

WILLIAM Y. GANUS ET UX.

IBLA 89-655

Decided February 28, 1992

Appeal from a decision of the Eastern States Office, Bureau of Land Management, rejecting application for conveyance of Federally-owned mineral interest. MSES-39939.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

BLM properly rejects an application for conveyance of a Federally-owned mineral interest, pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1988), where the applicant fails to establish that there are no known mineral values in the land or that reservation of the mineral interest is interfering with or precluding appropriate nonmineral development, and that such development is a more beneficial use of the land than mineral development.

APPEARANCES: William Y. and Melita E. Ganus, pro sese.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

William Y. and Melita E. Ganus have appealed from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated August 2, 1989, rejecting their application for conveyance of a Federally-owned mineral interest, MSES-39939.

On January 10, 1989, appellants filed an application for conveyance of the Federally-owned mineral interest in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 1, T. 8 N., R. 6 W., St. Stephens Meridian, Wayne County, Mississippi, pursuant to section 209(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b) (1988). The record indicates that the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 1 was patented by the United States on August 1, 1947, subject to a reservation of oil and gas (Patent No. 1122561). Along with their application, appellants submitted a copy of a June 8, 1984, warranty deed by which they acquired title from the patentee's successor-in-interest. In their application, appellants stated that there were no known mineral values in the land, noting that it was "surrounded by a dry hole," and argued that the continued reservation of the mineral interest by the United States might adversely affect use of the land for the production of timber, to which use the land was primarily suited.

In order to assess the potential for mineral development of the subject land, BLM prepared a mineral report on May 5, 1989. The report concluded that the land is "potentially valuable for oil, gas, and sulfur" and recommended that the minerals be retained in Federal ownership (Mineral Report at 4).

By letter dated June 16, 1989, BLM notified appellants that the subject land had been determined to be potentially valuable for oil, gas, and sulfur and that, therefore, in accordance with 43 CFR 2720.0-6, the mineral interest could only be conveyed if it was established "by convincing factual evidence" that reservation of the minerals by the United States was interfering with or precluding appropriate nonmineral development and that such development was a more beneficial use of the land than mineral development. BLM offered appellants the opportunity to submit such evidence and required them to notify BLM, within 30 days, whether they intended to offer such proof.

On June 27, 1989, appellants responded to BLM's letter, expressing their concern that continued reservation of the mineral interest by the United States might adversely affect use of the land for the purpose of managing and conserving its natural resources. They indicated that the reservation might result in mineral development and, thus, removal of trees. This, they argued, might, in turn, cause erosion and sedimentation of a stream running through the property, thus adversely affecting the scenic, environmental, recreational, educational, and economic value of the land.

Concluding that the application did not "qualify" for conveyance under section 209(b) of FLPMA, BLM thereupon rejected appellants' application. In particular, BLM held that the application did not qualify for conveyance under either subsections (b)(1) or (b)(2) of that statutory provision because the subject land had been determined to contain mineral values (oil, gas, and sulphur) and there had been no showing that reservation of the mineral interest by the United States was interfering with or precluding appropriate nonmineral development of the land, which development was a more beneficial use of the land than mineral development. BLM specifically noted that the land was then devoted to timber production and preservation of the natural environment and that there was no proof that this was a more beneficial use or that, even if it were, such use would be interfered with or precluded by reservation of the mineral interest by the United States, especially where BLM could condition any leasing of the land, including the prevention of surface occupancy if warranted. Appellants thereupon pursued the instant appeal.

[1] Under section 209(b) of FLPMA, the record owner of the surface estate of land may obtain conveyance of the underlying Federally-owned mineral interest only if the Secretary finds "(1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development." 43 U.S.C.

§ 1719(b)(1) (1988). See also 43 CFR Part 2720; Basin Electric Power Cooperative, 50 IBLA 197, 199 (1980).

In their statement of reasons for their appeal, appellants dispute that the subject land is valuable for oil or gas. In support of this, they contend that a nearby well was not productive of oil and gas from the Smackover Formation, which was the formation targeted by BLM as likely to be productive of oil and gas. Further, they suggest that the land is "not known to be on a known producing structure" for oil and gas (Letter to the Board, dated Sept. 18, 1989, at 8).

BLM's determination that the subject land is valuable for oil and gas is contained in the Mineral Report. That report concluded that oil and gas is present based on a review of the structural and stratigraphic character of the surrounding area. In particular, BLM noted that the subject land is underlain by the Smackover Formation, which had been found to be productive of oil and gas, from a depth of 15,500 feet, three miles southwest of that land. BLM recognized that three wells had been drilled in sec. 1, T. 8 N., R. 6 W., St. Stephens Meridian, Wayne County, Mississippi, but pointed out that none of these wells had penetrated the Smackover Formation. Therefore, BLM concluded that the subject land "remains prospective for oil and gas from the Smackover Formation" (Mineral Report at 2).

BLM effectively concluded that the subject land is situated on a "known producing structure," viz., the Smackover Formation. We have long held that a determination by BLM that a parcel of land is within a known producing structure (otherwise referred to as a known geologic structure (KGS)) will be affirmed on appeal where BLM has properly concluded that the land is underlain by a particular geologic structure (either structural, stratigraphic or a combination), which has been shown to be productive somewhere in the vicinity of that land. See Thunderbird Oil Corp., 91 IBLA 195, 202 (1986), aff'd sub nom., Planet Corp. v. Hodel, No. 86-679 HB (D.N.M. May 6, 1987). In these circumstances, the land is properly considered to be presumptively productive of oil and gas, even where there has been no production from that land. See Enron Oil & Gas Co., 117 IBLA 392, 397 (1991).

The burden is on the party challenging BLM's determination that land is within a known producing structure to establish either that the land is not underlain by the particular producing structure or that it would not be productive of oil and gas from that land. See Enron Oil & Gas Co., supra at 397-98. In the absence of such proof, we have affirmed BLM's determination.

While appellants have challenged BLM's determination that the subject land is within the boundaries of a known producing structure, viz., the Smackover Formation, they have offered no evidence that the land is not underlain by this formation. Their sole basis for challenging the Mineral Report's determination is the assertion that the formation will not be productive of oil and gas from this land, as evidenced by the lack of production from a nearby well. Assuming that this well attempted to obtain production from the Smackover Formation, which is by no means

verified, it is well established that the presence of one nearby dry hole will not undermine a determination by BLM that land is within a known producing structure. See Source Petroleum Co., 112 IBLA 184, 191 (1989). ^{1/} Therefore, we conclude that appellants have not established that the subject land is not within a known producing structure.

In any event, it is unnecessary for BLM to establish that the land is within a KGS in order to find "known mineral values." 43 U.S.C. § 1719(b)(1) (1988). In Mr. & Mrs. E. J. Wright, 83 IBLA 92, 94 (1984), we stated that: "[T]he actual discovery of oil or gas is not necessary to support a conclusion that the lands contain known mineral values." See also Kenneth C. Pixley, 88 IBLA 300, 302 (1985). Indeed, "[k]nown mineral values" are defined as "mineral values in lands with underlying geologic formations which are valuable for prospecting for, developing or producing natural mineral deposits. The presence of such mineral deposits in the lands may be known or geologic conditions may be such as to make the lands prospectively valuable for mineral occurrence." 43 CFR 2720.0-5(b) (emphasis added). The record amply demonstrates that the subject land is prospectively valuable for the occurrence of oil and gas based on geologic conditions, viz., the presence of the Smackover Formation, which has elsewhere been shown to be productive. See Temblor Enterprises, Inc., 86 IBLA 175, 178 (1985); Richard Alves, 85 IBLA 397, 401 (1985) (lands KGS'd); David D. Plater, 55 IBLA 296, 299 (1981). Appellants have presented no evidence to the contrary and, thus, have failed to rebut BLM's conclusion that the subject land has known mineral values. See Denman Investment Corp., 78 IBLA 311, 314 (1984).

Appellants suggest that reservation of the mineral interest may result in the clearing of trees from the subject land and then argue that such trees are "more valuable than any development such as malls, housing developments," and the like (Letter to the Board, dated Sept. 18, 1989, at 4).

^{1/} Appellants also suggest that the subject land will not be productive of oil and gas on the basis of the fact that, while wells to the east of that land have been productive, they are now abandoned. See Exhibit A attached to Letter to the Board, dated Mar. 22, 1990. These wells, however, were not relied upon by BLM because they are located in an area separated geologically from the subject land by a fault. See Mineral Report at 2, 8. Even if they had not been in a geologically distinct area, BLM could still have concluded that the subject land has known mineral values. See Jean Hubbard Waters, 89 IBLA 179, 182 (1985); Jerry R. Schuster, 83 IBLA 326, 328 (1984). At the time of the mineral report, BLM concluded that the Smackover Formation was productive of oil and gas in the area of the subject land as a result of production from a nearby well to the southwest of that land. See Mineral Report at 2. Since that time, there has been production from the nearby OXY USA No. 1 McIlwain "A" well on the order of at least 275 to 300 barrels of oil per day, according to appellants. See Letter to State Director, dated Apr. 26, 1990, at 1. This well produced from the Cotton Valley formation, which is situated above the Smackover Formation. See Attachment to Letter to the Board, dated June 4, 1990, at 4.

In effect, they contend that reservation of the mineral interest may interfere with or preclude the growing of trees on the subject land and that such trees are a more beneficial use of the land than other nonmineral development.

Appellants' argument evinces a basic misconception regarding the statutory qualifications for conveyance of a Federally-owned mineral interest. Such a conveyance hinges on a demonstration that reservation of a mineral interest in Federal ownership is interfering with or precluding appropriate nonmineral development and that such development is a "more beneficial use of the land than mineral development." 43 U.S.C. § 1719(b) (1988) (emphasis added). By contrast, appellants' argument is premised on an assertion that their posited nonmineral development is a more beneficial use than other nonmineral development. This does not succeed in establishing their qualifications under the statute.

In a subsequent letter to the Board, appellants contend that their ability to develop the land in the future will be "very limited" by reservation of the mineral interest and the attendant potential that BLM will permit mineral exploration and development (Letter, dated Mar. 22, 1990, at 1). They state that, in the future, they might "decide to develop [the land] into a recreational area, subdivide [it] into mini-farms, lease the hunting rights or whatever." Id.

However, appellants have simply offered no concrete plans for such development, 2/ nor have they demonstrated in what way reservation of the mineral interest is presently interfering with or precluding such development, nor how oil and gas leasing would affect such development. This is clearly an insufficient basis for concluding that the requirements of the statute have been satisfied. See 43 CFR 2720.0-6; David D. Plater, supra at 299. In any case, we can see no inherent conflict between such development and possible oil and gas production, given BLM's ability to restrict the location and scope of such activity so as to create the least impact on the 40-acre parcel of land. See Richard Alves, supra at 401.

While appellants have indicated that they have planted pine trees on the land, they have not indicated that they have any plans to harvest the timber at any time in the near future. Even if they intend to utilize the land for the production of timber, they have not demonstrated that reservation of the mineral interest will interfere with or preclude such production, again given BLM's ability to restrict the location and scope of mineral exploration and development. See Jean Hubbard Waters, supra at 182;

2/ We note that such development is unlikely in view of the fact that the record indicates that appellants intend to produce timber from the subject land. Indeed, in their application for conveyance, they stated that the "existing and proposed use of the land is the growing of pine trees" and that the land is "primarily suited for the production of timber." Also, in an Apr. 26, 1990, letter to the State Director, appellants averred that the land was "cleared and planted in pines at considerable cost to us."

Jerry R. Schuster, supra at 328. Nor can we conclude that this will be the case. See Temblor Enterprises, Inc., supra at 179. ^{3/}

In their June 1989 letter responding to BLM's requirement to submit evidence in support of their application, appellants raised the argument that reservation of the subject mineral interest "may seriously affect

long range plans for management, use, possible future development and protection to conserve * * * unique and irreplaceable [natural] resources for future generations and to provide present and future use and enjoyment to the community" (Letter to BLM, dated June 26, 1989, at 2). In particular, appellants suggested that, by cutting down trees, mineral exploration and development might result in erosion and, thus, increased scarring of the landscape and sedimentation of a local stream, which would in turn harm the environment and associated use of the land for scenic, educational, recreational and economic purposes. In order to prevent this, they primarily seek to preserve the existing trees on the subject land. ^{4/}

Even assuming that the conservation of natural resources, and especially trees, is "appropriate nonmineral development" within the meaning of section 209(b) of FLPMA, appellants have not demonstrated that reservation of the mineral interest will interfere with or preclude such development. Nor can we conclude that that will be the case. See Temblor Enterprises, Inc., supra at 179 (game preserve). As BLM correctly noted in its August 1989 decision, BLM has the authority to condition oil and gas leasing with measures designed to protect the environment. See, e.g., Bill J. Maddox, 72 IBLA 22 (1983). BLM has indicated that it intends to exercise that authority. See Letter to appellants from State Director, dated March 27, 1990, at 1 (notice of oil and gas lease sale will contain "any special conditions necessary to protect the environment"). Furthermore, BLM stated in its August 1989 decision that leasing will be undertaken only after a full review of the environmental consequences of leasing, pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (1988). Here, too, appellants have failed to show how mineral development will preclude appropriate nonmineral development.

^{3/} In Temblor Enterprises Inc., supra, we concluded that mineral development would not interfere with or preclude agricultural activity, relying on BLM's mineral report, which stated:

"Oil and gas activity does not require exclusive use of the surface. Each well pad requires roughly one acre of land, and only the area in the immediate vicinity of the well is cemented. Well drilling and pumper installation will cause temporary surface disturbance which can be reclaimed to the surface owner's satisfaction."

Id. at 179.

^{4/} We are constrained to point out that this argument is fundamentally inconsistent with appellants' original assertion that mineral development would interfere with the production of timber since such production, itself, normally involves the cutting down of trees.

Appellants have also challenged the congressional scheme for conveying Federally-owned mineral interests. They contend that section 209(b) of FLPMA discriminates against rural landowners, in violation of the U.S. Constitution. So far as we can determine, appellants' argument is that the statute discriminates against such landowners by requiring them to demonstrate that the reservation of a mineral interest in their land is interfering with or precluding appropriate nonmineral development, such as, factories, housing projects and malls, which, unlike large corporations, they are unable to afford to undertake. Further, appellants appear to argue that the statute discriminates against rural landowners to the extent that it requires them to establish, in the face of the immense lobbying power of the large corporations interested in mineral development, that nonmineral development is a more beneficial use of the land than mineral development.

The Board does not have jurisdiction to decide whether the congressional scheme for conveying Federally-owned mineral interests violates the U.S. Constitution. See Slone v. OSM, 114 IBLA 353, 357-58 (1990). Suffice it to say that there is nothing inherently discriminatory about section 209(b) of FLPMA. There is nothing in the statute which limits "appropriate nonmineral development" to expensive projects, such as factories, housing projects and malls. See H.R. Rep. No. 1163, 94th Cong., 2d Sess. 11, reprinted in 1976 U.S. Code Cong. & Admin. News 6175, 6185. Further, section 209(b) of FLPMA affords the rural landowner, as well as the large corporation, an equal opportunity to make a case for or against conveyance. In this regard, appellants have simply failed to establish that mineral development would interfere with or preclude nonmineral development which would be a more beneficial use of the land than mineral development.

Finally, appellants essentially contend that BLM was biased in its adjudication of their application for conveyance, as evidenced by the fact that BLM did not inform them, upon passage of section 209(b) of FLPMA, that they could thereby acquire the subject mineral interest, despite having then known that they were interested in it, and the fact that BLM delayed acting on such application from January to August 1989.

Appellants have not established that BLM acted in a prejudicial manner in adjudicating their application for conveyance. BLM was not required to inform them of the passage of section 209(b) of FLPMA since they are deemed to have knowledge of that statute. See Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947). Nor is there any bias inherent in BLM's short delay in processing their application. Rather, the record plainly demonstrates that appellants failed to establish that they qualify for a conveyance under the statute.

Thus, we conclude that BLM properly rejected appellants' application for conveyance of the Federally-owned mineral interest in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 1, T. 8 N., R. 6 W., St. Stephens Meridian, Wayne County, Mississippi, since they failed to establish, "by convincing factual evidence," their

qualifications for conveyance under section 209(b) of FLPMA. 5/ See
43 CFR 2720.0-6.

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.

James L. Burski
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge

5/ We do note, however, that in one aspect the decision below was flawed. Since the reservation in the patent was only for oil and gas, consideration of the value of sulphur was improper. This error, however, did not affect the underlying result inasmuch as we have concluded that the record clearly establishes that the subject land has known mineral values for oil and gas.