

ROBERT SCHULEIN

IBLA 79-74  
IBLA 79-118

Decided June 28, 1979

Appeals from three decisions of the Nevada State Office, Bureau of Land Management, requiring execution of special stipulations prior to issuance of oil and gas leases. N 17857 et al.

Reversed and remanded.

1. Oil and Gas: Stipulations

Where the surface administering agency proposes stipulations to protect the wilderness potential of National Forest lands from oil and gas operations, additional stipulations to that end are not to be imposed by the Bureau of Land Management, absent a compelling showing of need therefor.

APPEARANCES: C. M. Peterson, Esq., Poulson, Odell & Peterson, Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Robert Schulein appeals from three decisions of the Nevada State Office, Bureau of Land Management (BLM), two dated October 16, 1978, and one dated November 6, 1978, requiring the execution of special stipulations in connection with certain oil and gas lease offers 1/ made by the appellant for lands in the Humboldt National Forest.

1/ The lease offers included under the respective docket number are:

Appeals docketed under IBLA 79-74:

N-17861 N-17863 N-17864 N-17865  
N-17966 N-17869 N-17872 N-17873  
N-17876 N-17877 N-17878

Appeals docketed under IBLA 79-118

N-17857 N-17858 N-17859 N-17860  
N-17862 N-17867 N-17868 N-17880  
N-17881 N-17882 N-17883 N-17884

The decisions appealed from directed appellant to execute BLM's Wilderness Protection Stipulation (OG-22) and the U.S. Forest Service's Roadless Area Stipulation (OG-7), inter alia, as to all 23 offers. The decisions state, in relevant part:

. . . [T]he Federal Land Policy and Management Act of 1976 [43 U.S.C. 1782] requires the inventory of the public lands. This inventory must be reviewed so that roadless areas of 5,000 acres or more which have wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et. seq.) [sic] may be identified. To insure that the lands may be managed in a manner so as not to impair the possible suitability of such areas for preservation as wilderness, stipulation OG-22 is also attached.

In its statement of reasons appellant asserts that BLM's wilderness study program under Federal Land Policy and Management Act (FLPMA) is separate and distinct from the U.S. Forest Service's wilderness study program. Appellant further asserts that the lands involved will not be inventoried or evaluated under FLPMA and that consequently there is no need to execute the Wilderness Protection Stipulation, OG-22. Appellant finally contends that he "should not be required to accept two different stipulations relative to roadless areas, one requested by the Forest Service [OG-7], and one requested by the Bureau of Land Management [OG-22], which has no application to lands under the jurisdiction of the Forest Service." Appellant requests that the requirement for OG-22 be cancelled.

The text of the two stipulations are attached hereto as Appendixes A and B.

We note at the outset that the BLM wilderness study of public lands called for by section 603(a) of FLPMA, 43 U.S.C. § 1782 (1976), is a mandatory requirement for "roadless areas of five thousand acres or more and roadless islands of the public lands . . . ."

[1] A perusal of section 3 of the Wilderness Act, 16 U.S.C. § 1132 (1976), clearly shows that recommendations for areas for possible designation are to be made discretely by the Secretary of Agriculture (16 U.S.C. § 1132(b) (1976)) and the Secretary of the Interior (16 U.S.C. § 1132(c) (1976)). The latter's responsibility embraced the review of roadless areas "of five thousand contiguous acres or more in the national parks, monuments, or other units of the national park system and every such area of, and every roadless island within, the national wildlife refuges and game ranges, under his jurisdiction on September 3, 1964 . . . ." S. Rep. No. 94-583 on S. 507, culminating in FLPMA, discusses wilderness potential of public domain at pages 44-5 as follows:

The introductory provisions of the Wilderness Act refer to all Federal lands. However, the provisions mandating a review of Federal lands by the Secretaries of the Interior and Agriculture to determine their potential as wilderness limited the review to lands within national parks, wildlife refuges, and forests. This dichotomy has resulted in a running debate as to whether the national resource lands qualify for wilderness under the Wilderness Act. The Secretary has, by administrative action, begun to set aside certain national resource lands as "primitive areas." The regulations concerning these primitive areas virtually duplicate regulations for wilderness areas designated pursuant to the Wilderness Act. However, wilderness on the national resource [BLM] lands still has no affirmative statutory base. Without such a base, the Secretary has no legal responsibility to review the national resource lands to determine whether any additional areas might qualify as wilderness, nor is there any protection by law, of areas found to have wilderness characteristics.

These particular provisions were suggested by the Public Land Law Review Commission in the discussion of recommendation no. 78 . . . :

There is nothing in the Wilderness Act to preclude additions to the National Wilderness Preservation System of lands not previously identified for review. Accordingly, while maintaining the priority for review of the areas designated in the Wilderness Act, we believe that the initial inventory and review of other areas should be started as soon as possible. In this way it will be feasible for the public land management agencies to make recommendations to the Department heads for consideration, and for possible Executive recommendation to Congress on an orderly basis after 1974 for the inclusion in the wilderness system of any key wild areas of public domain or national forest lands that qualify under standards recommended in this report. [Footnote omitted.]

The particular section of FLPMA, section 603, 43 U.S.C. § 1782 (1976), relating to the BLM Wilderness Study, reads as follows:

Sec. 603. (a) Within fifteen years after the date of approval of this Act, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 201(a) of this Act as having wilderness characteristics described in the Wilderness Act of

September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness: Provided, That prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas: Provided further, That the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act.

(b) The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.

(c) During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of this Act: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 204 of this Act for reasons other than preservation of their wilderness character. Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of

such designated area, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants. [Emphasis supplied.]

Section 103(g) of FLPMA, 43 U.S.C. § 1702(g) (1976), defines "Secretary" as the Secretary of the Interior, "unless specifically designated otherwise."

Section 103(e) of FLPMA, 43 U.S.C. § 1702(e) (1976), states:

(e) The term "public lands" means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except --

(1) lands located on the Outer Continental Shelf; and

(2) lands held for the benefit of Indians, Aleuts, and Eskimos.

[Emphasis supplied.]

It is obvious that National Forest lands are not now "administered by the Secretary of the Interior through the Bureau of Land Management" and therefore are not within the ambit of section 603 of FLPMA, 43 U.S.C. § 1782 (1976). We note that the Wilderness Inventory Handbook, published by BLM as of September 27, 1978, confirms our interpretation by reiterating the foregoing definition of "public lands" on page 15, and reciting on page 4 that:

The wilderness inventory will be conducted on all public lands administered by the Bureau of Land Management except for lands:

a. where the United States owns the minerals but the surface is not Federally owned

b. being held for the benefit of Indians, Aleuts, and Eskimos

c. tentatively approved for State selection in Alaska.

d. on the Outer Continental Shelf

e. which are identified by BLM as commercial timber areas on the revested Oregon and California (O&C) grant lands.

We recognize that under 43 CFR 3109.2-1, 2/ BLM has authority to require reasonable stipulations. See, e.g., A. A. McGregor, 18 IBLA 74 (1974); Duncan Miller, 18 IBLA 71 (1974); Rainbow Resources, 17 IBLA 142 (1974); Duncan Miller, 16 IBLA 349 (1974). Cf. Duncan Miller, 35 IBLA 108 (1978); Robert L. Healy, 35 IBLA 66 (1978).

But the following regulation put stipulation requirements into focus when another agency is the surface managing agency of public lands.

43 CFR 3109.4-2 provides:

§ 3109.4-2 Special stipulations.

Offerors for noncompetitive oil and gas leases and applicants for permits, leases, and licenses for lands, the surface control of which is under the jurisdiction of the Department of Agriculture, will be required to consent to the inclusion therein of the stipulation on a form approved by the Director. Where the lands have been withdrawn for reclamation purposes the offeror or applicant will be required to consent to the inclusion of a stipulation on the approved forms. If the land is potentially irrigable, or if the land is within the flow limits of a reservoir site or within the drainage area of a constructed reservoir, or if withdrawn for power purposes, or where the lands have been withdrawn as Game Range Lands, Coordination Lands, or Alaska Wildlife Areas, the offeror or applicant will be required to consent to the inclusion of a stipulation on an approved form. Additional conditions may be imposed to protect the land withdrawn if deemed necessary by the agency having jurisdiction over the surface.

It seems obvious from the regulation quoted above that the agency having control of the surface is the one having the primary concern for surface protection. We do not mean to suggest that BLM is necessarily without authority to impose surface protecting stipulations additional to those requested by the surface managing agency, but only that such additional stipulations should be required only in compelling circumstances, which have not been demonstrated in the

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2/ This regulation provides:

"The Bureau of Land Management may require such special stipulations as are necessary for the protection of the lands embraced in any permit or lease.

"(See Montana Power Decision A 30310 December 3, 1965, I.M. No. 65-560 December 23, 1965)."

cases at bar. Execution of the stipulations requested by the Forest Service is deemed sufficient to protect the wilderness aspects of the lands in issue. Cf. Duncan Miller, 6 IBLA 216, 79 I.D. 416 (1972).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed and the cases remanded for further processing consistent herewith.

Frederick Fishman  
Administrative Judge

We concur:

Douglas E. Henriques  
Administrative Judge

Edward W. Stuebing  
Administrative Judge

APPENDIX A

ROADLESS AREA STIPULATION

It is mutually understood that some of the lands embraced in this lease have been inventoried as roadless areas and must be evaluated for their wilderness potential. Depending on the results of the evaluation, the areas in question may be determined as suitable for further wilderness study, or not suitable for wilderness. Those areas determined as suitable for wilderness may ultimately be classified as wilderness.

A. Existing roads, if any, may be used for temporary access in a non-destructive manner, but may not be reconstructed, improved or graded.

B. Where temporary access is needed to an area not served by an existing road, methods of access not resulting in erosion, scars or environmental damage shall be used.

C. Where long-term access or development is desired, or where the method to be used will possibly cause environmental damage, an application for such access or development shall be filed with the Supervisor of the National Forest involved. Such application shall include the nature of the proposed access or development, any measures proposed to minimize the environmental impact, including proposed restoration measures, and a map of the location and the access or development. The Supervisor will coordinate the proposal with the local office of the United States Geological Survey, and based upon such coordination and agreement reached with the United States Geological Survey, will either approve the proposal, conditioned upon necessary protective measures, or will disapprove the proposal.

D. This clause shall become inoperative in the event the area is determined as not suitable for wilderness.

E. If the area, or part of it, is determined as suitable for wilderness study, this clause shall remain in full force and effect until the area is either classified for wilderness or is formally rejected for such classification. If the area is classified as wilderness, this lease shall become subject to the provisions of the Act of September 3, 1964 (78 Stat. 893), and Acts amendatory or supplemental thereto, and Forest Service regulations and policies pertaining thereto.

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BY:

OG-7  
41 IBLA 260

APPENDIX B

WILDERNESS PROTECTION STIPULATION

By accepting this lease, the lessee acknowledges that the lands contained in this lease are being inventoried or evaluated for their wilderness potential by the Bureau of Land Management under section 603 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2743, 2785 (43 U.S.C. Sec. 1782).

Until the BLM determines that the lands covered by this lease do not meet the criteria for a wilderness study area as set forth in section 603, or until Congress decides against the designation of lands included within this lease as "wilderness," the following conditions apply to this lease, and override every other provision of this lease which could be considered as inconsistent with them and which deal with operations and rights of the lessee:

1. Any oil or gas activity conducted on the leasehold for which a surface use plan is not required under NTL-6 (for example, geophysical and seismic operations) may be conducted only after the lessee first secures the consent of the BLM. Such consent shall be given if BLM determines that the impact caused by the activity will not impair the area's wilderness characteristics.
  
2. Any oil and gas exploratory or development activity conducted on the leasehold which is included within a surface use plan under NTL-6 is subject to regulation (which may include no occupancy of the surface) or, if necessary, disapproval until the final determination is made by Congress to either designate the area as wilderness or remove the section 603 restrictions.

If all or any part of the area included within the leasehold estate is formally designated by Congress as wilderness, oil and gas exploration and development operations taking place or to take place on that part of the lease shall become subject to the provisions of the Wilderness Act of 1964 which apply to national forest wilderness areas, 16 U.S.C. Sec. 1131 *et seq.*, as amended, the Act of Congress designating the land as wilderness, and Interior Department regulations and policies pertaining thereto.

\_\_\_\_\_ Lessee's Signature

\_\_\_\_\_ Title

\_\_\_\_\_ Date

