

INTERIOR BOARD OF LAND APPEALS

J. W. McTiernan

136 IBLA 241 (September 10, 1996)

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Appeal from a decision of the Deputy State Director, New Mexico State Office, Bureau of Land Management, affirming decisions of the Tulsa District Office, denying an extension of time to drill a unit obligation well and disapproving applications for permits to drill. SDR 95-011; OKNM 7533X et al.

Affirmed.

1. Oil and Gas Leases: Consent of Agency–Oil and Gas Leases: Drilling–Oil and Gas Leases: Stipulations–Oil and Gas Leases: Suspensions–Oil and Gas Leases: Unit and Cooperative Agreements

BLM decisions denying an extension of time in which to drill a unit obligation well and disapproving applications for permits to drill will be affirmed where the unit operator's inability to timely drill stems from the surface management agency's refusal to waive the no surface occupancy stipulation included in all the leases within the unit. Since the unit operator knew at the time the unit was formed that all the leases were encumbered with the no surface occupancy stipulation precluding drilling operations on the surface of the leases absent waiver of that condition by the surface management agency, a suspension of drilling operations pursuant to the section of the unit agreement entitled "Unavoidable Delay" is not justified by the surface management agency's refusal to waive the condition.

APPEARANCES: J.W. McTieman, Oklahoma City, Oklahoma, pro se; Margaret Miller Brown, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management; Lynn Sturges, Esq., Department of the Army, McAlester, Oklahoma, for the McAlester Army Ammunition Plant.

## OPINION BY ADMINISTRATIVE JUDGE IRWIN

J.W. McTieman has appealed from the March 10, 1995, decision of the Deputy State Director (Deputy), New Mexico State Office, Bureau of Land Management (BLM), affirming decisions of the Tulsa District Office, BLM, dated February 1, 1995, and February 3, 1995, respectively, disapproving four applications for permits to drill (APD's) wells and denying an extension of time to drill an obligation well for the Southwest McAlester Unit (SWMU), located in T. 4 N., R. 13 E., Indian Meridian, Pittsburg County, Oklahoma, within the McAlester Army Ammunition Plant (MAAP). We granted the request of the Department of the Army (the Army) that consideration of the appeal be expedited.

BLM approved the unit agreement for the SWMU on July 30, 1992. The 10 leases included within the unit were issued pursuant to the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. §§ 351-359 (1994), effective December 1, 1988, and each lease is encumbered with surface use stipulations, including no surface occupancy, imposed by the MAAP, which may be waived or modified only with BLM's written approval upon the MAAP Commander's concurrence. See Statement of Reasons (SOR), Enclosure 1. 1/ The unit agreement, which designated McTieman, one of the lessees, as the unit operator, required that the drilling of the initial unit well be commenced within 6 months, i.e., by January 29, 1993 (SOR, Enclosure 3, section 9).

McTieman requested and was granted four 6-month extensions of time in which to begin drilling the unit obligation well to afford him time to discuss waiver of the no surface occupancy stipulations with the MAAP Commanding Officer (CO) and to obtain the CO's approval of a drilling location for the well. The last extension required that the drilling of the initial unit well start by January 29, 1995.

In June and September 1993, McTieman filed three APD's for wells in varying locations within the MAAP. He submitted a fourth APD for a different well site in May 1994.

In an application dated October 26, 1993, McTieman requested a suspension of operations and production for all the leases within the SWMU pursuant to 30 U.S.C. §§ 209 and 226(i) (1994) and 43 CFR 3103.4-2 and 3165.1 until such time as BLM and the Army approved McTieman's plan for exploration, development, and production operations on the MAAP and allowed

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1/ Paragraph 2 of the surface use stipulation identifies the areas subject to the no surface occupancy condition (SOR, Enclosure 1). Although the map referred to in that paragraph has not been included in the case file, all the parties agree that the leases in the unit were issued subject to the no surface occupancy stipulation.

modification of the surface use stipulations attached to the leases. See SOR, Enclosure 7. By decision dated November 22, 1993, BLM granted a suspension of operations in accordance with 43 CFR 3103.4-2 for each lease within the unit, effective July 1, 1993 (SOR, Enclosure 6).

By letters dated May 17 and June 16, 1994, McTieman requested that the four unapproved APD's be suspended until the surface location conflict with the MAAP was resolved. In separate letters dated June 30, 1994, BLM granted the requests and suspended the processing of the proposed APD's until BLM received written notice from McTieman lifting the suspension or for a period of 1 calendar year, i.e., until June 29, 1995, whichever was less.

By letter dated January 27, 1995, McTieman requested an additional suspension of the time period for the commencement of the unit obligation well, asserting that the MAAP had denied him access to a surface location in an area not currently leased by BLM and not subject to the no surface occupancy stipulation. McTieman sought the suspension in order to pursue a meeting with the MAAP CO with the hope of obtaining the surface management agency's cooperation in developing the oil and gas beneath the MAAP.

On February 1, 1995, BLM disapproved the four APD's as incomplete. BLM took this action in accordance with its December 22, 1994, letter, advising McTieman that the APD's would be suspended until January 29, 1995, and that if each APD was not in approved status on that date, the suspension would be lifted and the APD returned as incomplete and therefore unacceptable. <sup>2/</sup> McTieman sought State Director review of this decision arguing that he was awaiting a meeting with the MAAP CO and that BLM's decision abrogated McTieman's right to appeal the MAAP's decision.

On February 3, 1995, BLM denied McTieman's request for an extension of time in which to commence drilling the initial unit well to allow him to meet with the MAAP CO, obtain approval of the APD, and begin drilling operations. BLM stated that since the MAAP still did not agree with McTieman as to a desirable location for the unit well, granting another extension would be inappropriate in view of the fact that four successive extensions had already been allowed.

McTieman sought State Director review of BLM's extension denial. He asserted that the previous extensions had been granted because of circumstances beyond his control which continued to exist and that denying the current request based on the grant of the earlier requests would be arbitrary and capricious. McTieman explained that the MAAP had not responded timely to his drilling location suggestions and that a 12-month extension was needed to give the MAAP time to respond and to enable a drilling contractor to start work. McTieman cited section 25 of the unit agreement,

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<sup>2/</sup> No copy of this Dec. 22, 1994, letter has been included in the case file.

entitled "Unavoidable Delay," as support for his contention that the extension should be granted because matters beyond his control prevented him from drilling. He also averred that other activities, including previous oil and gas drilling, had been permitted on the MAAP. McTieman suggested that his request for an extension and/or suspension of time to commence drilling the unit obligation well should be approved to run concurrently with the lease suspensions.

In his March 10, 1995, decision, the Deputy consolidated McTieman's two review requests. He noted that McTieman had been unable to negotiate an acceptable well location with the MAAP due to the no surface occupancy stipulations attached to the leases included in the unit and that the ongoing dialogue between McTieman and the MAAP over the exact location of the initial unit well had provided the justification for the grant of the earlier extensions as well BLM's suspension of the processing of McTieman's APD's. The Deputy concluded that the unit agreement and APD's had been filed prematurely given the no surface occupancy stipulations included in the leases and that McTieman should have negotiated an acceptable drilling location with the MAAP before submitting any applications to BLM.

The Deputy observed that for over 2-1/2 years the MAAP had consistently indicated its intention to maintain no surface occupancy on the leases and unit, a position the MAAP CO had reiterated during a March 2, 1995, meeting with McTieman. The easing of lease stipulations placed on a Federal lease by a surface management agency is strictly under the jurisdiction of that agency, the Deputy stated, and BLM had no authority to interfere or intervene in the internal decision-making processes of the MAAP. He indicated that the previous oil and gas drilling operations at the MAAP had occurred on leases without no surface occupancy stipulations which were not included in the SWMU and had no relevance to his decision and noted that BLM had no jurisdiction over the MAAP's authority to allow other activities. Since BLM had granted McTieman adequate time to negotiate a drilling location and it was unlikely that the MAAP would change its position during a further extension/suspension, the Deputy affirmed BLM's decisions. The Deputy added that his decision did not abrogate McTieman's right to continue negotiations with the MAAP and that, should McTieman persuade the MAAP to allow drilling, he could reapply for a unit and resubmit the APD's.

On appeal McTieman argues for the first time that the lease suspensions granted on November 22, 1993, also suspend the unit agreement's obligation well requirement and the APD's (SOR at 1). He further avers that an official of the MAAP assured the potential lease bidders at a special presale conference in October 1988 that the surface management agency would accommodate exploration and drilling activities on each of the leases now included in the unit and that, in reliance upon this assurance, he incurred significant costs. *Id.* at 1-2. McTieman reiterates that the MAAP currently allows private and commercial vehicular traffic and sports activities such as fishing and hunting with firearms and has authorized a

hazardous waste facility as well as drilling, production, and transmission activities for 12 wells within the MAAP. Id. at 2. BLM's approval of the unit agreement as necessary and advisable in the public interest and for the purpose of conserving natural resources and the lease stipulation requiring prior BLM approval of lease activities, McTieman asserts, belie the Deputy's assertion that the unit agreement and APD's were filed prematurely. Id. McTieman also disputes the Deputy's conclusion that the MAAP is unlikely to waive the no surface occupancy stipulation, asserting that magazine overload, which varies with time, forms the primary reason for the denial of surface access and that the MAAP CO has assured McTieman that if space becomes available, magazines will be emptied to provide a safe distance for drilling operations. Id. at 3.

McTieman maintains that it is in the public interest for BLM to support him in his diligent effort to develop the natural resources subject to the unit and that he has exerted extraordinary diligence in fulfilling the obligations of the unit agreement and the leases (SOR at 3). He, therefore, requests that a suspension of the unit agreement and obligation well and the APD's be granted in accordance with section 25 of the unit agreement due to unavoidable delays. Id. at 4. 3/

The Army has responded to McTieman's appeal, asserting that despite McTieman's conviction that the MAAP must waive the no surface occupancy clauses in his leases, the regulations and leases themselves firmly establish that only BLM with the approval of the MAAP can grant such a waiver. See June 20, 1996, Letter at 1. The MAAP has thus far determined not to grant such a waiver, the Army explains, since the installation is a major ammunition production and storage facility and the local CO, who has the sole responsibility for installation safety and security and whose decisions should be respected, has denied the drilling requests based on

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3/ McTieman has also requested that operations for each lease committed to the unit be suspended effective Nov. 1, 1990, and continuing until the Army and BLM have approved his plan for exploration, development, and production operations on the MAAP and have allowed modification of the surface use stipulations and that all rentals be refunded subsequent to the Nov. 1, 1990, suspension date (SOR at 4). These issues reiterate the arguments made by McTieman in his Oct. 26, 1993, request for suspension of operations and production on the leases in the unit. See SOR, Enclosure 7 at 12-13. BLM granted a suspension of operations only for the leases effective July 1, 1993, and required the payment of rental. McTieman did not appeal that decision at that time and it became final. McTieman has not asked BLM to revisit the lease suspensions in any of the pleadings contained in the record before us, nor did BLM address these issues in the appealed decision. The Board of Land Appeals, as an appellate tribunal, does not generally make initial adjudicatory decisions on matters properly brought before BLM. See e.g., Joseph Smith, 135 IBLA 347, 349 (1996). Since these issues are not properly before us, they will not be addressed.

safety, security, and quantity distance requirement considerations. Id. at 1-2. The Army asserts that McTieman obtained the leases with the knowledge that the leases contained the no surface occupancy provisions and that his assertion that he is owed a waiver is flatly contradicted by the leases and regulations. Id. at 2. An August 28, 1995, letter to McTieman from the current MAAP CO, attached as Enclosure 1 to the Army's response, reiterates the Army's position that it is unlikely that McTieman's requests to drill will be granted in the foreseeable future.

As an initial matter, we reject McTieman's claim that BLM's November 22, 1993, order granting suspension of operations on the leases also suspended the unit agreement and McTieman's obligations under that agreement. Lease responsibilities are distinguishable from unit duties. Koch Exploration Co., 100 IBLA 352, 363 (1988). Suspension of operations under the leases and suspension of drilling obligations imposed by the unit agreement involve totally different considerations. Ruby Drilling Co., 119 IBLA 210, 214 (1991). Thus BLM's suspension of operations on the unitized leases does not mandate suspension of McTieman's obligation to drill the initial unit well or require BLM to suspend the APD's.

[1] Section 25 of the unit agreement states:

UNAVOIDABLE DELAY. All obligations under this agreement requiring the Unit Operator to commence or continue drilling, or to operate on, or produce unitized substances from any of the lands covered by this agreement, shall be suspended while the Unit Operator, despite the exercise of due care and diligence, is prevented from complying with such obligations, in whole or in part, by strikes, acts of God, Federal, State, or municipal law or agencies, unavoidable accidents, uncontrollable delays in transportation, inability to obtain necessary materials or equipment in the open market, or other matters beyond the reasonable control of the Unit Operator whether similar to matters herein enumerated or not.

See also Draft BLM Handbook H-3180-1.II.J.1.

McTieman essentially argues that the MAAP's refusal to waive the no surface occupancy stipulations contained in the leases despite his diligent efforts to propose a drilling location acceptable to the MAAP qualifies as a matter beyond his reasonable control, that is, a force majeure. The concept of force majeure, however, involves relief from onerous conditions beyond a lessee's or operator's control that arise during the term of a lease or unit agreement. See Alfred G. Hoyl, 123 IBLA 169, 186, 99 I.D. 87, 96 (1992), reaff'd as modified, 123 IBLA 194A, 100 IBLA 34 (1993). McTieman's inability to fulfill his obligation to drill the initial unit well stems from the no surface occupancy clauses contained in the leases

included in the unit. These surface use restrictions were part of the leases when issued and McTiernan knew of them and agreed to them at that time. <sup>4/</sup> He also chose to form the SWMU despite the no surface occupancy stipulations in the leases and before the MAAP had decided whether or not to waive those stipulations. Thus, the impediment to McTiernan's ability to drill the unit obligation well did not unexpectedly occur during the term of the lease but existed at lease issuance and unit creation. We find that the MAAP's insistence on retaining the no surface occupancy stipulations simply preserved the conditions extant at the time of lease issuance and unit formation and does not justify granting McTiernan a suspension of the unit drilling obligation. Cf. Amoco Production Co. (On Reconsideration), 96 IBLA 260, 262 (1987) (where a lease is encumbered by a wilderness protection or no surface occupancy stipulation and there has been no discovery and an APD request has been denied, the Secretary's policy is not to grant relief from the terms of the stipulation by granting a suspension).

BLM granted the APD suspensions and the drilling extensions to afford McTiernan time to negotiate with the MAAP over an acceptable location for the unit obligation well and the consequent relaxation of the surface use stipulations. The MAAP has clearly indicated that waiver of the no surface occupancy stipulations will not occur for the foreseeable future. BLM has no authority to waive or modify a stipulation imposed by the surface management agency as a prerequisite to lease issuance for acquired lands. See, e.g., Colorado Environmental Coalition, 125 IBLA 210, 214 (1993); Texaco, Inc., 115 IBLA 369, 372 (1990); James M. Chudnow, 91 IBLA 143, 146 (1986); Thomas Connell, 46 IBLA 331, 333 (1980); see also 30 U.S.C. § 352 (1994). Nor can BLM authorize activities under a lease, such as drilling, which are contrary to the lease's terms. Diamond Shamrock Exploration Co., 83 IBLA 318, 320 (1984). We, therefore, conclude that the Deputy properly upheld the decisions denying a further extension of time to drill the unit obligation well and disapproving the APD's as incomplete. As the Deputy noted, should circumstances change and the MAAP become amenable to surface use for oil and gas operations, McTiernan can reapply for a unit and resubmit APD's for well sites meeting the MAAP's approval.

To the extent not specifically addressed herein, McTiernan's arguments have been considered and rejected.

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<sup>4/</sup> Although McTiernan claims that the Army assured him prior to lease issuance that it would accommodate exploration and drilling activities on each lease, such statements would not estop the Army from denying waiver of the no surface occupancy stipulations. Estoppel against the Government in public lands matters must be based on affirmative misconduct, such as misrepresentation or concealment of material facts, which must be in the form of an official written decision. Ray L. Vergin, 133 IBLA 1, 3 (1995). Here McTiernan does not rely on an official written decision but only alleged oral statements.

Therefore, 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.

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Will A. Irwin  
Administrative Judge

I concur.

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Gail M. Frazier  
Administrative Judge