

Editor's note: Reconsideration denied by order dated Aug. 7, 1981

DALE E. ARMSTRONG

IBLA 79-451

Decided March 12, 1981

Appeal from a decision of the Utah State Office, Bureau of Land Management, rejecting oil and gas lease offers U-43040 and U-43041.

Reversed.

1. Exchanges of Land: Generally -- Mineral Leasing Act: Applicability -- Oil and Gas Leases: Lands Subject to -- Segregation -- State Exchanges: Effect of Application -- Taylor Grazing Act: Generally -- Words and Phrases

"Public land laws." Under 43 CFR 2091.2-3 (1979), a state exchange application segregated the selected public lands from appropriation under the public land laws, including the mining laws. The term "public land laws" is ordinarily used to refer to statutes governing the alienation of public land, and generally is distinguished from both "mining laws," referring to statutes governing the mining of hard minerals on public lands, and "mineral leasing laws," a term used to designate that group of statutes governing the leasing of public lands for oil, gas, and other selected minerals. Udall v. Tallman, 380 U.S. 1, 19 (1965).

2. Federal Land Policy and Management Act of 1976: Exchanges -- State Exchanges: Effect of Application

State exchange applications pending on Oct. 21, 1976, may be processed under

sec. 8(c) of the Taylor Grazing Act, 43 U.S.C. § 315g(c) (1970), only if the state had complied with all the requirements necessary to vest rights to the exchange in the state; all other applications must be processed under sec. 206 of the Federal Land Policy and Management Act of 1976.

3. Federal Land Policy and Management Act of 1976: Exchanges -- Segregation -- State Exchanges: Effect of Application

A state exchange application being processed under sec. 206 of the Federal Land Policy and Management Act of 1976 does not segregate the selected public lands from the operation of the mineral leasing laws. 43 CFR 2201.1(b).

APPEARANCES: Hugh C. Garner, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Dale E. Armstrong appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated May 3, 1979, rejecting oil and gas lease offers U-43040 and U-43041.

On April 19, 1979, appellant submitted to BLM the above over-the-counter offers to lease certain lands in Utah for oil and gas. 1/ BLM rejected these offers, because "the lands applied for * * * are within a State Exchange application, which segregates the public lands to the extent that they will not be subject to appropriation under the public land laws, including the mining laws, 43 CFR 2091.2-3." The effect of the segregation, BLM concluded, was to make the lands sought by appellant unavailable for leasing.

1/ The lands sought by appellant are set forth in his offers as follows: "U 43040
Township 37 South, Range 18 East, S.L.M., San Juan Co., Utah
 Section 1: Lots 1, 2, 3, 4, S 1/2 N 1/2, S 1/2
 Section 2: Lots 1, 2, 3, 4, S 1/2 N 1/2, S 1/2
 Section 11: All Section 12: all
 "U 43041
Township 37 South, Range 18 East, S.L.M., San Juan Co., Utah
 Section 3: Lots 1, 2, S 1/2 NE 1/4, S 1/2
 Section 10: All"

The state exchange application to which BLM refers is application U 3710 filed by the State of Utah. This application contains a provision reserving to the State of Utah all minerals contained in the lands offered for exchange. It further provides that the proposed exchange is to be made on an equal value basis.

The regulation which BLM cites in support of its decision, 43 CFR 2091.2-3, 2/ states:

The filing of a valid formal application for exchange under the regulations of Group 2200 of this chapter will segregate the selected public lands to the extent that they will not be subject to appropriation under the public land laws, including the mining laws. Any subsequently tendered application, allowance of which is discretionary, will not be accepted, will not be considered as filed, and will be returned to the applicant.

In his statement of reasons on appeal, Armstrong presents three arguments for reversal of the decision below:

1. An application for an exchange of lands pursuant to sections 8(c) and 8(d) of the Taylor Grazing Act does not segregate the subject lands from oil and gas leasing under the Mineral Leasing Act of 1920;
2. The proposed exchange of lands, if completed, will likely not include the lands sought by appellant for leasing; and
3. Exchanges of public lands must be carried out in accordance with the Federal Land Policy and Management Act.

[1] In his first argument on appeal, appellant examines the first sentence of the above-quoted regulation, 43 CFR 2091.2-3, giving particular attention to the phrase "subject to appropriation under the public land laws, including the mining laws." Appellant argues that the grant of an oil and gas lease to him would not constitute an "appropriation" of the subject lands, because an appropriation generally involves a transfer or alienation of title. An oil and gas lease, he argues, involves no such transfer or alienation.

Appellant also points out that the phrase "public land laws" ordinarily refers to statutes governing the alienation of public land and is generally distinguished from both the mining laws and the mineral leasing laws. Hence, appellant finds that the segregative effect of 43 CFR 2091.2-3, barring appropriation under the public land laws,

2/ The subject regulation, 43 CFR 2091.2-3, was repealed at 46 FR 1642 (Jan. 6, 1981). Regulations governing exchanges procedures pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701-1782 (1976), appear at 43 CFR Part 2200 (46 FR 1638 (Jan. 6, 1981)).

including the mining laws, would not bar an oil and gas lease under the mineral leasing laws.

BLM's decision of May 3, 1979, relies upon Information Memo No. 71-174, issued on February 14, 1972, by the Director, Bureau of Land Management, Washington, D.C., to the BLM State Director, Utah. The memo states in part:

Although 43 CFR 2091.2-3 does not specifically include segregation from the mineral leasing laws, the segregative effect does apply to applications or offers under the mineral leasing laws.

Allowance of mineral leases is discretionary and would be included within the intent of the second sentence of 43 CFR 2091.2-3. We believe the segregative effect is all-inclusive and includes rights-of-way and grants (e.g. R.S. 2477), SLUP's and other permits and leases under the public land laws. The rationale for the segregative effect is to prevent further encumbrances from occurring during processing of the exchange application. The segregative effect would not apply to grazing leases, licenses or permits.

We do not agree that the language of 43 CFR 2091.2-3 can support the interpretation which BLM has given to it, and accordingly we reverse the decision below. BLM's interpretation expands the generally accepted meaning of the term "public land laws" to include the mineral leasing laws. In Udall v. Tallman, 380 U.S. 1, 19 (1965), the Supreme Court said:

[T]he term "public land laws" is ordinarily used to refer to statutes governing the alienation of public land, and generally is distinguished from both "mining laws," referring to statutes governing the mining of hard minerals on public lands, and "mineral leasing laws," a term used to designate that group of statutes governing the leasing of public lands for gas and oil.

Where, as here, it is likely that the United States will reserve all minerals in the selected lands, the contemplated exchange amounts to an exchange of surface rights only. Under these facts, BLM's interpretation is especially inappropriate, as the grant of an oil and gas lease will cause but a minimal disturbance to the surface rights in the selected lands. See Kerr-McGee Corp., 46 IBLA 156, 158 (1980).

We are not unmindful of Tom B. Boston, 6 IBLA 269 (1972), wherein this Board affirmed the rejection of certain noncompetitive oil and gas lease offers for the identical lands herein involved. We believe that

Boston may be distinguished from the present case as having arisen when the pertinent regulation, 43 CFR 2091.2-3, read as follows:

The filing of a valid application for exchange under the regulations of Subpart 2244 will segregate the selected public lands to the extent that any subsequently tendered application, allowance of which is discretionary, will not be accepted, will not be considered as filed, and will be returned to the applicant. Where an application is withdrawn or finally rejected in whole or in part, the segregative effect of the application on the lands covered by the recall or rejection will terminate at 10:00 a.m. on the 30th day from and after the date a notice of the withdrawal or rejection is first posted in the land office having jurisdiction over said lands.

The amendment to this regulation, effective November 23, 1971, clearly excluded applications under the Mineral Leasing Act, 30 U.S.C. § 181-287 (1976), from the segregative effect of a state exchange application.

[2, 3] State exchange application U 3710 which BLM has cited in its May 3, 1979, decision was filed on August 14, 1967, by the State of Utah pursuant to section 8 of the Taylor Grazing Act, 48 Stat. 1269 (1934), amended 49 Stat. 1976 (1936). During the pendency of this application, Congress passed the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1782 (1976). Section 705(a) of FLPMA expressly repealed the applicable Taylor Grazing Act provisions formerly codified at 43 U.S.C. § 315g, 315g-1, and 315p (1970). Appellant argues that FLPMA must govern the present application and calls to our attention Organic Act Directive (OAD) No. 78-12 (March 15, 1978), which provides that any segregation under FLPMA must be accomplished by formal withdrawal.

State exchange applications which were pending upon the passage of FLPMA may continue to be processed under the Taylor Grazing Act, supra, only if the State had complied with all of the requirements necessary to vest rights to the exchange in the State, making any further action necessary by BLM purely ministerial. All other applications must be processed under section 206 of FLPMA, 43 U.S.C. § 1716 (1976). Bryner Wood, 52 IBLA 156 (1981). Regulations promulgated pursuant to FLPMA, specifically 43 CFR 2201.1(b) (46 FR 1640 (Jan. 6, 1981)), provide for segregation of lands covered by an exchange proposal only upon publication in the Federal Register of notice to that effect and only for a period of 2 years from the date of publication. Significantly, the language pertaining to segregation in the new regulations is identical to that in 43 CFR 2091.2-3, that is, "Publication of the notice * * * may segregate the public lands covered * * * to the extent that they will not be subject to appropriation under the public land laws, including the mining laws." (Emphasis added.) Thus, under FLPMA as well, we find that public lands selected for exchange are not segregated from the operation of the mineral leasing laws.

Our decision in the instant case does not direct BLM to issue leases U-43040 and U-43041. We recognize that the issuance of such leases is at the discretion of BLM. We hold only that BLM may not support its rejection of such lease offers by interposing any segregative effect caused by exchange application U 3710.

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 reversed and BLM is directed to reconsider lease offers U-43040 and U-43041 in accordance with this decision.

Douglas E. Henriques
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

