Terms Had Expired Prior to Submission of a Complete PoO

In contrast to the leases discussed above in sections I and II, this issue concerns leases that expired before the respective PoOs were deemed complete. The Kirkwood appeal involves five leases that were issued effective March 1, 1973, so that their primary terms ended on March 1, 1983.³³ The application was submitted on February 25, 1983, with the PoO, which was deemed complete as of August 8, 1983.

The owner of an oil and gas lease located in STSAs issued prior to November 16, 1981, was eligible to and could convert such lease into a CHL by filing an application and acceptable PoO “within two years from November 16, 1981.” 30 U.S.C. § 226(n)(1)(A) (2000); *see also* 43 C.F.R. § 3140.2-3(a). The regulations additionally specify that lessees may convert their existing oil and gas leases, provided “conversion is consistent with the provisions of this subchapter.” 43 C.F.R. § 3140.1-1. The CHLA requires the filing of a “complete” PoO, defined in the CHLA as a PoO that “is in substantial compliance with the regulations . . . for the filing of such plans.” 30 U.S.C. § 226(n)(1)(B) (2000). To be in substantial compliance, the PoO must meet the requirements of 43 C.F.R. § 3592.1, regarding how proposed exploration, prospecting, testing, development, or mining operations are to be

³² (...continued)

whether this is Kirkwood’s or BLM’s document. It is followed, however, by BLM’s Serial Register Page for each lease, run in April 2002. Each Register Page identifies the record title holder. For every lease held by a party other than Kirkwood, the Register Page acknowledges that it is part of the CHL application filed on Aug. 8, 1983, a circumstance clearly at odds with BLM’s position on appeal. The individual case files for the leases similarly confirm that BLM had not previously challenged the sufficiency of the concurrence letter.

³³ *See* leases U-21670, U-21671, U-21673, U-21674, and U-21675.

conducted, as well as those of 43 C.F.R. § 3140.2-3 relating to protection of the environment and diligent development using enhanced recovery methods.

As to the timely filing of the PoO, 43 C.F.R. § 3140.3-1 states that a PoO “shall be filed on or before November 15, 1983, or prior to the expiration of the lease, whichever is earlier, except as provided in § 3140.1-2 of this title.”

The regulation at 43 C.F.R. § 3140.1-2 states:

(a) Owners of oil and gas leases in [STSAs] which are scheduled to expire prior to the effective date of these regulations [June 23, 1982] or within 6 months thereafter [Dec. 22, 1982], may preserve the right to convert their leases to [CHLs] by filing a Notice of Intent to Convert with the State Director, Utah State Office, [BLM]. . . .

(b) A letter, submitted by the lessee, notifying the [BLM] of the lessee’s intention to submit a [PoO] shall constitute a notice of intent to convert a lease. The Notice of Intent shall contain the lease number.

(c) The Notice of Intent shall be filed prior to the expiration date of the lease. The notice shall preserve the lessee’s conversion rights only for a period ending 6 months after the effective date of this subpart [Dec. 22, 1982].

[5] Although no regulation is cited in its decision, it appears that BLM concluded that, in accordance with 43 C.F.R. § 3140.3-1, Kirkwood was required to submit his application, supported by a complete PoO, on or before the earlier of November 15, 1983, or the lease expiration date. However, the CHLA does not establish any such limitation. To the contrary, the statute provides only that “[t]he owner of (1) an oil and gas lease issued prior to November 16, 1981, . . . *shall be entitled to convert such lease . . . to a [CHL] . . . upon the filing of an application within two years from November 16, 1981.*” 30 U.S.C. § 226(n)(1)(A) (2000) (emphasis added). Kirkwood fulfilled the statute’s requirement, and thereby became “entitled” to convert the five leases. The effect of 43 C.F.R. § 3140.3-1 is to reduce the statutory 2-year period by more than 8 months and vitiate the statutory entitlement to lease conversion where no such authority is stated in the CHLA or suggested by its meager legislative history. “A regulation cannot create authority where none has been conferred by Congress, and where Congress has enacted a statute, a regulation cannot exceed, diminish, or negate the authority thus granted.” *Jerry D. Grover*, 160 IBLA 261, 267 (2003). To the extent there is a conflict between the statute and the regulation that purports to implement it, the statute controls. *Randy Roberts*,

175 IBLA 155, 164 n.8 (2008), and cases cited. Kirkwood is “entitled” to convert the five leases because he had timely filed an application, supported by a complete PoO as of August 8, 1983, within the 2-year period.³⁴ In its written communications with Kirkwood regarding these five leases and similarly situated leases, BLM seems to have implicitly reached the same conclusion. *See* Kirkwood SOR, Exs. A, C, and Kirkwood SSOR, Exs. T-V.

Moreover, none of the leases involved in these appeals, with one possible exception,³⁵ ever went into operations and/or production. Therefore, the leases could be terminated only for nonpayment of the annual rental and, indeed, the five leases had been the subject of some of the communications with BLM described above. Our ruling that the Government is estopped from demanding rentals for past years — and BLM’s admission that it is estopped from invalidating the leases on that ground — provide an additional basis for reversal. Accordingly, that part of the Kirkwood Decision declaring these five leases excluded from the application is reversed.³⁶

[6] Although the LLC Decision was also based on the conclusion that the leases had terminated by operation of law when their primary terms ended before the PoO was deemed complete, the LLC’s leases present a different situation. The LLC’s appeal relates to 10 of 14 leases identified in the LLC Decision at 2, the primary terms of which ended in 1982.³⁷ Unlike Kirkwood’s leases, the LLC’s leases were subject to the exception contained in 43 C.F.R. § 3140.3-1 because they were scheduled to expire between November 16, 1981, and December 22, 1982, and therefore required a

³⁴ It appears that BLM derived the alternate filing deadline for the PoO from that part of the CHLA that also mandated the issuance of final regulations “within six months of November 16, 1981,” which also established the date when the effectiveness of a Notice of Intent ended. 30 U.S.C. § 226(n)(1)(B) (2000). The exception envisioned in 43 C.F.R. § 3140.1-2 clearly does not apply to Kirkwood’s five leases, because those leases were not due to reach the end of their 10th year “after November 16, 1981, and before six months following issuance of implementing regulations.” 30 U.S.C. § 226(n)(1)(B) (2000).

³⁵ The possible exception is Lease U-2754 in the LLC’s appeal, which at one point in the 1980s had a well. *See, e.g.*, BLM memorandum dated Dec. 22, 1986.

³⁶ Our ruling moots Kirkwood’s untimely objections to the determination that the initial PoO was deficient and to the nature of those perceived deficiencies.

³⁷ *See* leases U-2754 (May 31, 1982), U-17782 through U-17784 (Jan. 31, 1982), U-18656 through U-18660 (June 30, 1982), and U-18661 (July 31, 1982).

Notice of Intent to commence the conversion process.³⁸ Under 43 C.F.R. § 3140.3-1, to be timely, the LLC had to submit a complete PoO by December 22, 1982. As required, the LLC filed Notices of Intent on December 3, 1981 (leases U-17782 through U-17784), and on February 1, 1982 (leases U-2754, U-18656 through U-18661), prior to lease expiration. Under the statute and the implementing regulation, the timely filing of a Notice of Intent preserved the LLC's right to convert its oil and gas leases only until December 22, 1982. 30 U.S.C. § 226(n)(1)(B) (2000); 43 C.F.R. § 3140.1-2(c). As the LLC's PoO was deemed complete as of July 19, 1983, well after the right to convert had expired, the LLC Decision properly excluded the 10 leases from the pending CHL application, not because the leases had terminated by operation of law before the PoO was deemed complete, but because the statutory right to convert them into CHLs had ended as a matter of law. The LLC Decision is accordingly modified and affirmed as so modified.

IV. Whether Appellants Have Been Prejudiced by BLM's Failure to Act on Their CHL Applications and, if so, Whether There is Any Relief That This Board Can Grant

Appellants express their exasperation with the fact that their CHL applications have been pending for so many years, despite the CHLA's mandate that the Department act on a PoO within 15 months of submittal. They allege that the Department's inaction has created the additional burdens of increased lease maintenance costs and increased risk of losing the leasehold and conversion right. Those claims are beyond this Board's authority and, to the extent that any right of action may exist, they must be pursued in a court of competent jurisdiction.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, that part of each decision requiring the payment of 7 years of annual rental for past years is reversed; that part of each decision eliminating leases from the conversion applications because the record title holders did not sign appellants' letters requesting conversion is set aside and the cases are remanded to allow the lessees (or their successors-in-interest) a reasonable opportunity to cure that deficiency; that part of each decision requesting additional

³⁸ It should be noted that the statute defines the expiration period as "after November 16, 1981, and before six months following issuance of implementing regulations." 30 U.S.C. § 226(n)(1)(B) (2000). The regulation defines the period as "prior to the effective date of these regulations, or within 6 months thereafter." 43 C.F.R. § 3140.1-2.

information and granting suspensions is affirmed; that part of the Kirkwood Decision excluding from the conversion application 5 oil and gas leases for which a complete application had been filed within the 2-year period specified in the statute is reversed; and the basis for that part of the LLC Decision excluding 10 leases from the pending application is modified to reflect that the PoO was not deemed complete until after the right to convert had ended as a matter of law and is affirmed as so modified.

_____/s/_____
T. Britt Price
Administrative Judge

I concur:

_____/s/_____
Christina S. Kalavritinos
Administrative Judge