

TUCKER AND SNYDER EXPLORATION, INC.

IBLA 79-386

Decided October 10, 1979

Appeal from decision of the Nevada State Office, Bureau of Land Management, rejecting in part oil and gas lease offer N 20672.

Affirmed.

1. Oil and Gas Leases: Discretion to Lease

Under sec. 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 226 (1976), the Secretary of the Interior has discretion to refuse to issue an oil and gas lease in the interest of conservation, wildlife protection, and other purposes in the public interest.

2. Oil and Gas Leases: Discretion to Lease -- Wildlife Refuges and Projects: Generally

The general prohibition against oil and gas leasing in wildlife refuges contained in 43 CFR 3101.3-3 (unless there is drainage) is a formal exercise of the Secretary's discretion under sec. 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 226 (1976).

3. Regulations: Generally

The Board of Land Appeals of the Department has no authority to declare a Secretary's regulation invalid.

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

## OPINION BY ADMINISTRATIVE JUDGE FISHMAN

This appeal is from a decision dated April 13, 1979, by the Nevada State Office, Bureau of Land Management (BLM), partially rejecting lease offer N-20672. The decision states that the lease was rejected as to these lands because they lie within the National Desert Wildlife Range which, according to the Sacramento Regional Solicitor's Office, have been withdrawn for the "protection, enhancement and maintenance of wildlife resources, including bighorn sheep." The regulatory authority for BLM's decision is 43 CFR 3101.3 providing that lands withdrawn for the sole purpose of protecting all species of wildlife in a particular area are wildlife refuge lands specifically exempt from oil and gas leasing, except when such lands are subject to drainage, and in those instances leases will be offered only under competitive bidding. 43 CFR 3101.3-3(a) and 43 CFR 3101.3-1.

Appellant's first argument suggests that pursuant to 16 U.S.C. § 688dd(c) (1976), providing that "United States mining and mineral leasing laws shall continue to apply to lands within the [National Wildlife Refuge System]" a determination should have been made whether mineral leasing would have been compatible on the subject lands. Appellant asserts that the regulations relied on in rejecting the offer were based on a "classification system which does not conform with the [National Wildlife Refuge System Act]," supra, of October 15, 1966. Appellant states that this Act adopts a "Congressional standard of determination of compatibility" which was not "the basis on which [BLM] rejected the subject offers to lease, and therefore [the decision] should be reversed." Appellant asserts that the lands within the Desert National Wildlife Range have never been formally withdrawn from oil and gas leasing and that refusal to lease was based on an exercise of the Secretary's discretionary authority. Appellant's position is that in exercising this authority the Secretary must consider both multiple uses and compatibility.

Appellant has reviewed at some length the evolution of Departmental regulations concerned with mineral leasing on wildlife refuge lands. Appellant states, apparently referring to 43 CFR 3101.3-1 through 3101.3-3, that these regulations "did not specify the basis on which the determination should be made that oil and gas leasing should not be permitted." Appellant requests that the Board declare the regulations invalid and reverse the decision appealed from.

[1, 2] Dispositive consideration was given to contentions similar to those here put forth in T. R. Young, Jr., 20 IBLA 333 (1975), where we stated at 335:

[The Mineral Leasing Act of 1920, as amended 30 U.S.C. sec. 181 (1976)] left the Secretary discretion to refuse to issue any lease at all on a given tract." Udall v. Tallman,

380 U.S. 1, 4, rehearing denied, 380 U.S. 989 (1963); Schraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1960); E. L. Lockhart, 12 IBLA 250 (1973). Such discretion may be exercised for conservation, wildlife protection, and other purposes in the public interest. Id. The general prohibition against oil and gas leasing contained in 43 CFR 3101.3-3 is a formal exercise of the Secretary's discretion under section 17 of the Act. Richard K. Todd, 68 I.D. 291, 296 (1961), aff'd sub nom., Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966); George N. Keyston, Jr., Newton H. Neustadter, Jr., A-28350, A-28528 (Aug. 7, 1962).

The Secretary's exercise of discretion in promulgating these regulations in no wise contravenes the proviso in 16 U.S.C. § 688dd(c) (1976), referred to in appellant's arguments.

Appellant's argument that the lands in issue were not formally withdrawn from oil and gas leasing was also considered in T. R. Young Jr., supra. In that case, the Fish and Wildlife Service had advised BLM that Waterfowl Production areas, as a part of the National Wildlife Refuge System, fell within the prohibition on leasing set forth in 43 CFR 3101.3-3(a)(1), where the Secretary declared: "No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in § 3101.3-1." The exception provided in section 3101.3-1 is that the U.S. Geological Survey, with respect to lands defined as unavailable for leasing under section 3101.3-3, may determine that such lands are subject to drainage. Upon such determination BLM and the Fish and Wildlife Service would be required to process an offering inviting competitive bids. 1/

The lands in T. R. Young, as those in the case at bar, were not withdrawn in haec verba from oil and gas leasing. In fact, the public land order expressly excepts mineral leasing from the impact of the withdrawal. However, as wildlife refuge lands, 2/ they were not available by reason of regulatory restrictions for oil and gas leasing except if there was drainage, and in that event competitive bidding would have been required. These considerations hold true for the case at bar.

1/ There is no indication that such a determination was made in the case at bar.

2/ The lands in issue are part of the National Desert Wildlife Range. As such, they constitute "wildlife refuge lands" within the ambit of 43 CFR 3101.3-3(a). 50 CFR 25.12(a) contains the following definitions, inter alia:

"(a) As used in the rules and regulations in this subchapter: "'National Wildlife Refuge System' means all land, waters, and interests therein administered by the U.S. Fish and Wildlife Service

[3] Appellant's request to have the regulations declared invalid cannot be considered by the Board. The Board of Land Appeals has no authority to declare a regulation invalid. Sombrero Ranches, 38 IBLA 327 (1978).

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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Frederick Fishman  
Administrative Judge

We concur:

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Joan B. Thompson  
Administrative Judge

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Newton Frishberg  
Chief Administrative Judge

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fn. 2 (continued)

as wildlife refuges, wildlife ranges, wildlife management areas, waterfowl production areas, and other areas for the protection and conservation of fish and wildlife including those that are threatened with extinction.

"National wildlife refuge" means any area of the National Wildlife Refuge System except wildlife management areas.

"Wildlife management area" (sometimes referred to as "coordination areas") means any area of acquired land or public land withdrawn by the U.S. Fish and Wildlife Service and made available to the various States, or instrumentalities thereof, by cooperative agreement for management of wildlife resources in accordance with the Act of March 10, 1934 (48 Stat. 401; 16 U.S.C. 661), as amended." The lands in issue are also therefore a part of a "National Wildlife refuge" with the purview of 50 CFR 25.12(a).

The Desert Wildlife Range was created by Public Land Order No. (PLO) 4079, dated August 26, 1966, found in 31 FR 11546-7 of September 1, 1966. It withdrew the lands affected thereby "from all forms of appropriation under the public land laws, but not from location under the mining laws (30 U.S.C., Ch. 2), nor leasing under the mineral leasing laws, and reserved [them] as the Desert National Wildlife Range for the protection, enhancement, and maintenance of wildlife resources, including bighorn sheep \* \* \*."

Thus oil and gas leasing -- insofar as PLO 4079 is concerned -- is not impermissible as to the lands affected thereby. The bar to oil and gas leasing thereon stems from the regulations.

