AGRI PROPERTIES LLP &
BAKKEN PRODUCTION INC.

193 IBLA 389 Decided November 27, 2018
Appeal from a decision of the Deputy State Director, Division of Energy, Minerals and Realty, Montana State Office, Bureau of Land Management, denying a request by Federal oil and gas lessees for a partial refund of the per-acre bonus bid paid, plus interest, for a partially cancelled Federal competitive oil and gas lease. NDM 105571.

Set aside and remanded.

1. Federal Oil and Gas Royalty Management Act of 1982

The Federal Oil and Gas Royalty Management Act requires that BLM refund an oil and gas lessee's overpayment. An "overpayment" is any payment in excess of an amount legally required to be paid on an obligation, including overpayment of a bonus bid.

2. Surveys of Public Lands

The approved plat of an official survey is conclusive as to the designations of the tracts contained in the survey and govern the disposal of those lands.

3. Federal Oil and Gas Royalty Management Act of 1982; Surveys of Public Lands

When BLM relies on the officially-filed survey contained in the public land records in issuing an oil and gas lease, the high bidder is legally required to pay the processing fee, rental, and bonus bid associated with the lands included in the lease. As a result, even if a later officially-filed resurvey
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shows that a portion of the lands leased are not owned by the United States, the lessee has not made an "overpayment of an obligation" requiring a refund under the Federal Oil and Gas Royalty Management Act.

4. Administrative Procedure: Decisions; Rules of Practice: Appeals

Because BLM employees are obliged by the conditions of their employment to abide by BLM's policies, it is proper for the Board to consider policy guidance in deciding whether a decision on appeal is in error.


OPINION BY ADMINISTRATIVE JUDGE SOSIN

Agri Properties LLP and Bakken Production Inc. have appealed from a July 21, 2015, decision of the Deputy State Director, Division of Energy, Minerals and Realty, Montana State Office, Bureau of Land Management (BLM), denying their request for a partial refund of the per-acre bonus bid paid, plus interest, in connection with Federal competitive oil and gas lease NDM 105571 in McKenzie County, North Dakota. The companies sought the refund following BLM's May 8, 2015, decision partially canceling the lease. BLM's decision to cancel the lease was based on its determination, after officially accepting an official resurvey of the area encompassing the lease, that the lease included lands that are not owned by the United States.

SUMMARY

BLM sold and issued an oil and gas lease to the appellants in 2013; that lease encompassed 80 acres, based on the officially-filed survey at the time. In 2014, BLM officially accepted a resurvey that identified 24 acres out of the 80 acres included in the lease as eroded and not owned by the United States. BLM therefore partially cancelled the lease. The appellants then sought a refund of the per-acre bonus bid they paid for the eroded acres included in the lease, citing the Federal Oil and Gas Royalty Management Act (FOGRMA), under which a lessee is entitled to a refund of any "overpayment of an obligation." BLM denied the appellants' request for a refund because when BLM issued the lease, the lands were identified in the officially-filed survey as owned by the United States, and because, based on its own guidance, no refund is appropriate when a resurvey results in a change in lease acreage.

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We conclude that BLM did not err in issuing the lease in reliance on the officially-filed survey, and the appellants therefore were legally obligated to pay the fee, rental, and bonus bid. Because the appellants were legally required to pay the bonus bid associated with the lease, they made no “overpayment of an obligation” requiring a refund under FOGRMA. BLM, however, retains discretion under the Federal Land Policy and Management Act (FLPMA) to provide refunds and has established policy guidance directing when it will do so. In this case, we find that BLM’s decision to deny the appellants’ refund was not dictated by the guidance BLM relied upon because that guidance does not apply to the facts here. We therefore conclude that the appropriate action is to set aside and remand BLM’s decision.

BACKGROUND

A. Lease NDM 105571

BLM offered lease NDM 105571 for sale on July 16, 2013. BLM described the lease as encompassing 80 acres, situated in the SW¼SE¼ and SE¼NW¼ sec. 24, T. 153 N., R. 98 W., 5th Principal Meridian, McKenzie County, North Dakota. The appellants were the successful bidders for the lease, with a high bid of $1,160,000 (80 acres x $14,500/acre). On the day of the lease sale, the appellants paid the non-refundable processing fee for the competitive lease application, the first year’s advance rental, and the minimum bonus bid for the lease. BLM issued the lease to the appellants on August 7, 2013, after the appellants paid the balance of the bonus bid. BLM made the lease effective September 1, 2013, for a term of 10 years and so long thereafter as oil or gas was produced in paying quantities.

B. Resurvey of the Leased Lands and BLM’s Decision Partially Cancelling the Lease

At the time of the lease sale and issuance, the public land records contained an official survey plat filed in 1901 for T. 153 N., R. 98 W., 5th Principal Meridian, North Dakota.
Dakota. That survey placed the Missouri River just west of section 24 of the township, and “all lands [within lease NDM 105571] were officially recognized as Federal minerals . . . .”

In 1953, the U.S. Army Corps of Engineers (Corps) completed a resurvey of the area in connection with the Garrison Reservoir project. In the course of its resurvey, the Corps determined that the Missouri River had moved eastward, bisecting the SE\(\frac{1}{4}\)NW\(\frac{1}{4}\) sec. 24, leaving only 16 acres of land (out of 40 acres) above the high-water mark.

On December 18, 2013, BLM’s Acting Chief Cadastral Surveyor for North Dakota officially accepted the Corps’ 1953 resurvey, which reflects that 24 acres in the SE\(\frac{1}{4}\)NW\(\frac{1}{4}\) sec. 24 along the Missouri River were eroded. Because the lands were eroded by the movement of the Missouri River and had become part of the bed of the river, they were owned not by the United States, but by the State of North Dakota. This is because ownership of the bed of navigable rivers is determined by state law, and under North Dakota law, a riparian owner loses title to lands that “are eroded and washed away by a navigable stream.”

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7 Survey Plat (1896).
8 Decision (July 21, 2015).
9 Statement of Reasons (SOR) at 2; id., Exhibit (Ex.) D, Final Project Map, Garrison Reservoir, Segment AA, Sheet 28 of 36 (Aug. 6, 1953).
10 Id. at 2 and Ex. D.
11 Supplemental Plat (Sheet 2 of 4), T. 153 N., R. 98 W., 5th Principal Meridian, North Dakota (Dec. 18, 2013) (Supplemental Plat).
13 Hogue v. Bourgeois, 71 N.W.2d 47, 52 (N.D. 1955); see id. (“The title of the State of North Dakota to lands below low water mark of a navigable stream is coextensive with the bed of the stream as it may exist from time to time. . . . [A]s the Missouri River eroded and submerged the mainlands on the east bank of the river, . . . the title to the submerged lands passed by operation of law to the State of North Dakota.”); see also J.P. Furlong Enterprises, Inc. v. Sun Exploration & Production Co., 423 N.W.2d 130, 132-33 (N.D. 1988) (“The Missouri River and the land adjoining it (i.e., riparian land) are subject to the processes of accretion, erosion, avulsion, and reliction. The consequences of these processes are addressed in NDCC Ch. 47-06. . . . [This statute] generally
BLM prepared a Supplemental Plat, which was officially filed on January 29, 2014. The Supplemental Plat identifies 40 acres of “Original Acreage,” 24 acres of “Eroded Land,” and 16 acres of “Remaining Land” in the SE ¼NW ¼ sec. 24.

BLM then issued a decision canceling the lease as to those eroded lands, identifying the lands remaining in the lease as:

T. 153 N, R. 98 W, 5th PM, ND
SEC. 24 POR SENW (16.00 AC);
SEC. 24 NWSE;
MCKENZIE COUNTY
56.00 AC
PD.

In its decision, BLM explained that it had officially accepted the Corps’ resurvey on January 29, 2014, and the resurvey officially recognized that a portion of the 80 acres originally included in lease NDM 105571 was eroded. BLM therefore cancelled the lease in part as of that date, identifying the new rental payment as “$84.00 (56 acres x $1.50).”

C. The Appellants’ Request for a Partial Refund and BLM’s July 2015 Decision

The appellants did not appeal BLM’s May 2015 decision partially cancelling the lease, and do not dispute BLM’s basis for cancellation—that a portion of the leased lands is not owned by the United States. But in a letter dated June 22, 2015, the appellants demanded a partial refund of the per-acre bonus bid paid for the lease. The appellants stated that they should receive a “$348,000 refund out of the total $1,160,000 lease bonus . . . paid for Federal Oil and Gas Lease NDM 105571,” and that the refund amount “represents the portion of the bonus attributable to the 24 acres eroded by the Missouri

follows the common-law rule that a riparian owner gains land by accretion and reliction and loses it by erosion.”).

14 Supplemental Plat.
15 Id.
16 Decision, Oil and Gas Lease Cancelled in Part (May 8, 2015).
17 Id.
18 Id.
19 Demand for Refund (June 22, 2015).
River as set out in the BLM Decision dated May 8, 2015." Citing to FOGRMA, the appellants stated that the refund amount constitutes an "overpayment of an obligation" under that statute requiring repayment. The appellants also sought interest on the overpayment under FOGRMA.

In the decision now on appeal, the Deputy State Director denied the appellants' request. The Deputy State Director stated that at the time of the lease sale and lease issuance, the boundaries of the lease were "fixed" by the original 1901 survey "until otherwise changed or updated by a later official survey." The Deputy State Director explained that because "rivers are constantly moving, especially in the plains states, ... the official record has to be the documentation relied on for the descriptions [of oil and gas leases]." He stated that because BLM can only divest public assets through an official cadastral survey, the recognized Federal minerals covered by the lease "were in effect until the resurvey was officially filed effective January 29, 2014." The Deputy State Director therefore concluded that BLM would not refund the appellants' bonus or interest "for the eroded lands that were recognized [in 2014] as no longer being Federal minerals." He further noted that if the appellants "had concerns about possible river movement" involving the lease lands, they could have made their own evaluation and "chosen not to lease the lands in NDM 105571."

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20 Id. at 1; see id. ("It would be wrong for the Department to retain the $348,000 that [the appellants] paid for a [F]ederal lease on acreage that was not and is not owned by the United States.").

21 Id. at 2; see 30 U.S.C. §§ 1721a(a)(1) ("If ... a lessee ... determines that ... a refund request is necessary to correct an ... overpayment of an obligation, the lessee ... shall ... request a refund within a reasonable period of time ... ") and 1702(25)(B) (defining "obligation" to include bonus payments).

22 Demand for Refund (June 22, 2015) at 2 (citing 30 U.S.C. § 1721(h) and 26 U.S.C. § 6621(b)).

23 Decision (July 21, 2015) ("At the time of issuance of Federal oil and gas lease NDM 105571, all lands were officially recognized as Federal minerals according to the most current official survey, the Dike survey executed in 1901.").

24 Id.

25 Id.

26 Id.

27 Id.
The appellants appealed BLM's decision, and BLM filed a motion to dismiss the appeal as untimely. By Order dated March 29, 2016, we denied BLM's motion to dismiss. The appeal is now ripe for final disposition on the merits.

DISCUSSION

In this appeal, the following is not in dispute: (1) at the time of the lease sale and lease issuance, the 1901 survey was the official survey in the public land records, and reflected 80 acres of Federal minerals available for leasing; (2) BLM officially accepted the Corps' resurvey in 2014, which reflects the erosion of 24 acres included in the lease; and (3) BLM properly partially cancelled the lease in 2015 to exclude those 24 acres from the lease because they are not owned by the United States.

The single issue in this appeal is whether the appellants are entitled to a refund of their bonus bid (including interest) associated with the 24 acres now excluded from their lease. As explained below, we conclude FOGRMA does not require that BLM refund to the appellants the portion of the per-acre bonus bid paid associated with the 24 acres now recognized as property of the State of North Dakota. But under FLPMA, BLM has retained discretion to provide refunds, which BLM implements through its policy guidance. Because we find that BLM's decision was based on guidance that does not apply to the facts of this case, we set aside and remand BLM's decision.

A. Under FOGRMA, A Lessee is Entitled to a Refund of an “Overpayment of an Obligation”

[1] Section 111A of FOGRMA authorizes a Federal oil and gas lessee to request a refund within a reasonable period of time if the lessee determines a refund is necessary to correct an “overpayment of an obligation.” The statute defines “overpayment” as “any payment by a lessee . . . in excess of an amount legally required to be paid on an obligation.” A lessee's “obligation” is defined broadly as “any duty of a lessee . . . to pay . . . the principal amount of any royalty, minimum royalty, rental, bonus, net profit

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28 IBLA 2015-229 Order: Motion to Dismiss Denied (Mar. 29, 2016).
29 43 U.S.C. § 1734(c) (2012) (providing that “the Secretary . . . may cause a refund to be made” when “any person has made a payment . . . relating to the sale, lease, use, or other disposition of public lands which is not required or is in excess of the amount required . . .”).
31 Id. § 1702(27).
share or proceed of sale . . . which arises from or relates to any lease . . .” In terms of
the duties of the Secretary, an “obligation” is defined just as broadly and includes any
duty to refund “the principal amount of any royalty, minimum royalty, rental, bonus, net
profit share or proceed of sale . . .” Because “obligation” includes bonus bids paid on
an oil and gas lease, section 111A of FOGRMA applies to the appellants’ request for a
refund.

In making a request for a refund, FOGRMA requires the lessee to follow certain
steps, including requesting the refund in writing, providing “information that reasonably
enables the Secretary to identify the overpayment,” and providing “the reasons why the
payment was an overpayment.” If a proper request for a refund is made, the statute
requires that such refund “shall” either be paid or denied within 120 days of the date the
Secretary receives the request.

Up until 2015, FOGRMA also required payment of interest on any overpayment of
an obligation. But in 2015, Congress repealed that provision.

B. The Appellants’ and BLM’s Arguments on Appeal

On appeal, the appellants argue that BLM must refund the bonus bid overpayment
because it leased lands the United States did not own at the time of the lease sale and
lease issuance. The appellants take issue with the statement in BLM’s decision that
BLM can only take action that is consistent with an official survey. They state: “A State’s
title to the bed of navigable rivers within its borders is conferred by the United States
Constitution, absolute, and follows the river’s gradual changes in course.” Therefore,
the appellants argue that the State of North Dakota’s ownership of the eroded 24 acres
“does not depend on any survey to be recognized or vest only when the BLM officially

32 Id. § 1702(25)(B).
33 Id. § 1702(25)(A).
34 Id. § 1721a(b)(1).
35 Id. § 1721a(b)(2).
36 See id. § 1721(h) (2012 & Supp. III 2015) (providing that “[i]nterest shall be allowed
and paid or credited on any overpayment, with such interest to accrue from the date
such overpayment was made . . .”).
37 See Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, Division C
(Finance), Title XXXII (Offsets), Subtitle C (Outlays), § 32301, 129 Stat. 1312, 1741
(Dec. 4, 2015).
38 SOR at 3.
39 Id.
recognizes that the river has moved.”\textsuperscript{40} They further state that “BLM’s leasing authority is based on statutes and regulations that nowhere refer [to] an ‘officially recognized . . . survey.’”\textsuperscript{41}

Fundamental to the appellants’ position is that the United States cannot lease lands it does not own.\textsuperscript{42} Relying on Board precedent, the appellants argue that a refund “is proper when, through no fault of the lessee, a federal lease is issued under a mistake of law or fact and then cancelled as a result.”\textsuperscript{43} The appellants state that here BLM issued lease NDM 105571 “based on some mistake of fact (the river’s position) or law (ownership),” and that this mistake “can[not] be blamed” on the appellants.\textsuperscript{44} They state that the resurvey “confirmed that a mistake was made in leasing the eroded land, if only because the United States had not owned it for over 60 years.”\textsuperscript{45} Consequently, the appellants argue that because BLM leased 24 acres “that had already been eroded by the Missouri River more than 60 years previously,” the per-acre bonus bid associated with those acres constituted an “overpayment of an obligation” under FOGRMA that requires a refund.\textsuperscript{46}

In response, BLM re-iterates its position that the sale and issuance of the lease was consistent with the official survey in the public land records at that time. BLM states that the official survey is “conclusive” as to the location of corners and lines, “whether such location is right or wrong, as may be shown by a subsequent survey.”\textsuperscript{47} BLM further argues that when a resurvey shows that the acreage contained in an oil and gas lease is smaller than the area shown by the original survey, BLM is entitled to adjust the acreage in the lease in accordance with the resurvey.\textsuperscript{48} And when BLM makes such an adjustment in acreage as it did in this case, BLM states that the policy contained in its Competitive Leases Handbook directs that no refund of bonus bids or rental monies is

\textsuperscript{40} \textit{Id.}; see Reply at 4 (“The State of North Dakota’s title to the Missouri Riverbed within its borders is ‘absolute’ . . . . It does not depend on BLM recognition or acceptance.”).
\textsuperscript{41} SOR at 6.
\textsuperscript{42} \textit{Id.} at 4 (citing the Mineral Leasing Act, 30 U.S.C. § 181 (2012), which authorizes leasing oil and gas deposits “owned by the United States . . .”).
\textsuperscript{43} Reply at 4 (citing \textit{Elaine D. Berman}, 140 IBLA 173, 176 (1997); \textit{Romola A. Jarett}, 63 IBLA 228, 89 I.D. 207 (1982)).
\textsuperscript{44} \textit{Id.} (“The mistake was then corrected by cancelling the lease as to the eroded acres. There is simply no way the mistake or cancellation can be blamed on Agri/Bakken.”).
\textsuperscript{45} \textit{Id.}
\textsuperscript{46} SOR at 5-6; Reply at 4, 5.
\textsuperscript{47} Answer at 8 (quoting \textit{Vaught v. McClymond}, 116 Mont. 542, 549-50 (1945)).
\textsuperscript{48} \textit{Id.} (citing \textit{Grace M. Brown}, 24 IBLA 301 (1976)).
made.\textsuperscript{49} That Handbook provides: "When corrected lease acreage is due to a resurvey, any increase or decrease in acreage would require a change in only the rental amount, beginning with the next lease anniversary date after notification to lessee. No refunds are to be made for either bonus bid or rental monies."\textsuperscript{50}

BLM states that in this case it offered for lease Federal minerals based on an official survey, "such that no administrative mistake was made in its initial description of the lands for competitive bid . . . ."\textsuperscript{51} BLM further states that "[t]he partial lease cancellation due to the resurvey did not change the initial payment obligation required to be paid by Appellants as a winning bidder in the competitive oil and gas lease sale . . . ."\textsuperscript{52} Therefore, BLM argues that its "partial lease cancellation due to the resurvey" did not result in an overpayment requiring a refund.\textsuperscript{53}

BLM further notes that when it offers a lease for sale "[t]he United States does not make any representation or warranty as to its title either in the lease or as a result of the BLM's status investigation for competitive leases."\textsuperscript{54} BLM states that a potential lessee may "examine the records of the county in which such land is located and conduct a physical inspection of the land" to discover any defects in the United States' title.\textsuperscript{55}

C. \textit{FOGRMA Does Not Require a Refund When BLM Issues an Oil and Gas Lease Consistent with the Official Survey at the Time of Lease Issuance}

Board precedent establishes that when BLM issues an oil and gas lease (or portion of a lease) without complying with applicable law, or when lands included in the lease were then unavailable for leasing, BLM must cancel the lease and provide an appropriate


\textsuperscript{50} Handbook H-3120-1 at 43.

\textsuperscript{51} Answer at 10; see \textit{id.} at 2 (stating that as a result of BLM's official filing of the Corps' survey in 2014, "a portion of the Federal lands leased in NDM 105571 were officially recognized as eroded.").

\textsuperscript{52} \textit{Id.} at 11.

\textsuperscript{53} \textit{Id.} at 11-12.

\textsuperscript{54} \textit{Id.} at 8.

\textsuperscript{55} \textit{Id.} at 8-9 (quoting TED P. STOCKMAN \& PHILLIP R. CLARK, 1-7 LAW OF FEDERAL OIL AND GAS LEASES § 7.03, Competitive Leases).
refund to the lessee. In *Elaine D. Berman*,\(^{56}\) for example, the Board reversed a BLM decision denying a refund to an oil and gas lessee after a Federal district court canceled the lease, holding that BLM had not properly complied with the National Environmental Policy Act or Endangered Species Act before issuing it. The Board found that “it is appropriate to refund lease rentals where the lease should never have been issued, there is no evidence lessees derived any benefit from possession of the lease during the time they held it, and no indication of *mala fides* or other factors militating against repayment.”\(^{57}\) The Board found that although the lands at issue were available for oil and gas leasing at the time the leases issued, BLM had made “a mistake of law . . . which could not be attributed to the lessees,” and a refund was proper.\(^{58}\) Similarly, in *Red River Oil & Gas, LLC*,\(^{59}\) we affirmed BLM decisions cancelling oil and gas leases and providing for refunds of bonus bids, rentals, and administrative fees because BLM had failed to obtain the consent of the Forest Service before leasing National Forest System lands, as required by the Mineral Leasing Act.\(^{60}\)

We have reached the same result in instances where BLM leased lands that were unavailable for leasing at the time of lease issuance. In *Romola A. Jaret*,\(^{61}\) BLM partially cancelled an oil and gas lease and refunded lease rental payments to the lessee because, at the time of lease issuance, BLM “mistakenly believed” that certain lands included in the lease were available for leasing when those lands were patented under the Homestead Act, with no mineral reservation to the United States.\(^{62}\) The Board rejected the appellant’s request for interest on her refund, but confirmed that BLM properly provided the refund because the lands “were never really subject to oil and gas leasing and . . . the lessees derived no benefits from the lease.”\(^{63}\) In reaching this conclusion, the Board relied upon its earlier ruling in *Bruce Anderson*,\(^{64}\) where the Board set aside and remanded BLM’s decision not to provide a refund of rentals paid on an oil and gas lease. There, BLM had cancelled the lease because the lands included in the lease were within

\(^{56}\) 140 IBLA 173 (1997).

\(^{57}\) Id. at 179.

\(^{58}\) Id. at 180.

\(^{59}\) 188 IBLA 216 (2016).

\(^{60}\) Id. at 230; see id. (stating that because BLM had no legal authority to issue the leases, they were “a legal nullity”) (quoting Clayton W. Williams, Jr., 103 IBLA 192, 203, 95 I.D. 102, 107 (1988)).

\(^{61}\) 63 IBLA 228, 89 I.D. 207 (1982).

\(^{62}\) Id. at 229, 89 I.D. at 207.

\(^{63}\) Id. at 230, 89 I.D. at 208.

\(^{64}\) 30 IBLA 118 (1977).
the corporate limits of El Reno, Oklahoma, and therefore unavailable for leasing.\(^65\) The Board stated that a refund was appropriate because the lands included in the lease "were never legally subject to noncompetitive oil and gas leasing," "[t]here is no indication that the lessees derived any benefits from the possession of this lease," and the lessees did not hold the lease "with knowledge that it was improperly issued."\(^66\)

These cases stand for the proposition that when BLM makes a mistake at the time it issues a lease – either because BLM violates an applicable law or because BLM makes an erroneous interpretation of the officially-filed survey or plat or makes an erroneous notation of the status of the lands on the plat – it properly cancels the lease and provides a refund to the lessee. BLM guidance reflects this standard. In its handbook on oil and gas lease relinquishments, terminations, and cancellations, BLM states that when a lease has been erroneously issued for lands that were not authorized for lease, it will cancel the lease and “authorize a refund, if applicable.”\(^67\) The handbook identifies several situations in which BLM issues a lease erroneously, including “[e]rroneous interpretation or notation of the status of the land, i.e., a lease is issued for lands that are already in an existing lease, for patented lands, for withdrawn lands, for lands within a city limit, or for lands on which there is a prior offer, etc.” (such as in Romola A. Jarret and Bruce Anderson); when a lease is issued “contrary to the law or regulations” (such as in Elaine D. Berman); and when a lease is issued “without proper surface owner consent” (such as in Red River).\(^68\)

Our precedent makes clear that refunds are required when BLM cancels a lease or portion of a lease because of an error made by BLM at the time of lease issuance. Although these cases generally were decided based on BLM's discretionary authority to provide refunds under FLPMA\(^69\) – which pre-dates FOGRMA – the results are consistent with applying FOGRMA in these circumstances. This is because under FOGRMA, a lessee cannot be "legally required" to pay for a lease that BLM issued in error, and the lessee has therefore made an "overpayment of an obligation" requiring a refund under the statute.\(^70\)

\(^{65}\) Id. at 119.
\(^{66}\) Id. at 120.
\(^{68}\) Id. at 68.
\(^{69}\) 43 U.S.C. § 1734(c).
\(^{70}\) 30 U.S.C. § 1702(27).
[2] But when BLM issues a lease in accordance with the officially-filed survey contained in the public land records at the time of lease issuance, BLM has made no error. This is true even if, as in this appeal, a later officially-filed resurvey demonstrates that lands included in the lease are not owned by the United States. This is because “the approved plat of an official survey is conclusive as to the designations of the tracts embraced therein, and must govern in the disposal of those lands.” As the Board has explained:

Plats of survey are kept at the local land offices for public information and the filing of a plat gives notice of the official survey of the land. There is no question that the authority to survey the public lands includes authority to order new surveys and to correct and supplement existing surveys. An almost necessary corollary of this authority is the administrative rule that, in disposing of public lands, the most recently accepted plat of survey is the official survey of the land shown thereon.

We have further explained that the Secretary of the Interior has authority to “cause to be made” surveys of the public lands to determine what lands are owned by the United States, and that underlying this principle is “that surveys of the United States, after acceptance, are presumed to be correct and will not be disturbed except upon proof that they are fraudulent or grossly erroneous.” The presumption that officially-filed surveys are correct and can be relied upon by BLM and the public is foundational to BLM's ability to manage its public lands.

Here, there is no dispute that the 2014 officially-filed resurvey shows that 24 out of the 80 acres are eroded, and all parties agree that the United States cannot lease lands it does not own. This principle supports BLM's decision to partially cancel the lease as to the 24 acres. But it does not mean that under FOGRMA the appellants are entitled to a refund of the per-acre bonus bid associated with these acres.

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71 Doris L. Ervin, 66 I.D. 393, 394 (1959) (BLM properly rejects an oil and gas lease offer as to surveyed lands that are not described in conformity with the most recent official plat of survey) (citing George W. Fisher, 24 L.D. 480 (1897); Elisha B. Martin, 16 L.D. 424 (1892)).
72 Id. (citations omitted).
FOGRMA requires a refund for an “overpayment,” which is any payment made “in excess of an amount legally required to be paid . . . .” At the time BLM sold and issued lease NDM 105571, the officially-filed survey represented that 80 acres of Federal minerals were available for leasing. Therefore, as the high bidder, the appellants were “legally required” to pay the processing fee, rental, and bonus bid associated with those 80 acres. As BLM states, once the appellants paid the remaining competitive lease bonus bid within 10 days of payment of the minimum bonus bid, first year’s rental, and processing fee as required by regulation, they made “a legally binding commitment to execute the lease bid form and accept a lease, including the obligation to pay the bonus bid, first year’s rental, and administrative fees.” Under FOGRMA, then, the payment the appellants made was what was legally required at lease issuance, and the appellants did not make an “overpayment of an obligation.” They therefore are not entitled to a refund under FOGRMA. To find that the appellants were not legally required to pay the processing fee, rental, and bonus bid for the acres leased would undermine the basic legal principal that officially-filed surveys of the United States “are presumed to be correct.”

Further, the present appeal is readily distinguishable from the cases relied upon by the appellants, where BLM made a mistake at the time it issued the lease. In contrast to those cases, here, the appellants have not shown that BLM failed to comply with any applicable law when it issued the lease (Elaine D. Berman). Nor have the appellants shown that BLM “mistakenly believed” that certain lands were available for leasing when, in fact, those lands were patented (Romola A. Jarret) or within a city limit (Bruce Anderson). In these latter cases, the officially-filed surveys were not described or discussed; rather, based on the information contained in those decisions, the error made by BLM was in notations on the plat, or interpreting the plat or survey. Here, however, the appellants have shown no such error. The cases the appellants cite are thus

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76 43 C.F.R. § 3120.5-3(a) (“Execution by the high bidder of a competitive lease bid form . . . shall constitute a binding lease offer . . . .”).
77 Answer at 11 (quoting MX Re-Store, LLC, 174 IBLA 254, 261 (2008) (citing 43 C.F.R. § 3120.5-3(a))).
78 Paco Production Co., 145 IBLA at 330.
79 SOR at 6.
80 140 IBLA 173.
81 63 IBLA at 229.
82 30 IBLA 118.
83 See Handbook H-3108-1 at 68, 73.
distinguishable from the situation in the present appeal, where, at the time of lease issuance, BLM made no error because the official public land records showed 80 acres of Federal minerals available for leasing.

We therefore conclude that FOGRMA does not mandate that BLM refund to the appellants their per-acre bonus bid associated with the eroded acres. However, and as explained below, we nevertheless conclude that it is necessary to set aside and remand BLM's decision.

D. BLM'S Guidance Governing the Adjustment of Lease Acreage Due to a Resurvey Does Not Apply in This Case

Separate from FOGRMA, FLPMA provides BLM with the authority to provide a refund in its discretion. The statute provides that “the Secretary . . . may cause a refund to be made” when “any person has made a payment . . . relating to the sale, lease, use, or other disposition of public lands which is not required or is in excess of the amount required . . . .” To implement this discretion, BLM has established policy guidance governing refunds. As noted above, for example, BLM's Handbook on oil and gas lease relinquishment, terminations, and cancellations specifies that when BLM issues a lease erroneously, it will cancel the lease and authorize a refund. Because we have concluded that BLM did not issue the appellants' lease in error, we found that its decision was consistent with this guidance. But BLM states that in denying the appellants' refund, it also acted in accordance with its Handbook on competitive oil and gas leases, which provides that BLM will not refund bonus bids or rental payments when “BLM must cancel a portion of a competitive lease due to changed acreage after a resurvey . . . .”

We find, however, that BLM's guidance does not apply to the facts of this case. That Handbook specifies that its direction not to provide a refund when a resurvey results in a change in a lease's acreage applies only when, after a lease has issued, “it is discovered that an error was made in the advertised parcel acreage in the sale notice, but the legal land description did not change . . . .” That was not the case here. First, there was no error in the advertised parcel acreage in the sale notice since BLM properly described the acres included in the lease based on the existing survey at the time of lease issuance.

84 43 U.S.C. § 1734(c).
85 Handbook H-3108-1 at 68, 73.
86 Answer at 8, 10 (citing Handbook H-3120-1 at 43; Grace M. Brown, 24 IBLA 301 (1976)).
87 Handbook H-3120-1 at 41.
issuance. More important, however, in order to accommodate the erosion of 24 acres and accurately reflect the 2014 officially-filed resurvey, the legal land description of the lands included in the lease must change. And because the legal land description must change, the Handbook's direction not to provide a refund does not apply.

While BLM further argues that the Board's decision in Grace M. Brown supports application of its Handbook in this case, we disagree. In Grace M. Brown, the Board upheld BLM's decision to adjust the acreage in an oil and gas lease after a resurvey showed that the amount of acreage in the lease was 178.45 acres, rather than 183.60 acres as shown by the original survey. The legal land description in the lease was described by metes and bounds. Consequently, that land description did not necessarily change even though the amount of land included in the lease was revised after correcting what appears to have been a straightforward miscalculation of the acreage. This is distinguishable from the situation here, where the legal land description was described as an aliquot part of a particular section in a township and range. To accommodate the removal of 24 acres, BLM had to change the legal land description in the lease.

[4] We have stated that since BLM employees "are obliged by the conditions of their employment to abide by" BLM's policies, it is proper for the Board to consider such guidance in deciding whether a decision on appeal is in error. And we have long held that we will uphold a BLM decision that "complies with its policy direction, unless doing so is unreasonable or contradicted by statute or regulation," since agency guidance is binding on BLM. The corollary to this principle is that the Board will not uphold a BLM decision that is inconsistent with its guidance. In its answer before the Board, BLM represents that the guidance in its Handbook on competitive oil and gas leases was the

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88 See Northern Michigan Exploration Co., 114 IBLA 177, 192, 97 I.D. 171 (1990) ("[A] legal description . . . cannot be understood apart from the official plat of survey.").
89 24 IBLA at 302.
90 Id.
91 Lease NDM 105571.
92 Decision, Oil and Gas Lease Cancelled in Part at 1.
94 Petan Company of Nevada v. BLM, 186 IBLA 81, 97 (2015); see also id. ("While the Manual and [Instruction Memorandum] are not binding on the Board, or an ALJ, they are binding on BLM."); Desert Sportsman's Rifle & Pistol Club, Inc., 188 IBLA 339, 346 (2016) ("BLM guidance and directives necessarily constrain the scope of its permissible discretion.").
basis for its decision denying the appellants' refund.\textsuperscript{95} Because we find that BLM improperly applied the guidance in its Handbook in this case, we set aside and remand BLM's decision so that BLM may consider whether to exercise its discretion under FLPMA to provide the requested refund of the appellants' per-acre bonus bid.

CONCLUSION

Because BLM properly issued the lease in accordance with the officially-filed survey at the time of lease issuance, the appellants' required payment of the processing fee, rental, and bonus bid for the acres leased does not constitute an overpayment of an obligation requiring a refund under FOGRMA. But because BLM retains the discretion to provide a refund under FLPMA and applied guidance limiting that discretion that was not applicable to the facts of the case, we conclude that BLM's decision is appropriately set aside and remanded.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior,\textsuperscript{96} we set aside and remand BLM's July 21, 2015, decision denying the appellants' refund.

\begin{flushright}
/s/ \\
Amy B. Sosin \\
Administrative Judge
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I concur:

\begin{flushright}
/s/ \\
Silvia Riechel Idziorek \\
Acting Deputy Chief Administrative Judge
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\textsuperscript{95} Answer at 10.
\textsuperscript{96} 43 C.F.R. § 4.1.