

R. L. HOSS

IBLA 93-408

Decided December 24, 1996

Appeal from decision of the Area Manager, Big Dry Resource Area, Bureau of Land Management, requiring payment of trespass damages and removal of property from an oil and gas lease. Trespass No. M-73627.

Reversed.

1. Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

The Department has generally held the issuance of special use permits to be appropriate only where the proposed use could not be authorized under other legal authority.

2. Oil and Gas Leases: Generally

The provisions of the Mineral Leasing Act and the terms of oil and gas leases issued thereunder are properly construed to authorize such use of the surface of the leased lands as is reasonably necessary for development of oil and gas reserves from the leasehold.

3. Oil and Gas Leases: Generally--Trespass: Generally

The authority to erect buildings and structures conveyed by an oil and gas lease issued under the Mineral Leasing Act is properly limited to surface occupancy reasonably necessary to development of oil and gas on the leasehold. When the record discloses that a structure used as a residence by the operator's personnel on a producing oil and gas lease in a remote area is a

practical necessity for production of oil on the lease, a finding of liability for trespass will be reversed to the extent occupancy is limited to the duration of the necessity.

APPEARANCES: Philip G. Dufford, Esq., and Terry Jo Epstein, Esq., Denver, Colorado, for appellant; John C. Chaffin, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

R. L. Hoss has appealed from the April 28, 1993, decision (M-73627) of the Area Manager, Big Dry (Montana) Resource Area, Bureau of Land Management (BLM), requiring removal of property and payment of trespass damages arising from residential occupancy on an oil and gas lease (Billings 038176). The BLM decision indicated that the occupancy involved the E $\frac{1}{2}$ SW $\frac{1}{4}$, sec. 6, T. 14 N., R. 31 E., Principal Meridian, Montana, embraced in the lease. Appellant asserts residential occupancy is authorized by section 1 of the lease, which grants the "right to construct and maintain thereupon all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations, or other structures necessary to the full enjoyment thereof." (Emphasis added.) He contends that the unit production is so marginal that it could not be economically operated if he were required to find housing elsewhere. 1/

1/ Appellant asserts that the houses are located about 30 miles from the nearest town, Winnet (population 207), 53 miles from Jordan (population 485), and 80 miles from Lewiston (population 7,104). Suitable alternative housing would require excessive transportation expense, less time on the job, and inaccessibility in the event of inclement weather. Citing the

BLM contends that the foregoing provision relates to "meter and valve housings and other related structures necessary for the production of petroleum, not permanently anchored houses and certainly not housing for employees" (Answer at 3).

The lease has a long history, having been part of a larger lease issued in 1941 and extended by production. ^{2/} It appears from the record that one of the structures on the lease is occupied by an employee who has been the custodian for the operator since 1948, prior to the time the Department amended its regulations to require approval of a plan of operations before commencing operations that would disturb the surface

fn. 1 (continued)

marginal economic status of the field, appellant contends that additional transportation costs would reduce the field to break even status and that the investment cost of alternative housing for workers who now receive free housing as a work incentive would generate a loss. Appellant asserts the absence of services at reasonable distances has compelled appellant to maintain his own facilities on the lease for welding, water hauling, trucking, machinery repair, and maintenance of oil production systems, and that continuous production has been possible only by housing the workers on site. Appellant contends that additional costs would force abandonment of the operation leading to premature loss of oil recovery estimated at 70,000 barrels over the final 10 years of the life of the field.

^{2/} Oil and gas lease Billings 038176 embracing sec. 6, T. 14 N., R. 31 E., Principal Meridian, Montana, was originally issued effective June 1, 1941, for a term of 5 years and has been extended by production. Production was established on a well in the NE¹/₄ SW¹/₄ of sec. 6 in April 1946. In 1966, there were 3 wells on the E¹/₂ SW¹/₄, and 11 wells on the rest of the lease averaging a total leasehold production of 1,500-2,000 barrels of oil per month. Memorandum, District Engineer, Billings, Montana, to Regional Oil and Gas Supervisor, Casper, Wyoming (Oct. 6, 1966). Effective Jan. 1, 1968, assignment of the operating rights in all of sec. 6 to R. L. Hoss was approved. Hoss subsequently assigned his interests to the Cat Creek Trust, of which he was sole trustee. In 1974, other land in sec. 6 was segregated from the base lease upon partial commitment to a unit.

other than well operations. See 43 CFR 3162.3-3 (originally promulgated as 30 CFR 221.28, 47 FR 47765 (Oct. 27, 1982)). ^{3/} Production from the wells on the lease and the unit of which the lease is a part was once processed by a refinery on the lease for use as jet fuel by the military.

Upon learning of a suspected occupancy trespass on the lease, BLM on June 11, 1980, investigated the site and identified a jet gas refinery that was no longer operating, five or six houses, pipelines, oil wells, and storage tanks. Two of the houses were occupied, one by Leonard Eastman (semi-retired), who had been the custodian for the operator since 1948. The other house was occupied by Larry Peterson, a rancher who sometimes worked for Eastman. The oil wells were said to have been on secondary recovery since 1958.

On January 12, 1987, BLM telephoned Hoss to advise him of its intent to require clean up of the lease and to bring it into compliance with current regulations. Hoss responded by stating that an attempt to make him clean up the site would result in closing the field since he did not wish to spend any more money there. Subsequent communications between counsel for Hoss and BLM resulted in an appeal that was withdrawn and dismissed. Robert L. Hoss, IBLA 88-46 (Oct. 27, 1987). An attempt to revive that appeal prompted reconsideration of that dismissal, but the Board adhered to

^{3/} While the preface to the rulemaking makes no reference to residential occupancy, the language of the regulation covering "any operation on the leasehold which will result in additional surface disturbance" is clearly broad enough to cover such use.

its dismissal of the appeal because there was "no issue ripe for review at the present time." Robert L. Hoss, IBLA 88-46; 88-70 (Apr. 29, 1991).

Although BLM's previous efforts focussed on requiring Hoss to obtain a permit for his occupancy and pay some minor trespass damages, BLM's attention was later directed to the need to clean up the abandoned jet fuel refinery and the difficulty that continued human habitation of the site would pose to that effort. ^{4/} On November 22, 1991, BLM issued a notice to cease and desist charging Hoss with constructing houses on Federal lands without authorization and allowing occupancy of those houses by oil field employees in violation of the Mineral Leasing Act, 30 U.S.C. §§ 181-287 (1994), the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1784 (1994), and Departmental regulations 43 CFR 2920.1-2, 3102.5-1, and 9262.1. Appellant was afforded 30 days in which to cease the trespass or demonstrate that he was not a trespasser as alleged. Hoss was also advised of potential civil and criminal liability.

Hoss through counsel responded by letter dated December 6, 1991, stating that the houses are not in trespass, but expressing a desire to conclude the matter by obtaining a lease or permit authorizing such occupancy. BLM appraised the trespass damages for three houses at \$450, or \$25 per year per site for 6 years but did not issue a permit, issuing instead

^{4/} By letter dated Nov. 18, 1991, the Department of Health and Environmental Sciences of the State of Montana advised BLM of the impact of the Montana Comprehensive Environmental Cleanup and Responsibility Act on the refinery site and BLM's potential liability.

the decision from which this appeal is taken. On appeal BLM explains that the permit was not granted because of the need to clean up the "abandoned jet fuel refinery constructed by the appellant's predecessor in interest," but also suggests that "[i]f appellant's housing were moveable, a new proposed nonconforming lease or permit, with a proposed relocation, may not require a consideration of the hazardous materials problem as it now exists" (Answer at 4 and n.2).

As a threshold matter, we note that the issue in this appeal is not whether BLM can order cessation of residential occupancy of the lease to the extent necessary to facilitate cleanup of the refinery site. If BLM is correct that the oil and gas lease does not authorize residential occupancy, appellant's employees may be removed as trespassers. If appellant is correct that the lease authorizes residential occupancy reasonably necessary for lease operations, BLM may still require appellant's employees to vacate their residences by suspending operations on the lease for the purpose of protecting the environment. See generally, Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981).

Appellant has made a persuasive argument that residential occupancy is reasonably necessary for lease operations 5/ and BLM's answer makes no effort to refute this contention. Therefore, the issue in this appeal is simply whether BLM is correct in contending that the lease does not

5/ See n.1, supra.

authorize such occupancy, even if it is reasonably necessary for lease operations.

[1] Before BLM's attention was directed to the need to clean up the abandoned refinery, BLM had concluded that the lease did not authorize residential occupancy but that such occupancy could be authorized by a special use permit. Even now BLM suggests that a special use permit for "moveable" housing elsewhere on the leasehold could be issued (Answer at 4 n.2). The Department, however, has traditionally regarded issuance of special use permits as appropriate only if the proposed use could not be authorized under other law. See 43 CFR 2920.1-1; Juliet Marsh Brown, 64 IBLA 379 (1982); James W. Smith, 44 IBLA 275, 279-80 (1979); Alfred E. Koenig, 4 IBLA 18, 78 I.D. 305 (1971). Thus, issuance of a use permit to an oil and gas lessee for residential occupancy reasonably necessary for oil and gas production would be appropriate only if the Mineral Leasing Act itself were inadequate to provide such authority. We find no basis for imputing such a limitation on the powers granted the Secretary by that statute.

[2] In Kinney-Coastal Oil Co. v. Kieffer, 277 U.S. 488 (1928), the Supreme Court sustained a suit by the holder of a Federal oil and gas lease against the owner of a homestead, patented with a reservation of oil and gas to the United States, where the surface patentee was installing utilities and building houses in such a manner as to impair operations under the lease. In listing operations conducted on the lease, the Court noted

that the operators had "erected houses for their workmen." Id. at 505. By enjoining the surface owner from subdividing his property and erecting houses, the Court in effect recognized that a Federal oil and gas lessee had a right to build houses for its employees superior to that of surface owners of a patented homestead. Accordingly, we conclude that no special use permit is required for residential occupancy of an oil and gas lease if the residential occupancy is shown to be reasonably necessary for the development of the leasehold, because the Mineral Leasing Act provides the statutory basis for authorizing that use.

[3] We recognize that BLM does not rely on statutory grounds to support its position that no residential occupancy is authorized but instead offers a narrow construction of the terms "buildings" and "structures" which appear in section 1 of the lease. The Court's analysis in Kinney-Coastal was based primarily on the applicable statutory provisions rather than the specific language of the Federal oil and gas lease, although the Court found that terms of the oil and gas lease were consistent with this statutory construction. 277 U.S. at 504-05. We believe that the oil and gas lease must be construed in a manner consistent with the statutory policies that animated the Court's reasoning. We note that section 1 of the Department's lease form in use when the lease in Kinney-Coastal was issued made no reference to housing, but, like appellant's lease, simply referred to "buildings" and "structures." Oil & Gas Regulations, 47 L.D. 437, 447 (1920); see Kinney Coastal Oil Co. v. Kieffer, supra at 493.

In other circumstances where residential occupancy was deemed to be reasonably necessary and incident to the development of a mineral deposit, we have found that authorization for such occupancy is derived from the legislation governing the disposition of the mineral. *E.g.*, Bruce W. Crawford, 86 IBLA 350, 374, 92 I.D. 208, 221 (1985) (occupancy of mining claim); P & O Falco, Inc., 78 IBLA 128 (1983) (residential trailer authorized by amending natural gas pipeline right-of-way). The Falco case involved a right-of-way issued pursuant to section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185 (1994), for a natural gas pipeline and support facilities. In that case, appellant sought to amend the right-of-way to include installation of a residential trailer to house security personnel. A BLM decision to reject the application was set aside and remanded by the Board when the applicant demonstrated that the trailer was necessary to operation and maintenance of the pipeline for reasons of safety and site security. P & O Falco, Inc., *supra* at 130-32. Noting that section 28 of the Mineral Leasing Act specifically authorizes "campsites," we concluded that the residential trailer in that case came within the definition of a campsite in the sense that it would be used to temporarily house one of appellant's employees. *Id.* at 130-31.

This Board has distinguished temporary from permanent residential facilities in at least one case. *See* George M. Wilkinson, 70 IBLA 1 (1983) (finding no basis in Geothermal Steam Act of 1970, 30 U.S.C. § 1001 (1994), or its implementing regulations allowing the erection of permanent homes as adjuncts to lease operations). The stated basis for our decision in Wilkinson was the absence of any affirmative provision for residential

occupancy in the applicable statute or its implementing regulations. In that decision, the Board found "no basis in the Act or regulations allowing the erection of permanent homes as adjuncts to lease operations," distinguishing "camp sites" which may be required "to temporarily house crews and staff associated with lease operations." George M. Wilkinson, 70 IBLA at 3 (emphasis added). Although the instant appeal has prompted us to consider a broader range of authorities such as Kinney-Coastal which were not considered in Wilkinson, we note that Wilkinson did not involve either pre-existing structures used to house operations personnel asserted to be in trespass or the question of whether a particular form of occupancy was reasonably necessary to support lease operations. The BLM in this case focussed on the physical attributes of the structure, *i.e.*, whether it was mobile such as a trailer mounted on wheels as opposed to building affixed to a foundation. We think the distinction between temporary and permanent occupancy is more properly analyzed in terms of the duration of the necessity (*e.g.*, access to facilities actually being used for production of oil or gas which are otherwise practically inaccessible) which requires the occupancy and limitation of any occupancy to a term which is coextensive with that need. Analyzed from this perspective, the Wilkinson case is distinguishable and does not support a finding of trespass.

This result is consistent with other court decisions involving this issue. Citing the Kinney-Coastal decision, a state court denied a surface patentee recovery from a Federal oil and gas lessee of the rental value of employee housing because such housing was reasonably incident to mineral operations. Holbrook v. Continental Oil Co., 73 Wyo. 321, 278 P.2d 798

(1955). The facts justifying the court's conclusion are comparable to those asserted by appellant herein. 278 P.2d at 801.

But even when we turn to cases construing the terms "buildings" and "structures" in private leases, we find little support for BLM's position. A Federal court held that a dozen residences for employees were authorized under a lease that likewise referred to "buildings" and other "structures" but did not expressly refer to housing. Livingston v. Indian Territory Illuminating Co., 91 F.2d 833 (10th Cir. 1937). A state court ruled that an oil and gas lease authorizing "structures" authorizes a residence for an employee reasonably required for lease production. Joyner v. R. H. Dearing & Sons, 112 S.W.2d 1109, 1112 (Tex. Civ. App. 1937), on retrial, 134 S.W.2d 757 (Tex. Civ. App. 1939).

In support of its argument that the lease does not allow for residential occupancy, BLM cites a Solicitor's Opinion entitled Rights of an Oil and Gas Lessee to the Use of the Surface of the Land and Surface Materials in his Lease, and with respect to Injury to the Land and Vegetation by Reason of Operations under the Lease, M-36575 (Aug. 26, 1959). This opinion primarily focussed on the legality of a lessee's use of caliche and other road building materials on the leasehold for lease operations, but other issues involved excessive surface disturbance in building pipelines, destruction of fences of grazing lessees, destruction of vegetation, and unnecessary use of the surface for construction of a landing strip. Despite the cogency of the analysis in Kinney-Coastal to

the issue addressed by the memorandum, that case was not even cited. ^{6/} Moreover, the only reference to housing appears in the following sentence: "They [lessees] may not erect houses for their employees unless authorized to do so by the lease." Id. at

3. No citation of authority for this statement appears until the end of the paragraph where there is a reference to a prior citation of 4 Summers, Oil and Gas, Permanent Edition, § 652, and cases cited and discussed.

The cited section of the Summers treatise, however, does not support BLM's decision in this appeal: "Since an oil and gas lessee has merely an easement and not a lease of the surface, he may not erect houses for his employees on the leased premises * * *, unless such use is shown to be reasonably necessary for carrying out the purposes of the lease." (Emphasis added; footnotes omitted.) The treatise supports the first part of this statement with a citation to Fowler v. Delaplain, 79 Ohio St. 279, 87 N.E. 260 (1909), where the court found that the lease contained no stipulation authorizing the lessee to sublet to his employees any of the surface for barns, residences, yards, gardens, pasture lots, etc., as may be merely convenient for the operation of the oil and gas lease, but the right to the surface is "restricted to so much as may be necessary" for producing operations. Id. at 289, 87 N.E. at 262. The treatise then supports the emphasized text with a citation to Livingston v. Indian

^{6/} We note that Kinney-Coastal was authored by Justice Van Devanter, "who, as Assistant Attorney General for the Interior Department from 1897 to 1903, did more than any other person to give character and distinction to the administration of the public lands." Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336-37 (1963).

Territory Illuminating Co., supra, which held that residences were authorized under a lease that likewise referred to "buildings" and "other structures" but did not expressly refer to housing. Given the fact that the Solicitor's Opinion did not focus on the subject of housing and the Solicitor himself relied upon Summers as authority, we do not construe the opinion as foreclosing employee housing that "is shown to be reasonably necessary for carrying out the purposes of the lease."

Although BLM relies on Fowler to support its decision in this appeal, we think that Fowler may be distinguished from the instant appeal because the court found that the oil and gas lessee had subleased the land in such a way as to authorize occupancy beyond what was necessary for oil and gas production. Although the Fowler decision may support the position that housing is not authorized unless a lease specifically so provides, decisions such as Livingston and Holbrook show that other courts have construed the words "buildings" and "structures" to include housing for employees when necessary to support lease operations. Thus, we are not persuaded that the Fowler case supports the BLM decision under appeal. ^{7/}

^{7/} Furthermore, we find no support for BLM's position in an opinion from the Associate Solicitor to BLM's Eastern States Director cited by BLM entitled Federal Jurisdiction over Acquired Private Leases in Ohio, (May 2, 1983). BLM refers to page 6 of the memorandum where it states that courts have been restrictive in allowing residential use "absent a strong reason to the contrary" (emphasis in original) and "only where necessary for the supervision of the well and production therefrom." The quoted statement supports appellant's position, not the BLM decision under appeal.

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 reversed.

C. Randall Grant, Jr.
Administrative Judge

I concur.

R. W. Mullen
Administrative Judge

