

ALTEX OIL CORP.

IBLA 83-338

Decided May 17, 1983

Appeal from decisions of the Oregon State Office, Bureau of Land Management, rejecting noncompetitive acquired lands oil and gas lease offers OR 35194 WA through OR 35201 WA.

Affirmed.

1. Mineral Leasing Act for Acquired Lands: Consent of Agency -- Oil and Gas Leases: Acquired Lands Leases -- Oil and Gas Leases: Consent of Agency

The Mineral Leasing Act for Acquired Lands of 1947, as amended, 30 U.S.C. §§ 351-359 (1976), requires that the consent of the administrative agency having jurisdiction over acquired land described in an oil and gas lease offer be obtained prior to the issuance of a lease for such land. Absent such consent, the Department of the Interior is without authority to issue a lease.

2. Constitutional Law: Due Process

An application for an oil and gas lease is a mere hope or expectancy and where a party has no property interest of which it may be deprived there can be no failure of Constitutional due process.

3. Oil and Gas Leases: Discretion to Lease -- Oil and Gas Leases: Land Subject to -- Wildlife Refuges and Projects: Generally

The general prohibition against oil and gas leasing in wildlife refuge lands contained in 43 CFR 3101.3-3 is a formal exercise of the Secretary's discretion under sec. 17 of the Mineral Lands Leasing Act, as amended, 30 U.S.C. § 226 (1976). Pursuant to the regulation, land within

the Columbia National Wildlife Refuge is not subject to noncompetitive oil and gas leasing.

APPEARANCES: Cecil C. Wall, President, Altex Oil Corporation, for appellant; Clyde T. Fitz, Esq., Office of Chief Counsel, Richland Operations Office, U.S. Department of Energy.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Altex Oil Corporation appeals from decisions of the Oregon State Office, Bureau of Land Management (BLM), dated December 22, 1982, rejecting noncompetitive acquired lands oil and gas lease offers, OR 35194 WA through OR 35200 WA, and December 31, 1982, rejecting noncompetitive acquired lands oil and gas lease offer, OR 35201 WA.

Appellant filed all of these lease offers on October 1, 1982, for acquired lands in Grant County, Washington. In its decision dated December 22, 1982, BLM rejected offers OR 35194 WA through OR 35200 WA for the following reasons:

Wildlife Refuge Lands are exempt from oil and gas leasing under 43 CFR 3101.3-3(a), except when these lands are subject to drainage and in those instances leases will be offered only under competitive bidding.

* * * * *

The lands are within the boundaries of Hanford Reservation Site. The surface management agency has withheld its consent to lease. See 43 CFR 3109.3-1.

Offers OR 35194 WA and OR 35195 WA are for lands within T. 14 N, R. 25 E., Willamette meridian (W.M.), Grant County, Washington, and offer OR 35196 WA is for land within T. 14 N., R. 26 E., W.M. The lands in these three offers are within both the Saddle Mountain National Wildlife Refuge (NWR) and the Hanford Reservation Site. However, as all of the lands included in these offers are within the Hanford Reservation, we need not consider the effect of the Saddle Mountain NWR. The Hanford Reservation Site, formerly under the control of the Atomic Energy Commission, is now under the jurisdiction of the Department of Energy (DOE). Offers OR 35197 WA through OR 35200 WA include lands within T. 15 N., R. 26 E., W.M., and T. 15 N., R. 27 E., W.M., which lands are not within a designated NWR but are part of the Hanford Reservation Site.

In its decision dated December 31, 1982, BLM rejected 324.93 acres of the land requested for lease in offer OR 35201 WA because it is within the Columbia NWR. 1/

1/ The remaining 5.07 acres which was not rejected in the decision is within that portion of the NW 1/4 NE 1/4 of sec. 19, T. 17 N., R. 29 E., W.M., which lies outside of the Columbia NWR.

In its statement of reasons, appellant alleges that "DOE has not met the burden of providing 'facts and data of record' to support its conclusions," and its action is therefore "arbitrary and capricious." It asserts that its constitutional right to due process has been violated. Furthermore, appellant argues that the decision to withhold consent was not made by the "head of the executive department" as statutorily mandated and that delegation of such authority has not been exercised.

[1] BLM requested consent of DOE to leasing the lands within the Hanford Reservation Site for oil and gas. DOE made the following response:

Hanford is still under very serious consideration for location of the national waste terminal storage repository. Tunnels have been drilled into basalt formations and tests are underway to determine the ability of basalt to withstand the heat produced by radioactive waste. Furthermore, we have drilled several deep holes into the basalt and confirmed its basic integrity. Many millions of dollars have been spent on this effort. Therefore, we remain unwilling to approve drilling of boreholes, either onsite or offsite, which conceivably could affect the aquifers or the deep geological structures under the Hanford Site.

Section 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1976), states in pertinent part:

No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department, independent establishment, or instrumentality having jurisdiction over the lands containing such deposit * * * and subject to such conditions as that official may prescribe to insure adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered.

The effect of this statute is to preclude mineral leasing on acquired lands of the United States without consent of the administrative agency having jurisdiction over the acquired land. Altex Oil Corp., 66 IBLA 307 (1982); Dennis Harris, 55 IBLA 280 (1981); Arthur E. Meinhart, 46 IBLA 27 (1980); Capitol Oil Corp., 33 IBLA 392 (1978). Thus, since DOE has withheld its consent, this Department cannot issue oil and gas leases for the land and the lease offers were properly rejected.

Although DOE's reasons for withholding consent to leasing within the Hanford Reservation Site were previously known to appellant (Altex Oil Corp., *supra*), it contends that the burden is on the jurisdictional agency to show BLM why its primary goal would be jeopardized by leasing and that this burden has not been met. We cannot recognize such an obligation on the part of the controlling agency since the Secretary is without authority to lease acquired lands without the proper consent regardless of the agency's reasons for withholding that consent. That limitation on the Secretary's authority is clearly expressed in the statute. Esdras K. Hartley, 57 IBLA 293, 294 (1981). See Amoco Production Co., 69 IBLA 279 (1982). BLM's recently released Instruction Memorandum No. 83-265 (January 19, 1983), instructs BLM officials

to request as part of their inquiry process that the surface managing agency submit reasons for a negative recommendation or denial of consent. This memorandum, however, recognizes that, although it would be helpful in supporting the rejection of an application for the surface managing agency to provide its rationale, it is not possible to compel an agency to provide such reasons. Thus, appellant's recourse is to pursue its objections to DOE's rationale with DOE itself.

Appellant also makes reference to an inability to find any delegation of authority to give or withhold the consent to lease. Section 644 of the Department of Energy Organization Act reads: "Except as otherwise expressly prohibited, the Secretary [of Energy] may delegate any of his functions to such officers and employees of the Department as he may designate, and may authorize such successive redelegations of such functions within the Department as he may deem necessary or appropriate." 42 U.S.C. § 7254 (Supp. IV 1980). DOE sets forth the delegation of the authority to withhold consent as thus:

DOE Order 4300.1 states that the Secretary of Energy or designee acting through the Director of Administration or designee establishes principles and policies relating to acquisition, use and disposition of real property owned or controlled by DOE. In a memorandum dated December 23, 1980, to individuals including the Heads of Field Organizations (which includes the Manager, Richland Operations Office) the Director of Administration authorized them to implement the DOE Real Estate Manual and related DOE Order 4300.1 which includes authority to approve or disapprove requests for real property actions.

In RL (Richland Operations Office) Order 1120.1 "Organization and Functions" dated February 20, 1981, that authority was redelegated to the Director, Facilities and Site Services Division, RL, who "Directs and administers real estate acquisition and disposal activities and approves land use permits, licenses, right-of-way agreements, leases, easements, and maintenance of official real estate records." Thereafter, the RL Director, Facilities and Site Services division informed the Oregon State Office of the BLM that DOE was unwilling to approve drilling on the Hanford Site.

In absence of evidence that this explanation is in error, it is accepted.

[2] Appellant asserts that a constitutional right to due process has been violated because there was no opportunity afforded to comment on DOE's reasons for withholding consent to lease prior to BLM's decision to reject the offers. However, the range of interests protected by procedural due process is not infinite. Board of Regents v. Roth, 408 U.S. 564, 570 (1972). The Fifth Amendment to the U.S. Constitution proscribes deprivation of "life, liberty, or property, without due process of law." In filing its offers to lease, appellant acquired no property interest. An application for an oil and gas lease is a mere hope or expectancy rather than a vested property right. Schraier v. Hickel, 419 F.2d 663 (D.C. Cir. 1969); Fen F. Tzeng,

68 IBLA 381, 386 (1982). See McTiernan v. Franklin, 508 F.2d 885, 888 (10th Cir. 1975). Thus, since appellant has no property interest of which it may be deprived, there can be no failure of due process in this case.

[3] BLM cited 43 CFR 3101.3-3(a), as the basis for exempting part of the lands in question from oil and gas leasing. Section 3101.3-3(a), precludes leasing lands withdrawn for the protection of all species of wildlife within a particular area. Esdras K. Hartley, 57 IBLA 319 (1981). Land in offer OR 35201 WA was rejected for the sole reason that it is within the Columbia NWR. Although the public land order (PLO) creating the Columbia NWR withdrew the lands designated therein for the protection of migratory birds and other wildlife, that order permits mineral leasing on those lands. PLO No. 243, 9 FR 11400 (Sept. 15, 1944). The specific order withdrawing the rejected land in question as part of the Columbia NWR is not disclosed in the case file records and we have not identified it. Nevertheless, there has been no showing or contention by appellant that this land is in a status different from other land included in the Columbia NWR. This Board has held repeatedly that the general prohibition against oil and gas leasing in wildlife refuge lands expressed in 43 CFR 3101.3-3 represents a formal exercise of the Secretary's discretion under section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976). Chester L. Pringle, 70 IBLA 254 (1983); Nugget Oil Corp., 61 IBLA 43 (1981).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the December 22, 1982, decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

James L. Burski
Administrative Judge

