

Editor's note: 84 I.D. 342

PERMIAN MUD SERVICE, INC.

IBLA 76-521

Decided June 30, 1977

Appeal from decision of New Mexico State Office, Bureau of Land Management, rejecting sodium prospecting permit application NM-24573.

Affirmed.

1. Applications and Entries: Vested Rights--Mineral Lands: Determination of Character of--Mineral Lands: Leases--Public Lands: Leases and Permits--Sodium Leases and Permits: Leases--Sodium Leases and Permits: Permits

Under 30 U.S.C. § 262 (1970), a valuable deposit of sodium must be leased competitively even though the Geological Survey determination that lands are so known may have been made subsequent to appellant's filing of its application.

2. Act of January 31, 1901--Mineral Lands: Leases--Mineral Lands: Prospecting Permits--Mining Claims: Lands Subject to--Mining Claims: Locatability of Mineral: Leasable Compounds--Mineral Leasing Act: Applicability--Mineral Leasing Act: Lands Subject to--Sodium Leases and Permits: Leases--Sodium Leases and Permits: Permits

Under 30 U.S.C. §§ 162 and 262 (1970), valuable deposits of sodium compounds are

not open to location and disposition under the mining laws, but may be disposed of only under the Mineral Leasing Act, except for certain claims under 43 CFR 3501.1-1(b), existent at passage of Mineral Leasing Act of 1920 which have since been maintained in accordance with statute and regulation. Max Barash, 63 I.D. 51 (1956), was overruled in part by Solicitor's Opinion M-36686, 74 I.D. 285 (1967).

APPEARANCES: James E. Templeman, Esq., Sanders, Templeman and Crutchfield, Lovington, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GOSS

Permian Mud Service, Inc., appeals from a February 6, 1976, decision of the New Mexico State Office, Bureau of Land Management (BLM), rejecting its application NM 24573 for a sodium prospecting permit.

The question involves sodium chloride only. Permian's application was filed on January 20, 1975, and after several amendments was given a priority date of February 19, 1975. In its statement of reasons, Permian avers that in August 1973, it had entered the subject federal lands under the mistaken belief that they were owned by the State of New Mexico, and since shortly after that entry, "[b]rine in marketable quality and quantity has been produced"

from the Tracy No. II hole on the lands. 1/ This hole existed prior to appellant's entry, and was considered dry. Upon discovering that Tracy No. II was actually located upon federal lands, appellant in October 1973 canceled its application with the New Mexico Oil Conservation Commission and in March 1974 submitted an application for a federal permit. For various reasons of procedure which are not disputed, its filings prior to January 20, 1975, were deemed insufficient.

On February 6, 1976, the State Office issued its decision rejecting the 1975 application because:

The lands described in this application are known to contain a valuable deposit of sodium chloride several hundred feet thick and may be leased only by competitive bidding as provided by 43 CFR Subpart 3520.

The record does not indicate the date upon which Geological Survey determined that the subject lands were known to contain a valuable deposit of sodium chloride. Permian urges that this may have occurred after it filed its permit application, but offers no evidence. The record contains a Geological Survey letter dated December 22, 1975, stating that the land contains a valuable deposit

1/ The brine, according to Permian, "would be used to take the place of drilling mud since it causes less friction to a drilling bit than mud and is considerably cheaper than mud." Statement of Reasons at 1.

of sodium chloride several hundred feet thick and that sodium chloride brine is presently being produced.

As to the prospecting permit, Permian offers an analogy to federal oil and gas leasing, summarizing Max Barash, 63 I.D. 51 (1956), in its Statement of Reasons at 3:

Federal oil and gas lands are not subject to competitive bidding until it is determined that oil fields under such lands are embraced within known geological structures of producing oil and gas fields. If that determination is made after a proper offer for a non competitive lease a subsequent determination that the land does contain valuable minerals will not affect the applicant's right to a non competitive lease.

[1] Under 30 U.S.C. § 262 (1970), valuable sodium deposits are subject to competitive bidding. Appellant admits that valuable brine has been produced from the sodium chloride deposit since approximately 1973, and that the rules for known valuable deposits of sodium are analogous to those for known valuable deposits of oil and gas. In the case cited by Permian, Max Barash, supra, the Solicitor stated that "* * * the Department may properly reject a noncompetitive offer to lease for oil and gas because it covers land within the known geologic structure of a producing oil or gas field so long as the determining facts are ascertained prior to the date of the offer." 63 I.D. at 60-61. Permian emphasizes the latter part of this holding.

While Barash 2/ followed then departmental precedent, in 1967 the Department's position was reexamined in Solicitor's Opinion M-36686, 74 I.D. 285, and overruled in part. In McDade v. Morton, 353 F. Supp. 1006 (D. D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974), the District Court at 1009-10 discussed the change in departmental interpretation and regulations:

It is clear from the express language of Section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226, that public lands of the United States "which are known or believed to contain oil or gas deposits may be leased" * * * by the Secretary of the Interior and that, "if the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease * * * shall be entitled to a lease of such lands without competitive bidding." * * * The Courts have long construed these provisions as giving the Secretary broad discretion in the issuance of oil and gas leases, the only limitation upon his discretion (as to land which is not within any known geologic structure of a producing oil or gas field) being that, if the land is leased, it must be leased to the first person making application therefor who is qualified under the statute and applicable regulations to receive a lease. * * * Given this broad discretion of the Secretary and the explicit statutory limitation, the courts have consistently held that no right to receive an oil and gas lease is obtained by the filing of a lease offer, even though the offeror be the "first qualified applicant," and that the Secretary may determine at any time prior to the acceptance of a lease offer not to lease particular land even if offers

 2/ For subsequent history of Barash, see Barash v. McKay, 256 F.2d 714 (1958) judgment for plaintiff; Max Barash, 66 I.D. 11 (1959). See also Udall v. King, 308 F.2d 650 (D.C. Cir. 1962); John P. Dever, 67 I.D. 367 (1960).

for such land were filed long before the determination not to lease or were filed in response to a direct invitation to file. *
* *

The court also held that under the Department's regulations the Secretary had authority to require competitive oil leasing when the lands described in the noncompetitive offer are transferred from the category of nongeologic structure to known geologic structure (KGS) of a producing oil and gas field after the noncompetitive offer is filed:

The express wording of the Mineral Leasing Act, 30 U.S.C. § 226(a), (b) and (c), makes it clear that the Secretary of the Interior may not, without competitive bidding, lease lands which are within a known geologic structure. The question presented here is what is the scope of the Secretary's authority where, after a lease offer has been filed but before acceptance, and upon receipt of new or additional information, the land described in the offer is transferred from the category of non-geologic structure to that of a known geologic structure of a producing oil and gas field.

Though the Mineral Leasing Act is silent on this precise question, Department of the Interior regulations exist directly on point. Under present regulations, in effect since 1967, Plaintiff clearly is not entitled to the leases he seeks. The regulations, in pertinent part, state:

* * * When land is within the known geologic structure of a producing oil or gas field prior to the actual issuance of a lease, it may be leased only by competitive bidding * * *. [43 CFR 3101.1-1, formerly 43 CFR 3122.1, 32 F.R. 13324 (1967).]

If, after the filing of an offer for a non-competitive lease and before the issuance of a lease pursuant to that offer, the land embraced in the offer becomes within a known geological structure of a producing oil or gas field, the

offer will be rejected and will afford the offeror no priority. [43 CFR 3110.1-8, formerly 43 CFR 3123.3(c), 32 F.R. 13324 (1967).]

* * * * *

Inasmuch as Plaintiff is clearly not entitled to the relief he seeks under the current Department regulations cited above, the only question that remains is whether the regulations are a lawful administrative interpretation and implementation of the Mineral Leasing Act.

To answer this question, an understanding of the history of Sec. 17 of the statute and pertinent regulations is necessary.

Shortly after passage of the Mineral Leasing Act in February of 1920, the antecedent of the regulations in issue here, and the express policy of the Department of the Interior was that no prospecting permit * * * could be granted "within the known geologic structure of a producing field even though such a status as to the deposits may have arisen only during the pendency of the application for a permit. . . ." Case of Wilmer Jeannette, 47 L.D. 582 (1920).

In April of 1921, under a new administration, Secretary of the Interior Albert B. Fall revoked the then existing regulation, reasoning that the regulation was not based under a mandatory provision of the statute and upon the premise that the rights of an oil and gas applicant were similar to those of a homestead entryman. [Instructions, 48 L.D. 98, 99 (1921)].

* * * * *

In September of 1967, Solicitor Frank J. B[al]rry issued an opinion (74 I.D. 285) in which he concluded that the past practice of determining whether to lease land competitively or noncompetitively upon the basis of facts known at the time of the filing of a lease offer was clearly erroneous and contrary to the ordinary reading of the statute. Following this opinion the regulations were amended as hereinbefore cited.

* * * * *

Applying this principle of law to the facts herein, the Court finds that not only were the 1967 regulations

authorized under the Mineral Leasing Act but they clearly embody what the Court finds to be the correct interpretation of the literal, mandatory language of the statute, i.e. that lands within a known geologic structure of a producing oil or gas field "shall be leased . . . by competitive bidding." [30 U.S.C. § 226(b)]. (Emphasis Added).

As was stated by the Court of Appeals for this Circuit in District of Columbia National Bank v. District of Columbia, 121 U.S.App.D.C. 196, 198, 348 F.2 808, 810 (1965):

* * * The plain meaning of the words is generally the most persuasive evidence of the intent of the legislature. The plain meaning doctrine must be given application, however hard or unexpected the particular effect, where unambiguous language calls for a logical and sensible result. * * *

The unambiguous language of the Mineral Leasing Act states that leases for land within a known geologic structure of an oil or gas field shall be leased by competitive bidding. The logical and sensible regulatory result under such wording is to preclude any type of leasing other than by means of competitive bidding whenever it becomes apparent that the applied for leases involve lands within a known geologic structure. To hold otherwise would fly in the face of the "plain meaning" of the statute's words.

353 F. Supp. 1010-13.

In said 43 CFR 3110.1-8, the Departmental oil and gas regulations considered in McDade, supra, specifically provided for postfiling KGS determinations, but neither the regulations controlling sodium permits and leases, nor the conditions stated on the sodium prospecting permit application, are explicit on this point. 3/ This,

3/ The regulations controlling sodium prospecting permits and leases are at 43 CFR Group 3500. Prospecting permits are covered in 43 CFR Part 3510, competitive leases in 43 CFR Part 3520

however, does not render an analogy to oil and gas leasing invalid. The Court in McDade at 1012 concluded that the oil regulation clearly embodies the correct interpretation of the statute as to the meaning of "shall be leased * * * by competitive bidding." Despite the lack of a regulation comparable to section 3110.1-8, the Board concludes that the State Office properly interpreted section 262 in rejecting Permian's application. C. A. Spicer, A-24421 (March 28, 1947). Appellant has no vested right to a lease without competitive bidding. 4/ David Miller, 15 IBLA 270, 272 (1974). The lands must be leased competitively because they are known to contain valuable deposits of sodium chloride, even though the determination that the lands are so known may have been made by the Geological Survey subsequent to Permian filing its application.

4/ The determination on issuance of a sodium prospecting permit for a particular tract of land is committed to the Secretary's discretion, and he may properly reject an application for such a permit when he finds for sufficient reasons that it is not in the public interest to allow the permit. Joseph I. O'Neill, Jr., A-30488 (Supp) (Dec. 7, 1966), petition for review dismissed under stipulation, Civil No. 3556-SD-K, S.D. Cal., Nov. 22, 1971; see Gene R. Blaney, A-30894 (June 11, 1968). As originally written, the Mineral Leasing Act of 1920, supra, did not grant the Secretary such discretion, and directed him to issue a permit to any qualified applicant. The mandatory words directing the Secretary to issue permits were deleted by the 1928 amendments, supra, and the Secretary has since been held to possess discretionary authority in the issuance of permits. Burnham Chemical Company v. Krug, 81 F. Supp 911 (D.D.C. 1949), aff'd, 181 F.2d 288 (D.C. Cir. 1950), cert. denied, 340 U.S. 826 (1950).

While it could at first seem unfair for the Department to change its classification of the lands after Permian's filing of a noncompetitive offer, the Department has the responsibility to see that the United States receives a fair price. The United States is not forced to strike a bargain denying itself fair value, any more than a private owner would be.

[2] Permian also contends that:

30 U.S.C.A. Section 162 requires that it be permitted to mine the sodium chloride in the instant case in accordance with federal law relating to placer-mining claims. This section provides that all unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable [therefor] are subject to location and purchase under the provisions of the law relating to placer-mining claims, for example, 30 U.S.C.A. Sections 29, 35 and 36. There is no question that the lands in the instant case contain deposits of salt and are [chiefly] valuable [therefor].

Statement of Reasons at 4.

This argument of Permian is not properly before the Board; there is no evidence of any placer location and no appeal from any action regarding a placer claim. Moreover, in Solicitor's Opinion, 49 L.D. 502 (1923), the Solicitor considered the identical question raised by Permian. Reading the Act of January 31, 1901, 30 U.S.C. § 162 (1970), in pari materia with the Mineral Leasing Act of February 25, 1920, 5/ he concluded that:

 5/ The Mineral Leasing Act of 1920, as amended, is codified at 30 U.S.C. § 181, et seq. (1970).

Section 37 [of the 1920 Act] directed that the mineral deposits named in the act (including sodium chloride, or salt) shall be disposed of only pursuant to the terms of the act. It therefore repealed all previous acts relating to the disposition of those minerals. However, it excepted valid claims existent at the date of the passage of the act. * * * 6/ , 7/

This conclusion was reaffirmed in Solicitor's Opinion, M-36823 (May 7, 1971). As to sodium, see 43 CFR 3520.1-2. The Department has held that valuable deposits of sodium compounds which are enumerated in the Mineral Leasing Act 8/ are not open to location and disposition under the mining laws, but may be disposed of under the provisions of the Mineral Leasing Act only. E.g., Wolf Joint Venture, 75 I.D. 137, 139 (1968). In an analogous case involving oil shale, the United States Supreme Court has said:

The Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only to lease. But § 37 (U.S.C. Title 30, § 193) contains a saving clause protecting "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated," and declaring that they "may be perfected under such laws, including discovery." 9/

Wilbur v. Krushnic, 280 U.S. 306, 314-15 (1930).

6/ 30 U.S.C. § 193 (1970).

7/ Sections 23 and 24 of the 1920 Act, 41 Stat. 447, specifically excepted sodium lands in San Bernadino County, California. This exception was repealed by omission from the 1928 amendments to the Mineral Leasing Act, Act of December 11, 1928, 45 Stat. 1019.

8/ 30 U.S.C. § 261 (1970).

9/ See 30 U.S.C. § 193 (1970), n. 4, supra.

Thus, we conclude that the provisions of 30 U.S.C. § 162 (1970) are not applicable to Permian's 1973 entry and location on the sodium chloride bearing lands in issue. 10/ The vitality of 30 U.S.C. § 162 (1970) today is based upon the savings clause supra, and is generally 11/ limited to any valid claims existent at the date of passage of the Mineral Leasing Act of 1920, supra, which have since been maintained in accordance with statute and regulation.

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.

Joseph W. Goss
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

10/ There is nothing in the record to indicate that the Department has yet initiated action to determine the extent of trespass damages.

11/ See 43 CFR 3501.1-1(b).