

ESDRAS K. HARTLEY  
IMPEL ENERGY CORP.

IBLA 80-622, 81-129  
81-130, 81-159

Decided September 1, 1981

Appeals from decisions of Idaho State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offers. I-12421 Acq., et al.

Affirmed.

1. Oil and Gas Leases: Discretion to Lease -- Oil and Gas Leases: Lands Subject to -- Wildlife Refuges and Projects: Generally

A regulation, 43 CFR 3101.3-3(a)(1), which provides that no offers for oil and gas leases covering wildlife refuge lands will be accepted only precludes leasing lands withdrawn for the protection of all species of wildlife within a particular area.

2. Endangered Species Act of 1973: Section 7: Critical Habitat -- Oil and Gas Leases: Discretion to Lease

Designation of an area as a critical habitat pursuant to sec. 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C.A. § 1536 (West Supp. 1980), does not necessarily foreclose oil and gas leasing in that area.

3. Endangered Species Act of 1973: Section 7: Critical Habitat -- Oil and Gas Leases: Discretion to Lease -- Wildlife Refuges and Projects: Generally

The Secretary of the Interior may, in his discretion, reject any offer to lease

Federal lands for oil and gas, upon a determination supported by facts of record that the leasing would not be in the public interest because it is incompatible with uses of the lands which are worthy of preservation. Where the land has been designated a critical habitat pursuant to sec. 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C.A. § 1536 (West Supp. 1980), and where BLM determines that oil and gas development would result in an unavoidable adverse impact, rejection of a lease offer will be affirmed in the absence of countervailing compelling reasons.

4. Oil and Gas Leases: Lands Subject to

Where oil and gas lease offers are filed for lands the ownership of which is unresolved, such offers are subject to rejection for that reason.

Lee B. Williamson, 54 IBLA 326 (1981) and David A. Provinse, 49 IBLA 134 (1980), overruled to the extent inconsistent.

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Esdras K. Hartley and Impel Energy Corporation 1/ have appealed from various decisions of the Idaho State Office, Bureau of Land

---

1/ The BLM decision appealed by Impel Energy Corporation, docketed under IBLA 81-129, listed Walter W. Sapp and Impel Energy Corporation as the adversely affected parties. The decision noted that Sapp originally filed noncompetitive oil and gas lease offers I-10552 Acq., I-10553 Acq., and I-12012 Acq., in 1976 and that, on June 27, 1977, he filed assignments of 100 percent record title interests in offers I-10552 Acq. and I-10553 Acq. to Impel Energy Corporation. The assignments were denied by BLM in the same decision. Impel Energy Corporation had an interest in the lease offers with respect to offers I-10552 Acq. and I-10553 Acq. by virtue of the unapproved assignments. See 43 CFR 3106.3-3. However, there is no evidence in the case records that it had any interest in the lease offer with respect to offer I-12012 Acq. Accordingly, Sapp was the only party with a right to appeal with respect to the rejection of that lease offer. See 43 CFR 4.410. As no appeal was taken, BLM should properly have closed the case with respect to lease offer I-12012 Acq. See 43 CFR 4.411(b). We will not consider that lease offer in the decision in this case.

Management (BLM), rejecting their noncompetitive oil and gas lease offers. <sup>2/</sup> The basis for the rejection was that the lands were either within Grays Lake National Wildlife Refuge or within 1 mile of the boundary of the refuge. This area was established as a critical habitat for the whooping crane, an endangered species, and is managed by the Fish and Wildlife Service (FWS), U.S. Department of the Interior. The rule establishing the critical habitat was published at 43 FR 20938 (May 15, 1978), and designated the following lands: "Grays Lake National Wildlife Refuge, and all contiguous land and water within 1 mile of the boundaries of this refuge." 43 FR 20940 (May 15, 1978).

In IBLA 80-622 BLM relied on the fact that the subject lands were within the Grays Lake National Wildlife Refuge and on a recommendation by FWS "that oil and gas leasing is incompatible with the purpose for which the lands were acquired, namely, the National Wildlife Refuge system," citing 43 CFR 3101.3-3(a). In IBLA 81-129, 81-130, and 81-159 BLM stated that the subject lands had been designated a critical habitat for the whooping crane, an endangered species, citing section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C.A. § 1536 (West Supp. 1980). The BLM decisions also noted the adverse effect "exploration or surface disturbance activity" would have on other species, including "'sensitive' species such as the prairie falcon, osprey, bald eagle, pine marten, and trumpeter swan."

Grays Lake National Wildlife Refuge, originally approximately 12,000 acres situated in the center of the old meandered lakebed of Grays Lake in Idaho, was established pursuant to a "Refuge Use and Cooperative Use Agreement" (RUCUA), between the Bureau of Sport Fisheries and Wildlife (now FWS) and abutting private landowners, and to a "Memorandum of Understanding" (MOU) between the Bureau of Sport Fisheries and Wildlife and the Bureau of Indian Affairs (BIA). Under the MOU, approved by the Secretary of the Interior on October 12, 1964, BIA agreed to the establishment of a national wildlife refuge, subject to certain rights of the Fort Hall Indians to the water in Grays Lake and the storage of water for the Fort Hall Indian Irrigation Project in adjacent Federal lands withdrawn pursuant to the Act of March 1, 1907, P.L. No. 59-154, 34 Stat. 1015, 1024. Under the RUCUA, the abutting private landowners agreed to the establishment of a national wildlife refuge for "migratory birds and other wildlife" subject to their

<sup>2/</sup> The following lists the various lease offers involved herein:  
Lease Offer No.

Esdras K. Hartley	80-622	I-12421 Acq. I-12504 Acq.
Impel Energy Corp.	81-129	I-10552 Acq. I-10553 Acq.
Esdras K. Hartley	81-130	I-11425 to I-11436 I-11848
Esdras K. Hartley	81-159	I-12323 Acq.

Appellant      IBLA No.

use of land in the lakebed "incident to the gaining of a livelihood, including grazing, haying, and other agricultural purposes." The parties expressly agreed that the agreement was without prejudice to any rights that they might have in the lakebed. The term of the agreement was 99 years. See Proposed Establishment of a Refuge for Migratory Birds at Grays Lake, Idaho, Solicitor's Opinion, 71 I.D. 311 (1964). On June 15, 1965, the Migratory Bird Conservation Commission (MBCC), approved establishment of the 12,000-acre Grays Lake National Wildlife Refuge for the purposes of "waterfowl nesting," pursuant to the Migratory Bird Conservation Act, as amended, 16 U.S.C. § 701 (1976).

On May 9, 1972, the MBCC approved the prospective purchase of approximately 8,000 acres of private land outside the old meandered lakebed line pursuant to authority under the Migratory Bird Conservation Act, supra. Accordingly, the United States has undertaken to acquire the land of abutting private landowners in order to obtain any rights they might have in the lakebed itself. The land covered by lease offers I-12421, I-12504, I-10552, I-10553, and I-12323 was acquired by general warranty deeds from 1967 to 1976. These deeds generally provided that the land was being acquired for the use of FWS as a national wildlife refuge pursuant to section 6 of the Migratory Bird Conservation Act, as amended, 16 U.S.C. § 715e (1976), and the Migratory Bird Hunting Stamp Act, as amended, 16 U.S.C. § 718 (1976). Each of these purchases was again approved by the MBCC.

Lease offers for the acquired lands were filed pursuant to the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 351 (1976). The remaining lease offers were filed pursuant to the Mineral Leasing Act, as amended, 30 U.S.C. § 181 (1976). Both of these Acts provide that Federal lands are available for oil and gas leasing at the Secretary's discretion. They provide that the land "may be leased by the Secretary." 30 U.S.C. §§ 226(a), 352 (1976). See generally Udall v. Tallman, 380 U.S. 1, 4, rehearing denied, 380 U.S. 989 (1965); Shraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1969); see also General Crude Oil Co., 18 IBLA 326 (1975).

In their statements of reasons for appeal, appellants contend that:

1. 43 CFR 3101.3-3(a) is not applicable to preclude oil and gas leasing on the lands in question;
2. A FWS recommendation concerning oil and gas leasing is not binding on BLM;
3. Designation of the area as a critical habitat pursuant to section 7 of the Endangered Species Act of 1973, supra, does not preclude oil and gas leasing;
4. Oil and gas leasing is not necessarily incompatible with a wildlife refuge or a critical habitat especially considering the imposition of protective stipulations;



evidence that the land in question has been withdrawn for that purpose. Accordingly, 43 CFR 3101.3-3(a)(1) is not applicable.

Furthermore, oil and gas leasing is not precluded within areas of the national wildlife refuge acquired by the Secretary of the Interior as an inviolate migratory bird sanctuary pursuant to the Migratory Bird Conservation Act, supra. The primary authority for acquisitions under that Act is section 5, which provides in relevant part that "[t]he Secretary of the Interior is authorized to purchase or rent \* \* \* and to acquire by gift or devise, for use as inviolate sanctuaries for migratory birds, areas which he shall determine to be suitable for such purposes \* \* \*." 16 U.S.C. § 715d (1976). An inviolate sanctuary is one on which hunting is not permitted. S. Rep. No. 1175, 95th Cong., 2d Sess. 4, reprinted in [1978] U.S. Code Cong. & Ad. News 7643. There is no indication that inviolate sanctuary status prevents oil and gas leasing. See also Legislative Authority for Endangered Species Program, Solicitor's Opinion, 72 I.D. 13, 16-17 (1965).

[2] Nor does designation of the area as a critical habitat pursuant to section 7 of the Endangered Species Act of 1973, as amended, 16 U.S.C.A. § 1536 (West Supp. 1980), necessarily preclude oil and gas leasing. 6/ 50 CFR 402.01 provides that all Federal agencies will insure "that their activities or programs do not result in the destruction or adverse modification of critical habitat." "Destruction or adverse modification" is defined as: "[A] direct or indirect alteration of critical habitat which appreciably diminishes the value of that habitat for survival and recovery of a listed species. \* \* \* There may be many types of activities or programs which could be carried out in critical habitat without causing such diminution." 50 CFR 402.02 (emphasis added). Therefore, designation as a critical habitat does not foreclose other activities in the area. However, any proposed activity must be closely scrutinized, taking into consideration the possible impacts on the habitat.

---

6/ On Dec. 28, 1979, section 7 (P.L. 96-159, 93 Stat. 1226) was amended to read: "Each Federal agency shall \* \* \* insure that any action authorized, funded, or carried out by such agency \* \* \* is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." (Emphasis added.) A 1978 amendment on Nov. 10, 1978 (P.L. 95-632, 92 Stat. 3752), inserted the word "adverse." As enacted in 1973, the section provided for the taking of actions "to insure that actions \* \* \* do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species \* \* \*." Appellants assert that the changes were made to introduce flexibility into the Act and that issuance of oil and gas leases is not likely to jeopardize the continued existence of the whooping crane.

Part of the basis for rejection of the applications in these cases is apparently a memorandum from the BLM District Manager, Idaho Falls, to the Idaho State Director, dated December 17, 1979, concerning "Oil & Gas and Geothermal Lease Applications within the Grays Lake National Wildlife Boundary." The thrust of this memorandum is that by both statute and regulation leasing is not allowable in the wildlife refuge or critical habitat lands. A subsequent BLM memorandum dated August 27, 1980, stated: "Although there has not been an official withdrawal for a wildlife refuge, the rationale for rejection is based primarily on the designation of the Gray's [sic] Lake area as critical habitat for the whooping crane (FR 5-15-78) and the Endangered Species Act of 1973." As pointed out above, these bases do not foreclose leasing. Therefore, we must examine the record to determine whether there is adequate support for the determination not to lease the lands in question.

[3] We have held that the Secretary may exercise his discretion under the mineral leasing laws to reject oil and gas lease offers where the land is used as a habitat for endangered animals. See Carol Lee Hatch, 50 IBLA 80 (1980); Dell K. Hatch, 34 IBLA 274 (1978). Where the record indicates that the development of an oil and gas field would be incompatible with this public purpose, BLM's decision not to issue the lease will be affirmed in the absence of compelling reasons for its modification or reversal. Id.

In addition, with respect to the acquired land lease offers, the recommendation by FWS that oil and gas leasing is incompatible with the purpose for which the national wildlife refuge was established is not conclusive, even though the land is under FWS jurisdiction. See Kent E. Peterson, 30 IBLA 199 (1977); Daphine Shear, 29 IBLA 33 (1977), and cases cited therein. Where acquired lands are under the jurisdiction of a bureau of the Department of the Interior, it is the Secretary's consent which is necessary to leasing of the land. Id.

Grays Lake is described as a marsh-wetland-pond habitat characteristic of the late successional stage of an eutrophic lake. Approximately 1,000 acres of open water remain as numerous shallow ponds and small lakes. The marsh supports North America's highest known greater sandhill crane nesting density, with populations ranging between 1,200 and 2,200. Surrounding areas adjacent to or in close proximity to Grays Lake are important components of the sandhill crane habitat, including feeding, nesting, rearing, and fall staging areas. Grays Lake is also an important waterfowl production area.

The whooping crane was introduced into the Grays Lake area in May 1975 under a transplant program whereby greater sandhill cranes serve as "foster parents." As of December 1979, 16 whooping cranes, which now use the Grays Lake area, had been reared. The aim of the program is to establish a permanent breeding population of whooping cranes.

The rule establishing Grays Lake and other areas as a critical habitat illustrates the importance of the Grays Lake area for the whooping crane:

In this rule only the Grays Lake area offers potential nesting habitat for the whooping crane. The rearing of young cranes extends for approximately ten months; that is, until the young cranes are driven out of the family unit by their parents on the spring migration. All the areas in this rule constitute habitats essential to the rearing of these young whooping cranes by providing the cranes with sites for training and protection as well as feeding and other normal behavior.  
\* \* \*

Whooping cranes do not readily tolerate disturbances to themselves or their habitat. A human on foot can quickly put a whooping crane to flight at distances over one quarter of a mile. Loss of large expanses of wetlands and shooting were the major factors in causing the massive declines of whooping cranes in the late 1800's. The one common feature uniting the vast majority of confirmed sightings of this crane in migration is the proximity to wetlands that provide undisturbed roosting sites.

43 FR 20939 (May 15, 1978).

In response to the filing of two geothermal lease applications in August 1974 for lands in the Grays Lake area, BLM prepared an environmental assessment report. This report, which is included in the record in these cases, inventoried the wildlife resources present in the Grays Lake area and assessed the potential impact of geothermal leasing on such resources. While the report does not cover the entire area sought for oil and gas leasing in these appeals, it does provide adequate support for the decision to reject appellants' lease offers. Furthermore, it provides justification for rejecting the offers rather than permitting leasing with protective stipulations.

The summary and recommendation of the report is as follows:

Grays Lake is an unique and sensitive ecosystem located in the upper portion of its draining system. The drainage area above Grays Lake is relatively small and becomes closely tied through its watershed to the maintenance and support for the large marsh system. The marsh itself supports a highly valued waterfowl population and is nationally noted for supporting the highest known nesting density of greater sandhill cranes in North America and for the experiment to establish the endangered whooping crane. The endangered peregrine falcon also uses this area. The relative isolation of the valley from population centers,

the relatively small amount of intensive resource development near the marsh and the relatively little past or present disturbance or alteration of the marsh vegetation all contribute to maintaining the unique quality of Grays Lake and its wildlife resources.

Report dated December 20, 1977, from BLM area manager, Soda Springs, to BLM, district manager, Idaho Falls.

Appellants have submitted numerous documents on appeal to establish that the whooping crane and oil and gas development coexist peacefully in the Aransas National Wildlife Refuge, managed by FWS, in southeastern Texas. It is apparent from these submissions that given certain circumstances oil and gas leasing is compatible with the whooping crane and other wildlife resources. Appellants further assert that inadequate consideration was given to leasing with appropriate protective stipulations.

The situation at Grays Lake differs from that at Aransas, however. Aransas merely provides wintering habitat for the whooping cranes, whereas a program is being pursued at Grays Lake to establish a nesting and breeding colony of whooping cranes in that area. Oil and gas leasing activities could have a detrimental effect on that program. Appellants have failed to offer persuasive assurance that exploration and development in this area would not jeopardize this program. As we stated in A. Helander, 15 IBLA 107, 111 (1974), "[i]f it is found that the need for environmental protection is of paramount importance and that the environmental values could not withstand any of the oil and gas activity, then no lease should issue." The record supports a finding that it is likely that oil and gas exploration and development would result in adverse modification of the whooping crane habitat in the Grays Lake area.

We find that appellants have not offered compelling reasons to reverse or modify BLM's determination to preclude oil and gas leasing of these lands.

[4] The majority of the lands sought in the Mineral Leasing Act offers, in IBLA 81-130, cover lands in the lakebed of Grays Lake. This land was the subject of the RUCUA. As explained in the Solicitor's Opinion, 71 I.D. 311 (1964):

Although title to this land has been in dispute for many years, the landowners at Gray's [sic] Lake, who claim title to this land, have indicated that they are willing to enter into a use agreement covering a specified area for a period of 99 years. This agreement provides to the Government all of the advantages of a lease and preserves to the landowners

and the Government their respective long-standing claims to the lands, but does not require the passing of a monetary consideration.

\* \* \* \* \*

Under the proposal which is outlined above, no payment is to be made to the landowners for their assent to utilization by the United States of the 13,000 plus acres. Thus, a long-standing controversy with respect to this land will be settled on a favorable basis so as to allow its use for an extremely valuable departmental objective. It is our opinion that there is now no necessity to obtain opinions by the Attorney General as to the title of the 13,000 plus acres within the meander line that will be developed for refuge use.

\* \* \* \* \*

Accordingly, we see no legal obstacles to the establishment of a refuge at Gray's [sic] Lake, Idaho, through the use of the agreement which your office has described. In addition, there is no need to send files to the Attorney General for title opinions on the land which is to be used for the refuge.

Id. at 312-14.

In addition, in an attachment to a memorandum, dated June 25, 1965, from the Chief, Division of Realty, FWS, to various FWS Regional Directors, ownership of the land was described as follows:

There has been no judicial determination of the extent of the rights to the bed of Grays Lake between the United States, and the private landowners whose lands abut the meander line of Grays Lake. Agreements executed by all abutting private landowners, which will be executed by the United States after Migratory Bird Conservation Commission approval, postpones any judicial determination of these rights and defines certain areas of usage by the parties thereby permitting establishment and operation of a 13,000-acre refuge. These agreements will avoid the problems of condemnation for at least a period of 99 years.

Where title to land is in dispute, the Board has held that the Secretary may properly exercise his discretion to reject a lease offer for such land, without reference to the merits of the dispute or the quality of the title asserted by the United States. Don Jumper, 24 IBLA 218 (1976); see also Samson Resources Co., 55 IBLA 51 (1981); N. L. Industries, Inc., 34 IBLA 99 (1978). In this case, since ownership of the lakebed is unresolved, those offers included in IBLA 81-130,

which describe such lands, were subject to rejection for that reason. See David A. Provinse, 45 IBLA 111 (1980).

We note also that after the BLM decision in the cases docketed as IBLA 81-129, 81-130, and 81-159, counsel for appellants requested that BLM reconsider its decisions and issue the leases with no surface occupancy stipulations. BLM responded by letter dated November 4, 1980, that: "1. No leasing in this area was proposed and accepted during the public review of the recently completed Soda Springs management framework plan. 2. Directional drilling would be impracticable to the lessee because of the distance involved." Appellants argue that the record does not indicate the facts on which BLM based its conclusion and also that it is in a better position technically to determine the feasibility of directional drilling operations than is BLM. While appellants may be in a better position to determine the feasibility of directional drilling operations, we cannot agree that it was error to reject the request for leases with no surface occupancy stipulations. The record adequately supports the decision not to lease.

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 affirmed.

Bruce R. Harris  
Administrative Judge

We concur:

Bernard V. Parrette  
Chief Administrative Judge

Edward W. Stuebing  
Administrative Judge

