

INTERIOR BOARD OF LAND APPEALS

Kay Papulak

132 IBLA 117 (March 1, 1995)

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KAY PAPULAK

IBLA 93-630

Decided March 1, 1995

Appeal from decisions of the Wyoming State Office, Bureau of Land Management rejecting noncompetitive oil and gas lease offers WYW-129915, WYW-129916, and WYW-129917.

Affirmed

1. Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Rental

It is proper for BLM to reject a noncompetitive oil and gas lease offer for failure to comply with 43 CFR 3103.2-1(a). Each noncompetitive lease offer must be accompanied by full payment of the first year's rental based on the total acreage. An exception to absolute compliance with the letter of this requirement is made if the amount submitted with the offer is deficient by not more than 10 percent or \$200, whichever is less.

2. Board of Land Appeals—Rules of Practice: Appeals: Stay

Under 43 CFR 4.21(a), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed with the notice of appeal.

APPEARANCES: Kay Papulak, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Kay Papulak has appealed three July 27, 1993, decisions issued by the Wyoming State Office, Bureau of Land Management (BLM), rejecting Papulak's noncompetitive oil and gas lease offers WYW-122915, WYW-129916, and WYW-129917. The stated reason for BLM's rejection was Papulak's failure to tender the full amount of the advance rental when she submitted her offers.

The lands described in offers WYW-129915 and WYW-129917 became available for noncompetitive lease offers after the land was listed for competitive leasing and no bids were submitted. A portion of the land described

in offer WYW-129916 had been offered for competitive leasing in 1992 and was open for noncompetitive offers. The balance of the land described in that offer was to be posted for competitive lease sale at a future date. The BLM decision did not specifically identify what lands described in offer WYW-129916 fell in each of the two categories.

All three lease offers were rejected because Papulak had failed to submit the full first year's rental with her lease offer, as required by 43 CFR 3103.3-2. The amount submitted with lease offer WYW-129915 was \$5,240, and the first year's rental stated in that offer was \$5,820. She submitted \$6,050 with offer WYW-129916, which gave \$6,702 as the first year's rental amount, and \$5,190 was submitted with WYW-129917, which listed a \$7,560 first year's rental. A \$75-per-application filing fee was also due with each of her offers.

In its decisions BLM also noted that the acreage of the land listed in each of her offers differed from that stated on the face of the offers. According to BLM, the correct first year's rental was as follows: WYW-129915 – \$5,829; WYW-129916 – \$8,346; and WYW-129917 – \$5,710.50. As can be seen, the amount submitted was more than \$200 less than the first year's rental, using either the Papulak or the BLM acreage.

[1] Section 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 226 (1988), provides that a lessee must pay rental "in advance." Failure to tender rental goes to the adequacy of an offer, and an offer submitted without the first year's rental is considered incomplete. Thus, a failure to submit rental and other fees does not constitute a technical or insignificant defect which may be waived by the Department. An offer not accompanied by the first year's rental is properly rejected. Stephen S. Lange, 119 IBLA 45, 46 (1991).

BLM rejected her offers for failure to comply with 43 CFR 3103.2-1(a). That regulation provides that "each noncompetitive lease offer shall be accompanied by full payment of the first year's rental based on the actual total acreage * * *." (Emphasis added.) Because it is sometimes difficult to accurately calculate the exact acreage described in an offer, an exception to absolute compliance with the letter of this requirement is found in the same regulation. "An offer deficient in the first year's rental by not more than 10 percent or \$200, whichever is less, shall be accepted by the authorized officer provided all other requirements are met." (Emphasis added.)

The Department has consistently required that the first year's rental submitted with an offer (which is based upon the acreage of the land sought by the offeror) correspond to the rental amount for the acreage described in the offer. The one making the offer is offering to lease all of the land described in the offer and to pay the prescribed per-acre advance yearly lease rental for that land. The fact that part of the lands described in the offer may subsequently be deemed unavailable for

leasing is not relevant when determining whether the amount submitted with the offer is adequate. Dorothy L. Davis, 88 IBLA 282, 285 (1985); Mountain Fuel Supply Co., 13 IBLA 85, 87 (1973); see James M. Chudnow, 77 IBLA 77, 78 (1983). Therefore, the fact that some of the land described in WYW-129916 was found to be unavailable for noncompetitive leasing does not differentiate that offer from the other two at issue.

Papulak contends that BLM's rejection of her offer was based on a recently adopted change from a regulation requiring not less than 10 percent (10-percent rule) to a regulation requiring not less than 10 percent or \$200, whichever is less. She further maintains that the application of the rule change is discretionary with each BLM State Director and BLM should have applied the previous 10-percent rule to her offers. ^{1/}

The \$200 limit in 43 CFR 3103.2-1(a) is not new. It has been in the regulation since 1983. See 48 FR 33662 (July 22, 1983). Duly promulgated regulations have the force and effect of law and are binding on the Department. The Joyce Foundation, 102 IBLA 342, 345 (1988); Carl H. Alber, Jr., 100 IBLA 257, 260 (1987); Kuugpik Corp., 85 IBLA 366, 370 (1985). Thus, contrary to Papulak's contention, the application of 43 CFR 3103.2-1(a) is not discretionary, and a BLM State office cannot decide whether or not to apply it. ^{2/}

Papulak contends that BLM ignored her appeal when it issued leases to parties who had submitted subsequent lease offers. She states that these leases, which had a September 1, 1993, effective date, leased essentially the same lands described in her offers. She asks the Board to direct BLM to suspend those leases until her appeal is resolved. A note in the case file confirms that intervening offers were filed on July 29, 1993, but is silent on whether or when any leases were issued.

[2] Under 43 CFR 4.21(a), a decision will be effective on the day after the expiration of the time during which a person adversely affected may file a notice of appeal unless a petition for stay pending appeal is filed with the notice of appeal. In this case, no petition for stay was filed and BLM's rejection of Papulak's offers became effective on the day

^{1/} Papulak provides no information as to when BLM might have applied the 10-percent rule. When the \$75 filing fee is added, the amounts submitted by Papulak were also deficient by more than 10 percent.

^{2/} If Papulak were able to point to some occasion since 1983 when BLM accepted an offer when the first year's rental was more than \$200 short, it would not help her. Prior incorrect application of law or regulations does not justify a subsequent failure to follow the law or regulations. Thomas Frazier, 106 IBLA 43, 44 (1988); David Provinse, 35 IBLA 217, 220 (1978).

following the expiration of the appeal period, August 29, 1993. Robert E. Oriskovich, 128 IBLA 69 (1993). 3/ BLM was free to issue leases to the next qualified offeror.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge

3/ Papulak also argues that BLM erred when it did not include Form 1842.1 with its July 27, 1993, decisions, and asks the Board to set aside the decisions and remand the cases to permit BLM to correct that error. The alleged failure to include the form has nothing to do with the merits of the BLM decision. In addition, Papulak was not prejudiced by this alleged failure, as she filed a timely appeal from each decision. The decisions informed Papulak of her appeal rights. Her request for remand is denied.