

**Editor's note: appealed - aff'd, Civ.No. 80-0488 (D.D.C. Sept. 25, 1980), 498 F.Supp. 677; rev'd, No. 80-2302 (D.C. Cir. June 11, 1982); 683 F.2d 427; D.Ct. denied motion to enforce judgment, held not in conflict with 8th Cir. decision in Arkla, 734 F.2d 347; 654 F.Supp. 319 (Jan. 15, 1987)**

TEXAS OIL & GAS CORP.

IBLA 80-228

Decided February 20, 1980

Appeal from decision of the Montana State Office of the Bureau of Land Management rejecting oil and gas lease offers M 37283-84-85 (Acq.).

Dismissed.

1. Administrative Procedure: Generally -- Appeals -- Rules of Practice: Appeals: Dismissal -- Secretary of the Interior

The Board of Land Appeals is without jurisdiction to review and decide the validity or legality of an order issued personally by the Secretary of the Interior in his capacity as chief executive officer of the Department, and an appeal which is limited to those issues must be dismissed.

2. Administrative Procedure: Administrative Review -- Administrative Procedure: Judicial Review -- Rules of Practice: Appeals: Dismissal

Where oil and gas lease offers have been rejected because of a moratorium on the leasing of the subject lands which was imposed by the direct order of the Secretary of the Interior, and the rejected applicant has filed suit, now pending, for judicial review of the legality of the Secretary's order, and also makes a contemporaneous appeal to the Board of Land Appeals, the Board will not await the outcome of the judicial proceedings, but will summarily dismiss the appeal.

APPEARANCES: Craig R. Carver, Esq., Head, Moye, Carver & Ray, Denver, Colorado, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE STUEBING

In May 1977 Texas Oil & Gas Corporation filed three offers to lease for oil and gas certain acquired lands within Malmstrom Air Force Base, Montana. The lease offers were twice rejected by the Montana State Office of the Bureau of Land Management (BLM) for reasons unrelated to the instant appeal, and each of these decisions was subsequently vacated or suspended by BLM pending further inquiry. However, on November 1, 1979, the Secretary of the Interior declared a moratorium on the issuance of oil and gas leases for acquired lands within military reservations until further notice. The order further expressly directed BLM to reject all pending oil and gas lease applications filed prior to September 21, 1978. The full text of the Secretary's order, with a summary and supplemental information, was published in the Federal Register at 44 FR 64085 (Nov. 6, 1979).

In compliance with the Secretary's order, BLM rejected the subject lease offers by decision dated November 30, 1979, from which action Texas Oil & Gas Corporation has appealed to this Board.

Appellant has now filed a request with the Board to extend the time for the filing of its statement of reasons for appeal indefinitely or, alternatively, to stay proceedings upon its appeal. In submitting its request, appellant explains that it does not dispute the fact that BLM's decision was made in response to the Secretary's order, adding, "TXO's dispute lies therefore, not with the State Office but with the Secretary's order itself and its legality." Appellant further observes that apparently the Secretary's action was an exercise of his powers pursuant to 43 CFR 4.5(a)(1), and appellant concludes therefore that "\* \* \* neither the State Office nor the IBLA has the power to overturn the decision rejecting these lease applications." Accordingly, appellant concludes, "\* \* \* an appeal to the IBLA would constitute a futile act, not required by the regulations of the Department or the Administrative Procedure Act." In light of appellant's analysis of the situation, it has advised this Board:

Accordingly, Appellant TXO has filed a suit in the United States District Court for the District of Columbia, raising as the issues for consideration the appropriateness, legality and applicability [1/] of the Secretary's November 1, 1979 decision to these lease applications.

Notwithstanding the foregoing expression of its views, appellant still desires that this Board maintain this appeal on our docket in a suspended and unperfected state pending final judicial resolution of the lawsuit "or any appeals taken therefrom."

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1/ Despite this reference to "applicability", it is clear from the language, supra, that appellant agrees the Order, as written, does apply to the lands herein concerned.

[1] Appellant is correct in its assumption that this Board is without jurisdiction to entertain appeals which are solely directed to the validity and legality of an order issued by the Secretary in the exercise of his official powers and duties. We have repeatedly held that in cases where the basis of an action by an agency of this Department is a Secretarial order, this Board will only review the case for the purpose of deciding whether the order was properly applied and implemented. See, e.g., Robert V. Bailey, 12 IBLA 253 (1973), aff'd sub nom. Krueger v. Morton, 539 F.2d 235 (D.C. Cir. 1976); Woods Petroleum Corp., 12 IBLA 247 (1973); Marvin E. Weaster, 10 IBLA 277 (1973). Since appellant admits that there is no question that BLM's action was required by the Secretary's order in this instance, there remains no issue over which this Board has jurisdiction, and the appeal must be dismissed.

[2] There is an additional basis for dismissal of this appeal. Appellant's filing of a suit for judicial review of this matter contemporaneous with the filing of its appeal to this Board has placed the matter before two tribunals, administrative and judicial. In such circumstances the Department has customarily deferred to the jurisdiction of the court. The Board might suspend the administrative appeal to await the court's disposition of the case, or the administrative appeal may be dismissed, as indicated by the circumstances. Donald W. Coyer, 36 IBLA 181 (1978); Carl Alber, A-30369 (May 25, 1967). In view of our initial holding that the Board is without jurisdiction, suspension of the appeal would be pointless in this instance.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is hereby dismissed. The administrative record will be returned to the Montana State Office, BLM, so that it can be made available for use in the litigation.

Edward W. Stuebing  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Joseph W. Goss  
Administrative Judge

