

RICHARD D. SAWYER

IBLA 2002-189

Decided August 19, 2004

Appeal from decision of the California State Office, Bureau of Land Management, rejecting oil and gas lease offer CACA 38563.

Affirmed.

1. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: First Qualified Applicant--Oil and Gas Leases: Federal Onshore Oil and Gas Leasing Reform Act of 1987--Oil and Gas Leases: Lands Subject To--Oil and Gas Leases: Noncompetitive Leases--Oil and Gas Leases: Offers to Lease

When Congress enacted the Federal Onshore Oil and Gas Leasing Reform Act to amend statutory provisions pertaining to noncompetitive oil and gas leasing under 30 U.S.C. § 226(c), it did not fundamentally change the nature of the entitlement of the first qualified applicant for a noncompetitive oil and gas lease, which has long been recognized as subject to the discretionary authority of the Secretary under 30 U.S.C. § 226(a) to determine whether the land is to be leased or not.

2. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: First Qualified Applicant--Oil and Gas Leases: Federal Onshore Oil and Gas Leasing Reform Act of 1987--Oil and Gas Leases: Lands Subject To--Oil and Gas Leases: Noncompetitive Leases--Oil and Gas Leases: Offers to Lease

The filing of a post-sale noncompetitive oil and gas lease offer which has not been accepted does not give the offeror any right to a lease, or generate a legal interest

which reduces or restricts the discretion vested in the Secretary to issue leases for the lands involved.

3. Oil and Gas Leases: Applications: Generally--Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: First Qualified Applicant--Oil and Gas Leases: Federal Onshore Oil and Gas Leasing Reform Act of 1987--Oil and Gas Leases: Lands Subject To--Oil and Gas Leases: Noncompetitive Leases--Oil and Gas Leases: Offers to Lease--Withdrawals and Reservations: Effect Of

A post-sale noncompetitive oil and gas lease offer that has not been accepted is properly rejected if the land is withdrawn from oil and gas leasing while the offer is pending.

APPEARANCES: Richard D. Sawyer, Malibu, California, pro se; Daniel G. Shillito, Esq., and Alf W. Brandt, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

#### OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Richard D. Sawyer has appealed from a December 31, 2001, decision of the California State Office, Bureau of Land Management (BLM), rejecting oil and gas lease offer CACA 38563 because the land for which the offer was filed was no longer subject to oil and gas leasing. Appellant's offer was filed on August 8, 1997, and was still pending on January 17, 2001, when President Clinton issued Proclamation 7393 establishing the Carrizo Plain National Monument. The Proclamation withdrew approximately 204,107 acres, including the land described in appellant's oil and gas lease offer, "from disposition under all laws relating to mineral and geothermal leasing." Although the establishment of the monument was made "subject to valid existing rights," BLM found: "Because no lease had been issued pursuant to CACA 38563, the applicant had no 'valid existing rights' arising out of that offer."

Appellant contends that his offer described land that had been the subject of a competitive oil and gas lease sale for which no qualifying bid was received. As the first qualified applicant for a noncompetitive lease, appellant asserts he was entitled to issuance of a lease within 60 days under 30 U.S.C. § 226(c)(1) (2000). Appellant contends that he was entitled to issuance of a lease on October 8, 1997, more than three years prior to the proclamation's withdrawal of the land, and he therefore had a valid existing right before the withdrawal took effect. In its Answer, BLM refers to our decision in George W. Witter, 129 IBLA 359 (1994), upon which BLM relied in the decision under appeal. In Witter, 129 IBLA at 363, we held that a pending post

sale offer “does not invest the offeror with a legal or equitable title, claim, interest, or right to receive the lease.”

The Mineral Leasing Act provides: “All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary.” 30 U.S.C. § 226(a) (2000). All lands to be leased must be made available for competitive bidding under 30 U.S.C. § 226(b)(1), with certain exceptions.<sup>1/</sup> Subsection (b)(1) further provides, however, that if no bids are received for the land or if the highest bid is less than the national acceptable minimum bid, the “land shall be offered promptly within 30 days for leasing under subsection (c) of this section and shall remain available for a period of 2 years after the competitive lease sale.”

Appellant asserts that a competitive sale for the land described in its offer had been held on May 7, 1997, and that the land became open for noncompetitive offers because no qualifying bids were received. Appellant filed his offer with BLM on August 8. Appellant refers to 30 U.S.C. § 226(c)(1) (2000), that provides in part as follows:

If the lands to be leased are not leased under subsection (b)(1) of this section or are not subject to competitive leasing under subsection (b)(2) of this section, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding, upon payment of a non-refundable lease application fee of at least \$75. \* \* \* Leases shall be issued within 60 days of the date on which the Secretary identifies the first responsible qualified applicant. [Emphasis added.]

Appellant was not identified as the first qualified applicant under this provision because BLM had mistakenly believed that appellant’s offer was a “presale offer” for land that had never been in a competitive lease sale.<sup>2/</sup> Appellant had filed several presale offers for land in the Carrizo Plain, and BLM had taken no action on those offers before the establishment of the national monument. In a decision dated August 8, 2001, BLM rejected appellants’ presale offers but also included

<sup>1/</sup> The exceptions involve special tar sand areas under subsection (b)(2) and special circumstances pertaining to vested future interests becoming vested present interests under subsection (b)(3), neither of which applies to the matter here under appeal.

<sup>2/</sup> Although public lands are not subject to noncompetitive leasing until they have first been placed in a competitive lease sale, BLM’s regulations permit presale noncompetitive lease offers to be submitted prior to the formulation a list of lands available for competitive nominations. See 43 CFR 3110.1(a)(1).

CACA 38563 in its decision. When BLM learned that CACA 38563 was a post sale offer, it vacated its August 8 decision in part with respect to that offer in a decision dated August 30, 2001.<sup>3/</sup> BLM then rejected CACA 38563 in the December 31, 2001, decision that is the subject of this appeal.

In its decision, BLM found that appellant had “no ‘valid existing rights’ arising out of” his offer, citing our Witter opinion. It is well established that until an offer is accepted through issuance of a lease, the offer is properly characterized as a hope or expectancy rather than a vested property right. See Schraier v. Hickel, 419 F.2d 663 (D.C. Cir. 1969); McDade v. Morton, 353 F. Supp. 1006, 1010 (D.D.C. 1973), aff’d, 494 F.2d 1156 (D.C. Cir. 1974). Appellant nevertheless contends that the characterization of an offer as a mere hope or expectancy may have been the case for offers filed before the Mineral Leasing Act was amended by the Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA),<sup>4/</sup> but after that amendment, this characterization does not apply to noncompetitive offers filed for land that had received no bids at a competitive lease sale during the two year period of availability.

Appellant contends that although the Secretary may have had discretion to lease or not to lease up to the competitive sale on May 7, 1997, the Secretary had “no further discretion to withdraw the lands from leasing.” (Notice of Appeal/Statement of Reasons (NOA/SOR) at 2.) “Instead,” appellant contends, “the Act required that the lease SHALL be issued within 60 days. \* \* \* [I]ssuance is mandatory and the BLM cannot decline to grant the lease based on subsequent or intervening events that take place over three years after said 60 day period. The word ‘shall’ shows Congress considered the matter and made law.” Id. We note, however, that under the terms of the statute, the 60-day period does not begin to run from the date on which appellant filed his offer but from “the date on which the Secretary identifies the first responsible qualified applicant.” Nevertheless, we do not base our decision on the fact that BLM had not identified appellant as the first responsible qualified applicant filing a post lease offer prior to the withdrawal for the Carrizo Plain National Monument.

Although our holding in Witter was based on pre-FOOGLRA case law, we disagree with appellant’s contention that FOOGLRA changed the Mineral Leasing Act in a way that precluded the Secretary from exercising his discretion to lease or not to lease under section 226(a) after lease offers had been filed. Although the provision requiring issuance of a lease within 60 days was added by FOOGLRA, the mandatory

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<sup>3/</sup> Sawyer appealed BLM’s decision rejecting his presale offers, and BLM’s decision was affirmed by this Board. Richard D. Sawyer, 160 IBLA 158 (2003).

<sup>4/</sup> FOOGLRA was enacted as part of Title V of the Omnibus Budget Reconciliation Act of 1987, 101 Stat. 1330-259 (1987).

term “shall” appeared in subsections (b) and (c) before FOOGLRA amended them. Subsection (b)(1) previously provided that “[i]f the lands to be leased are within any known geological structure of a producing oil and gas field, they shall be leased to the highest responsible qualified bidder \* \* \*.” 30 U.S.C. § 226(b)(1) (1982) (emphasis added). Subsection (c) previously provided: “If the lands to be leased are not subject to leasing under subsection (b) of this section, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding. 30 U.S.C. § 226(c) (1982) (emphasis added).

The relationship of the statutory requirements in section 226 pertaining to lease issuance to the discretionary authority of the Secretary was considered in detail in Haley v. Seaton, 281 F.2d 620, 624-25 (D.C. Cir. 1960), which traced the origins of those provisions to earlier amendments to the Mineral Leasing Act and observed:

It is significant that the phrase “may be leased by the Secretary of the Interior” in § 17 of the original Mineral Leasing Act [now 30 U.S.C. § 226] was carried forward without change in the Amendment of 1935 and the Amendment of 1946, indicating an intent to continue to give the Secretary of the Interior discretionary power, rather than a positive mandate to lease.

Id. at 625. The court concluded that the provision containing requirements for the issuance of competitive or noncompetitive leases

applies only to lands “to be leased,” plainly implying that the Secretary of the Interior was to determine what lands were to be leased. Accordingly, we conclude that the acceptance or rejection of the applications to lease here involved was a matter resting within the discretion of the Secretary of the Interior.

Id.

[1] In 1965, the Supreme Court adopted a similar construction of the Secretary’s authority to refuse to issue a lease to a first qualified applicant: “Although the Act directed that if a lease was issued on such a tract, it had to be issued to the first qualified applicant, it left the Secretary discretion to refuse to issue any lease at all on a given tract.” Udall v. Tallman, 380 U.S. 1, 4 (1965). In Duesing v. Udall, 350 F.2d 748, 752 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966), the court rejected arguments similar to those advanced by appellant because Congress did not modify the language of section 226(a): “The initial sentence of section 17, which was dominant in the thinking of the Secretary and the courts, was left intact.” Thus, while FOOGLRA may have modified the requirements of subsections (b) and (c), it,

like prior amendments to the Mineral Leasing Act, “carried forward without change” and “left intact” the language of subsection (a) under which the Secretary has discretionary authority to determine at any time whether land subject to a pending offer was to be leased. Accordingly, in the absence of any modification to section 226(a), we conclude that when Congress enacted FOOGLRA, it did not fundamentally change the nature of the entitlement of the first qualified applicant for a noncompetitive oil and gas lease, which has long been recognized as subject to the discretionary authority of the Secretary under section 226(a) to determine whether the land is to be leased or not. “Given the Secretary’s discretion whether to lease the lands at all, plaintiffs’ offer to lease could not, in and of itself, vest plaintiffs with any right to a lease, and plaintiffs’ contention that Section 226(c) required the Secretary to issue the leases was properly dismissed as a matter of law.” Burglin v. Morton, 527 F.2d 486, 488 (9<sup>th</sup> Cir.), cert. denied, 425 U.S. 973 (1976).

[2] Courts have consistently rejected the proposition that a “valid existing right” to a lease arises from the filing of a qualified noncompetitive offer. “The filing of an application which has not been accepted does not give any right to a lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved.” Duesing v. Udall, 350 F.2d at 750-51.

[E]ven if an application for lease were first in time [under section 226(c)] and filed in response to a government notice that it will receive offers, no legal claim against the government arises. [Schraier v. Hickel, 419 F.2d 663, 667 (D.C. Cir. 1969).] The result is the same where offers were filed long before a determination by the Secretary not to lease. McDade v. Morton, 353 F.Supp. 1006 (D.D.C. 1973), aff’d, 161 U.S.App.D.C. 237, 494 F.2d 1156 (1974).

Arnold v. Morton, 529 F.2d 1101, 1106 (9<sup>th</sup> Cir. 1976).

Appellant refers to our decision in Witter and attempts to distinguish it from this appeal by arguing that Witter supports the exercise of discretion to reject lease offers where evidence in the record shows dedication of the land for public purposes with which oil and gas development would be incompatible. (NOA/SOR at 3.) Appellant asserts that BLM’s decision “argues none of these points” but “cites ‘administrative error’ as its excuse to support its delaying tactics and to circumvent an Act of Congress and deny the issuance of the lease within the 60-day period as required by Section 226(c)(1).” Id.

Appellant’s argument fails for two reasons. Although BLM’s decision may not have explained in detail the public purposes for which oil and gas development was deemed incompatible, the text of the Proclamation sets forth that explanation, as

BLM points out in its Answer. (Answer at 5.) However, the fundamental reason why appellant's argument fails is the effect of the withdrawal itself. Witter differs from this case because the land in Witter had not been withdrawn, so BLM still had discretionary authority to accept or reject Witter's offer. The Board, therefore, was required to determine whether the reasons provided by BLM supported its exercise of discretion to reject the offer. See Arnold v. Morton, 529 F.2d at 1106. In this case, appellant's arguments concerning BLM's land use planning involving the Carrizo Plain, and BLM's treatment of oil and gas lease offers during the time those plans were developing, see NOA/SOR at 3, do not diminish the effectiveness of the withdrawal under the proclamation. See Richard D. Sawyer, 160 IBLA 158, 160-61 (2003).

[3] In Richard D. Sawyer, we affirmed BLM's rejection of appellant's presale noncompetitive lease offers because those offers established no valid existing rights that survived the withdrawal. We recognize that despite the different statutory language that may govern a postsale noncompetitive offer, we must reach the same conclusion. Since the appellant's noncompetitive offer had not been accepted, it did not survive the withdrawal. See Haley v. Seaton, 281 F.2d at 626. Accordingly, we conclude that BLM properly rejected appellant's offer because the land was no longer available for oil and gas leasing.

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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H. Barry Holt  
Chief Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge