

TUCKER AND SNYDER EXPLORATION CO., INC., ET AL.

IBLA 80-66

Decided October 30, 1980

80-91

80-92

Appeals from decisions of the California State Office, Bureau of Land Management (BLM), rejecting 48 noncompetitive oil and gas lease offers. CA 5551, etc.

Set aside and remanded.

1. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior may, in his discretion, reject any offer to lease public lands for oil and gas deposits upon a proper determination that the leasing would not be in the public interest, even though the land applied for is not withdrawn from leasing under the operation of the mineral leasing laws. The refusal to lease should be supported by facts to demonstrate that the leasing would not be in the public interest. Mere conclusory findings, unsupported by facts, do not warrant rejection.

2. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Stipulations

Bureau of Land Management decisions rejecting oil and gas lease offers will be set aside and the cases remanded for further consideration where the only basis for the decisions was possible future harm to desert tortoises which are currently under consideration to determine if they should

be placed on the endangered species list, and the record demonstrates the decline of the species is due to other reasons, and there has been no determination whether other measures, including protective stipulations in oil and gas leases, could be taken to protect the tortoises while permitting oil and gas exploration and development.

APPEARANCES: Fred H. Malzacher, Thomas L. Williamson, pro sese; C. M. Peterson, Poulson, Odell and Peterson, Denver, Colorado, for Tucker and Snyder Exploration Co., Inc., and Cities Service Company.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Tucker and Snyder Exploration Co., Inc., filed nine offers on November 3, 1978 (IBLA 80-66, CA 5551, etc.). Fred H. Malzacher filed an offer May 24, 1976 (IBLA 80-91, CA 3714). Thomas L. Williamson filed four offers on April 28, 1977 (CA 4310, etc.) and Cities Service Company filed 32 offers on November 14, 1978, or January 18, 1979 (CA 5586, etc.) (IBLA 80-92), for oil and gas leases in the Ivanpah Valley of San Bernardino County, California. The California State Office, Bureau of Land Management (BLM), rejected all of these noncompetitive oil and gas lease offers by decisions dated October 9, 1979. Because each appeal involves the same decision and issues, the Board has sua sponte consolidated these appeals for consideration.

BLM rejected the offers because it anticipated that additional oil and gas leasing would further reduce the already declining Ivanpah Valley desert tortoise (Gopherus agassizi) population. In particular, the decision voiced concern about habitat loss to roads, drill pads, and sumps; increased access causing increased vandalism and collection of specimens; and direct mortality from vehicles.

The BLM decisions were based on an extensive biological status report on the desert tortoise in the State of California. The report, prepared by Dr. Kristin Berry and L. Nicholson of the BLM Desert Planning Staff, assembles desert population data derived from 1,153 strip transects and 21 permanent study plots in southern California. One of the study plots and several transects lie in the Ivanpah Valley. This report concluded that the numbers of desert tortoises were declining over most of their California range due to a wide variety of factors, grazing in particular. Any disturbance, including oil and gas exploration, could cause a further decline according to this report. Population density varies from self-sustaining levels of 100 to 250 desert tortoises per square mile down to a threshold level of 50 to 100 per square mile and less. The report suggests that the desert tortoise should be designated an endangered species and that Ivanpah Valley should be one of four critical habitat areas.

Subsequent to the Berry report, the Riverside District Office, BLM, assembled an environmental analysis report (EAR) on oil and gas leasing in the Ivanpah Valley, embracing approximately 294 square miles of which 93 percent is BLM managed public lands. This report acknowledges that many questions concerning desert tortoise biology remain. It gives specific information about the area. Although 39 square miles (14 percent) of the Ivanpah Valley now lie under oil and gas leases, there is no current production and little exploration. Most of the valley is under application. The Geological Survey has determined that the lands within the valley are potentially geologically favorable for oil and gas. Past oil and gas drilling of seven exploratory wells resulted in adverse impacts to desert tortoises and their habitat, but in localized areas; the average disturbance was 2 acres per site. There is little vehicle traffic and off road vehicles are infrequently used in this remote area. Current levels of livestock grazing and wild burros present some problems, e.g., trampled young, burrow cave-ins, and especially competition for annual forage plants in spring and early summer. Ivanpah Valley is the largest block of predominantly public land which supports a high concentration of desert tortoises, making this the best of the Berry Report's four proposed critical areas within which BLM can manage habitat.

The Riverside District Office recommended to the State Director, in view of the considerations outlined in the EAR, that limited leasing activity be conducted in Ivanpah, but with stipulations to protect the desert tortoises. However, the State Director in the decisions on appeal here reversed the District Office.

The desert tortoise is a protected species under California law. It is not protected by Federal law. The Fish and Wildlife Service is currently conducting a formal status review in order "to determine if it should be proposed for listing as an endangered or threatened species." 43 FR 37662 (Aug. 23, 1978).

All appellants assert that careful oil and gas development in Ivanpah Valley would not significantly affect desert tortoises. Appellant Malzacher acknowledges the ongoing status review by the Fish and Wildlife Service, but argues that domestic oil and gas exploration is essential to the United States. Appellant Williamson emphasizes Ivanpah Valley's potential for oil and gas. Appellant Cities Service argues that some of its applications were for lands not covered in the EAR cited in the State Director's decision, so that it was denied an opportunity to comment on the relative merits of leasing with respect to these lands. Both Cities Service and Tucker and Snyder Exploration Co., Inc., argue the following:

1. BLM needs a rational basis for rejection of these lease offers.

2. Both companies applied for some leases in areas where the concentration of desert tortoises is low.

3. They object to the lack of notice or opportunity to participate in the environmental assessment which they claim was prepared in response to their applications. In particular, they argue that BLM did not consult with them as reasonable outside sources, according to the environmental assessment preparation instructions found in the BLM Manual, section 1791.23(c).

4. Given BLM's multiple use principles, it did not adequately consider using protective stipulations.

5. It would be arbitrary and capricious to deny oil and gas leasing but to allow other land uses that take a heavier toll on desert tortoises.

[1] The Secretary of the Interior, through BLM, has the discretion to refuse to issue an oil and gas lease, even where the lands are available for leasing. Udall v. Tallman, 380 U.S. 1, 4 (1965), rehearing denied, 380 U.S. 989 (1965); Cartridge Syndicate, 25 IBLA 57 (1976). Any such refusal must be supported by facts of record when questioned on appeal. W. E. Haley, 46 IBLA 151 (1980). A decision rejecting an oil and gas lease offer for undue degradation of environmental values will be set aside if the record does not clearly support BLM's conclusion. John M. Lebfroom, 43 IBLA 67 (1979).

The decision stated that it was based on a biological report. A thorough review of the report and the rest of the record reveals no direct causative link between oil and gas leasing and the desert tortoise decline. Instead, the report itself implicates numerous factors in this decline; particularly competition for food with wild burros and domestic stock. Admittedly, no one knows whether a drastic increase in oil and gas leasing in Ivanpah Valley would have a great or small impact on tortoise populations. The Berry report briefly refers to one operator who violated stipulations (p. 66), but the report does not indicate whether this is typical. BLM does not refer to this at all. The State Director's decision did not account for the widely varying concentration of the creatures in different parts of the valley. It appears that numbers are minimal in some of the outer areas under application.

[2] Complete rejection of an oil and gas lease application is more extreme than even the most stringent stipulation. Stanley M. Edwards, 24 IBLA 12, 18, 83 I.D. 33, 35 (1976). This record does not give the reasons for the State Director's refusal to consider stipulations. Here the State Director dismisses the possibility of stipulations without analysis. He relies on material that appears to

contradict his position. Nor does the record show a proper exercise of discretion based on an independent analysis to determine whether, and what kind of leasing would be in the public interest. Esdras K. Hartley, 23 IBLA 102 (1975); Stanley M. Edwards, supra at 21, 83 I.D. 36.

Appellants have expressed a willingness to accept stipulations that would prohibit activities on the land during the time the tortoises are active, and restrict them to the times the tortoises are hibernating. Such a proposal should be considered.

If upon further consideration BLM still believes the applications should be rejected, it should support its decision with a reasoned analysis specifically indicating why stipulations are not feasible. In any event, we suggest BLM consider the proposals submitted by appellants and other information they may wish to submit to support their positions.

Accordingly, 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 vacated and remanded for reconsideration and action consistent with this opinion.

Joan B. Thompson
Administrative Judge

I concur:

Joseph W. Goss
Administrative Judge

ADMINISTRATIVE JUDGE LEWIS DISSENTING:

I disagree with the majority opinion for the following reasons.

BLM rejected the subject oil and gas lease offers on the ground additional leasing in the Ivanpah Valley of California would further reduce the already declining Ivanpah Valley desert tortoise (Gopherus agassizi) population. The majority ruled that the cases should be remanded to BLM (1) to consider stipulations that would prohibit activities except when the tortoises are hibernating and (2) to present an analysis why such stipulations are not feasible and to consider other information appellants may submit to justify their position.

First, it is basic that the Department of the Interior has not only the right but the duty to protect the total resource value of land under its jurisdiction. The resource value of land includes, in addition to other values, its value as a habitat for wildlife, which includes the desert tortoise. Dell K. Hatch, 34 IBLA 274 (1978). The Secretary, through his duly authorized representative, BLM, has the authority to refuse to lease lands for oil and gas purposes even if the lands have not been withdrawn from the operation of the general mining and mineral leasing laws. Dell K. Hatch, supra.

The majority acknowledges that BLM based its decisions on "an extensive biological status report on the desert tortoise in the State of California." The report, according to the majority, concluded that the numbers of the desert tortoise were declining due to various factors, and that "Any disturbance, including oil and gas exploration, could cause a further decline"; the report suggests that the desert tortoise should be designated an endangered species and that Ivanpah should be one of four critical habitat areas.

I respectfully submit, what more does BLM need to do to conclude that leasing should not be allowed in this area? Does the species involved, the desert tortoise, have to be listed as endangered and even become extinct before BLM can act? In Justice Douglas' dissent in Sierra Club v. Morton, 405 U.S. 727 (1972) at 750-51, fn. 8, he states: "'When a species is gone, it is gone forever. Nature's genetic chain, billions of years in the making, is broken for all time.' Conserve - Water, Land and Life, Nov. 1971, p. 4."

BLM in its decision in the present case sets forth the following:

From analysis of the data from the permanent trend study plots and several transects for the Ivanpah Valley, it has been determined that tortoise population there is declining at a rate of approximately 5 percent per year. This decline is based on comparing annual production of

new tortoises with the measured mortality in the population. There are several factors contributing to this condition and most of the actions associated with oil and gas exploration, development, and production will further impact the desert tortoise. These actions will cause the rate of decline of this tortoise population to increase, thereby causing its eventual extinction. Loss of this population will jeopardize the continued existence of the tortoise as a species.

There are several factors that relate to the additional impacts that would accrue from oil and gas development in the Ivanpah Valley: (1) This population is declining even without the impacts of oil and gas development; (2) There will be additional habitat loss to roads, drill pads, and sumps; (3) A relatively small increase in vandalism and collecting made possible by increased access could double the rate of population decline, particularly if the loss is to the adult population segment; and (4) The increased vehicle use, on and off of roads, will cause direct mortality on tortoises.

In the instant case BLM, as the duly authorized representative of the Secretary, was fully and legally authorized to reject the lease offers in order to preserve the land as a habitat for the desert tortoise, and thus to preserve the desert tortoise as a species. Carol Lee Hatch, 50 IBLA 80 (1980); Dell K. Hatch, *supra*; Udall v. Tallman, 380 U.S. 1 (1963); United States v. Wilbur, 283 U.S. 414 (1930); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966). BLM did not act arbitrarily but relied on an extensive, scientific report of the status covering the desert tortoise.

Stipulations providing for limited use of the land by lessees may preserve nonliving objects, such as those having archaeological value. However, any leasing will bring roads, vehicles, and people. These will in time totally destroy a living creature such as the tortoise. The tortoises will be carried off, run over, and killed by other means, and will disappear because of the disturbance to the physical place, which will adversely affect the breeding, growth, and longevity patterns of this species. I do not find it believable that a lessee investing money in searching for, and even discovering, oil and gas on leased public land will carry on operations only during 4 months of the year when, according to appellants, the tortoise is said to be hibernating. But that argument is incidental. The prime consideration is that the advent of people, machinery, and vehicles, brought by granting the leases, will inevitably diminish and even eliminate an already disappearing animal species. I submit that

granting oil and gas leases subject to stipulations would in no way prevent the destruction of a disappearing animal species. Therefore, I most earnestly conclude that BLM's well-founded decision should be affirmed, and that no leasing should be permitted in the Ivanpah Valley.

Anne Poindexter Lewis
Administrative Judge

