

HINGELINE OVERTHRUST OIL & GAS, INC.

IBLA 82-632

Decided March 27, 1984

Appeal from decision of the Montana State Office, Bureau of Land Management, rejecting oil and gas lease offers M 50659, M 50660, and M 50661.

Set aside and remanded.

1. Fish and Wildlife Service--Indian Lands: Generally-- Public Lands: Jurisdiction Over--Withdrawals and Reservations: Effect of

The Act of May 23, 1908, 35 Stat. 267, as amended, 16 U.S.C. § 671 (1976), providing for the establishment of the National Bison Range, terminated the status of the land included therein as land reserved for Indian use.

2. Oil and Gas Leases: Lands Subject to--Wildlife Refuges and Projects: Leases and Permits

The 1984 Continuing Resolution (98 Stat. 151) provides, at sec. 137, that no funds shall be used to process or grant oil and gas lease applications or offers on any Federal lands, outside Alaska, that are units of the National Wildlife Refuge System, except where there are valid existing rights or where the lands are subject to drainage, unless and until the Secretary of the Interior promulgates revisions to the existing regulations so as to explicitly authorize the leasing of such lands; holds a public hearing with respect to such revisions; and prepares an environmental impact statement with respect thereto. All action upon affected oil and gas lease applications or offers filed before Nov. 14, 1983, is properly suspended until completion of the necessary steps.

APPEARANCES: Hugh C. Garner, Esq., Rosemary J. Beless, Esq., Salt Lake City, Utah, and Van L. Butler, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Hingeline Overthrust Oil & Gas, Inc. (Hingeline), has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM),

dated February 26, 1982, which rejected its noncompetitive over-the-counter oil and gas lease offers, M 50659, M 50660, and M 50661. ^{1/} The State Office rejected these offers stating: "All of the lands in the offers are within the Flathead Indian Reservation. This office has no jurisdiction over leasing same."

On appeal, Hingeline requests that the decision be reversed and the cases remanded to BLM for issuance of the leases subject to the approval of the Secretary of the Interior. Hingeline argues that the lease offers are for lands that are no longer within the Flathead Indian Reservation because the lands were excepted from the reservation as part of the creation of the National Bison Range by the Act of May 23, 1908 (35 Stat. 267), and as part of a game range these lands are available for oil and gas leasing subject to the approval of the Secretary of the Interior. Hingeline contends that the National Bison Range has never specifically been withdrawn from oil and gas

^{1/} M-50659 involves the following described lands:

"T. 18 N. R. 21 W., P.M.

Sec. 1: Lts 1-4, S 1/2 N 1/2,
S 1/2

Sec. 2: Lts 1-4, S 1/2 N 1/2,
S 1/2

Sec. 3: Lts 1-4, S 1/2 N 1/2,
S 1/2

Sec. 4: Lts 1,2, S 1/2 NE 1/4,
SE 1/4

Sec. 9: E 1/2

Sec. 10: All

Sec. 11: All

Sec. 12: All

Sec. 13: All

M-50660 involves the following described lands:

"T. 19 N. R. 21 W., P.M.

Sec. 27: SE 1/4, SW 1/4, S 1/2 SE 1/4

Sec. 34, Sec. 35, and Sec. 36."

M-50660 involves the following described lands:

"T. 18 N., R. 20 W., P.M.

Sec. 5: Lot 4, S 1/2 NW 1/4,
SW 1/4, W 1/2 SE 1/4,
SE 1/4 SE 1/4

Sec. 6: Lts 1-7, SE 1/4 NW 1/4,
E 1/2 SW 1/4, S 1/2
NE 1/4, SE 1/4

Sec. 7: Lts 1-4, E 1/2 W 1/2,
E 1/2

Sec. 8: All

Sec. 17: All

T. 19 N. R. 20 W., P.M.

Sec. 31: Lots 1-4, E 1/2 W 1/2, E 1/2"

Sec. 14: All

Sec. 15: All

Sec. 16: E 1/2

Sec. 21: Lot 1, NE 1/4

Sec. 22: Lts 1,4, NW 1/4,
NE 1/4 SW 1/4, E 1/2

Sec. 23: All

Sec. 24: All

Sec. 25: Lts 1, 2, NW 1/4,
N 1/2 SW 1/4, E 1/2

Sec. 26: Lot 1, NW 1/4, NE 1/4,
N 1/2 SE 1/4

Sec. 27: N 1/2 NE 1/4"

Sec. 18: Lts 1-4, E 1/2 W 1/2,
E 1/2

Sec. 19: Lts 1-4, E 1/2, W 1/2,
E 1/2

Sec. 29: NW 1/4, N 1/2 NE 1/4,
N 1/2 SW 1/4, SW 1/4

Sec. 20: All

Sec. 30: Lts. 1-4, E 1/2 W 1/2,
E 1/2

leasing and the applicable statutes and Federal regulations allow oil and gas leasing on the National Bison Range, subject to the discretion of the Secretary of the Interior.

[1] The Flathead Indian Reservation, as established by Article II of the Treaty with the Flatheads at Hell Gate, promulgated on July 16, 1855, 12 Stat. 975, included the land embraced by the instant lease offers within its exterior boundaries. However, by the Act of May 23, 1908, 35 Stat. 267, as amended, 16 U.S.C. § 671 (1976), Congress directed the President "to reserve and except from the unallotted lands now embraced within the Flathead Reservation, in the State of Montana, not to exceed twelve thousand eight hundred acres of said land * * * for a permanent national bison range for the herd of bison to be presented by the American Bison Society." 2/ (Emphasis supplied.) Further provision was made in that Act for the payment of the appraised value of the land to the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille tribes. Finally, Congress provided that "the Secretary of Agriculture is hereby authorized and directed to inclose said lands with a good and substantial fence and to erect thereon the necessary sheds and buildings for the proper care and maintenance of the said bison."

Ultimately, a total of 18,521.35 acres were set aside for the bison range. Included in this acreage are the lands applied for herein. It is not possible to read this Act without arriving at the conclusion that its purpose was to terminate the land's status as reserved for Indian use. Not only did the Act "except" the land from the Flathead Indian Reservation, it expressly made provision for payment of its appraised value, a clear indication that a taking was contemplated. Indeed, jurisdiction over the land was actually transferred from the Department of the Interior to the Department of Agriculture, where it remained until 1939. In 1939, jurisdiction was returned to the Department of the Interior under section 4(f) of Reorganization Plan No. 2, not for the purpose of consolidating Indian holdings in one Department, but rather to vest the functions of the Secretary of Agriculture relating to the conservation of wildlife, game, and migratory birds in the Secretary of the Interior.

In this regard, we would differentiate the situation of the National Bison Range from that accorded various bird refuges established on certain reservoir sites within the Flathead Reservation. The Act of April 23, 1904, 33 Stat. 302, had directed the allotment of the Flathead Indian Reservation and opened surplus unallotted land to settlement and entry. Further provision was made in that Act for the construction of irrigation facilities. Subsequently, by the Act of March 3, 1909, 35 Stat. 796, the Secretary was authorized to reserve any lands within the Flathead Indian Reservation which were chiefly valuable for powersites and irrigation sites. Various such sites were, in fact, reserved, and placed under the jurisdiction of the Bureau of Reclamation.

Later, in 1921, certain bird refuges were established at these reservoir sites by Executive Order of June 25, 1921. These reservoir

2/ The Act of Mar. 4, 1909, 35 Stat. 1051, expanded the area to be reserved and excepted to not to exceed 20,000 acres.

sites, however, were transferred from the jurisdiction of the Bureau of Reclamation to the Office of Indian Affairs by the Act of June 5, 1924, 43 Stat. 390, 402. Such lands remain under the jurisdiction of the Bureau of Indian Affairs (BIA). See generally Jurisdiction of Flathead Tribal Council to Regulate Hunting on Pablo and Ninepipe Reservoir Sites, M-34739 (Jan. 3, 1947).

What must be kept in mind in comparing the treatment of the reservoir bird refuges with that of the National Bison Range, is the fact that, as was typical of many contemporary Acts of Congress directing the allotment of lands within established Indian reservations and the sale and disposal of surplus lands after allotment, the United States, under the Act of April 23, 1904, supra, acted merely as a "trustee" for the Indians to dispose of their lands. As the Supreme Court held in Ash Sheep Co. v. United States, 252 U.S. 159 (1920), such lands held the status of "Indian lands" rather than "public lands" until the contemplated sales were actually made. Since reservoir lands were, themselves, withdrawn from entry under the authority of the Act of May 29, 1908, 35 Stat. 448, such lands necessarily retained their status as "Indian lands," though they were additionally subject to a reservation for reservoir purposes. Thus, it was totally consistent with their status as Indian lands that administration of such lands was eventually vested in the Office of Indian Affairs, predecessor of BIA.

None of these considerations is applicable to lands within the National Bison Range. The Act of May 23, 1908, 35 Stat. 267, as amended, 16 U.S.C. § 671 (1976), clearly contemplated the present extinguishment of title rather than a trusteeship arrangement. Administration of the bison range was transferred out of the Department of the Interior into the Department of Agriculture, an action consistent with the view that Indian title was being extinguished. ^{3/} Moreover, it is clear that the Fish and Wildlife Service has treated the subject lands as lands within its jurisdiction. See 50 CFR 33.4 (authorizing sport fishing in the National Bison Range). We conclude, therefore, that, to the extent that BLM predicated rejection of the instant oil and gas leases on the theory that they are "Indian lands" under the jurisdiction of BIA, the decision must be deemed in error.

Under the circumstances described above, it is clear that Congress specifically and unambiguously authorized the taking of tribal property for a Federal use, the standard for effecting the extinguishment of Indian title firmly rooted in Federal case law. See Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Winnebago Tribe, 542 F.2d 1002 (8th Cir. 1976).

Appellant notes that the general rule, repeatedly held by the Department, is that unless a withdrawal or reservation of public domain land

^{3/} Although the trust obligations of the United States to Indians may be required to be discharged by executive departments other than the Department of the Interior (see F. Cohen, Handbook of Federal Indian Law at 225 (1982 ed.)), it is clear in this case that Congress did not bestow upon the Department of Agriculture any responsibilities over the Indians of the Flathead Reservation.

specifically provides otherwise, the land withdrawn or reserved is presumed to be available for oil and gas leasing under the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181, 226 (1976). In this case, of course, no reference was made as to whether the land within the National Bison Range was available for oil and gas leasing in the order establishing the range for the obvious reason that the order predated the Mineral Leasing Act. Thus, it could be argued that the general rule should not be applied since it is based on the application of a negative inference (that is, the order would have expressly noted that the Mineral Leasing Act would not apply had such been the intent) which inference could not arise where a withdrawal predated the Act. Under such an analysis the land in the National Bison Range would not be subject to leasing under the 1920 Act.

However, in Martin Wolfe, 49 L.D. 625 (1923), which involved another withdrawal predating the Mineral Leasing Act, it was held that while the Department was granted the authority to lease such lands under the Act, ^{4/} it was also granted the authority to decline to issue such leases. First Assistant Secretary Finney held that where leasing was incompatible with the purposes for which land was reserved, a permit could properly be denied. The extent that the National Bison Range may be leased therefore requires advertence to the purposes for which it was established.

[2] In this regard, we note that in D. M. Yates, 73 IBLA 353, 355 (1983), and D. M. Yates, 70 IBLA 240, 242 (1983), this Board held that game ranges are included in the "National Wildlife Refuge System," as designated by section 4 of the Act of October 15, 1966, as amended, 16 U.S.C. § 668dd (1976). All units of the National Wildlife Refuge System, with the exception of wildlife management areas, are now defined as "national wildlife refuges." 50 CFR 25.12.

We note that 43 CFR 3101.3-3(b)(1) governs oil and gas leasing in game range lands. That regulation provides that lands not closed to leasing by agreement of the Fish and Wildlife Service and BLM are subject to leasing on the imposition of such stipulations as are agreed upon by both the Fish and Wildlife Service and BLM. There is no indication that the National Bison Range was ever closed to mineral leasing, and, thus, 43 CFR 3101.3-3(b)(1) would be applicable and we would normally remand the subject lease offers for further consideration pursuant to the regulatory guidelines.

However, while the case has been pending before the Board, Congress has acted to suspend issuance of oil and gas leases for lands within the National Wildlife Refuge system. Thus, section 317 of the 1984 Continuing Resolution, 98 Stat. 151, provides:

No funds in this or any other Act shall be used to process or grant oil and gas lease applications on any Federal lands outside of Alaska that are in units of the National Wildlife

^{4/} This should be contrasted with lands within national parks where the Department was expressly deprived of the authority to issue any leases by section 1 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 181 (1976).

Refuge System, except where there are valid existing rights or except where it is determined that any of the lands are subject to drainage as defined in 43 CFR 3100.2, unless and until the Secretary of the Interior first promulgates, pursuant to section 553 of the Administrative Procedure Act, revisions to his existing regulations so as to explicitly authorize the leasing of such lands, holds a public hearing with respect to such revisions; and prepares an environmental impact statement with respect thereto.

It is clear from our analysis that the National Bison Range is a unit of the National Wildlife Refuge system. Thus, section 317 requires that BLM suspend all action on the above offers until further regulations are promulgated, a public hearing is held, and an environmental impact statement is prepared and finalized. See TXO Production Corp., 79 IBLA 81 (1984). Accordingly, while we are setting aside BLM's decision rejecting the instant lease offers, no action may be taken to issue leases in response to these offers until such time as the steps outlined above have been completed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is set aside and the case remanded for further action consistent herewith.

James L. Burski
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

