

Appeal from decision of the Eastern States Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer ES 28676.

Affirmed.

1. Oil and Gas Leases: Lands Subject to -- Withdrawals and Reservations: Effect of -- Words and Phrases

"Reserved," "set apart," "withdrawn." Lands which are "reserved" and "set apart" for the protection and preservation of wildlife pursuant to the Migratory Bird Conservation Act of 1929, as amended, are "withdrawn" for the protection of all species of wildlife within the meaning of 43 CFR 3101.3-3(a)(1).

APPEARANCES: Richard F. Price, Jr., Esq., New Orleans, Louisiana, pro se.
OPINION BY ADMINISTRATIVE JUDGE ARNESS

Richard F. Price appeals from a decision of the Eastern States Office, Bureau of Land Management (BLM), dated November 9, 1982, rejecting his noncompetitive oil and gas lease offer ES 28676 dated August 17, 1981. The lease offer was rejected for the reason the lands sought to be leased were acquired lands within the Delta National Wildlife Refuge which had been withdrawn for the protection of all species of wildlife in the area by Executive order of the President, and were therefore unavailable for leasing pursuant to 43 CFR 3103.3-3. The tract sought embraces acquired lands in secs. 27, 28, 33, and 34, T. 20 S., R. 20 E., and secs. 3 and 4, T. 21 S., R. 20 E., Plaquemines Parish, Louisiana.

In his statement of reasons filed in support of appeal, Price contends the Executive orders establishing the refuge make no specific mention of withdrawal of the refuge lands from mineral leasing. He further argues, based upon an analysis of 43 CFR 3101.3-3 and Esdras K. Hartley, 57 IBLA 319, 323 (1981), that absent a clear statement of withdrawal, refuge land is presumed to be available for lease. Reasoning from his interpretation of the Hartley decision, supra, he contends that lease issuance in response to his offer, with appropriate stipulations, is not inconsistent in fact with use of the refuge land for a wildlife refuge, and that a decision to lease in this case

is properly within the discretion of the Secretary of the Interior. He concludes that, in the absence of a reasoned basis upon which to refuse this lease offer, it should be accepted. Appellant also seeks an order requiring a hearing to present evidence concerning the factual matters raised by his arguments. The purpose of the hearing sought is presumably to demonstrate the compatibility of oil and gas lease and development with the preservation and protection of wildlife. For reasons given in this opinion, infra, this motion is denied.

The applicable regulation, 43 CFR 3101.3-3(a) (1982), provides:

(a) Wildlife refuge lands. Such lands are those embraced in a withdrawal of public domain and acquired lands of the United States for the protection of all species of wildlife within a particular area. Sole and complete jurisdiction over such lands for wildlife conservation purposes is vested in the U.S. Fish and Wildlife Service even though such lands may be subject to prior rights for other public purposes or, by the terms of the withdrawal order, may be subject to mineral leasing.

(1) Leasing. No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except [where refuge land is subject to drainage] * * *. [1/]

This rule, which, among other things, prohibits oil and gas leasing upon wildlife refuge lands except where they are subject to drainage, is a formal exercise of the Secretary's discretion to withdraw the lands from leasing. Nugget Oil Corp., 61 IBLA 43 (1981).

The Delta National Wildlife Refuge was established as the Delta Migratory Waterfowl Refuge by Exec. Order No. 7229 (Nov. 19, 1935), providing that certain lands in Louisiana were "reserved and set apart * * * as a refuge and breeding ground for migratory birds and other wildlife" pursuant to provision of the Migratory Bird Conservation Act of 1929 (1929 Act, Act), 45 Stat. 1222, as amended, 16 U.S.C. § 715-715(r) (1982). Subsequently, Exec. Orders Nos. 7383 (1 FR 840 (June 5, 1936)) and 7538 (2 FR 110 (Jan. 19, 1937)) also "reserved and set apart" additional lands for the refuge. By Exec. Order No. 8517 (Aug. 16, 1940), further additions were made to the refuge, including the lands sought to be leased by appellant, which were "included in and reserved as a part of the refuge." The refuge is now a part of the National Wildlife Refuge System. See 50 CFR 25.12. 2/

1/ Recodified to 43 CFR 3101.5-1 (1983) without substantial revision. 48 FR 33665 (July 22, 1983).

2/ While this appeal was pending, Congress suspended issuance of all oil and gas leases in the National Wildlife Refuge System by enactment of section 137, of the Act of November 14, 1983, 97 Stat. 981, Further Continuing Appropriations for Fiscal Year 1984, which 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

This Board's decision in Hartley found provisions of 43 CFR 3101.3-3(a) prohibit leasing in those wildlife refuges where there is a withdrawal of the land made for the protection of all species of wildlife in the refuge area. See Hartley, supra at 323-24. Contrary to appellant's analysis of 43 CFR 3101.3-3(a)(1) that regulation provides that "wildlife refuge lands" will not be leased except where they are subject to drainage. The drainage exception is not applicable here and, as later discussed, in this opinion, the lands sought by appellant for leasing are legally withdrawn for the protection of all wildlife. As a result, they are not available for leasing. Hartley, supra; see also D. M. Yates, 74 IBLA 23 (1983); D. M. Yates, 73 IBLA 353 (1983).

In this case BLM has assumed the land sought to be leased in the Delta refuge is located within an area which has been withdrawn for the protection of all wildlife. The decision from which appeal is taken rejects the lease offer for this stated reason without elaboration. It is not, however, facially evident from the orders creating the refuge that a "withdrawal" of the refuge land was made for all species of wildlife, since the refuge land is not expressly "withdrawn" but rather is "reserved" and "set apart." While appellant assumes that the effect of the Hartley decision is to automatically open acquired refuge lands to leasing in the absence of a specifically stated withdrawal, this conclusion is contrary to prior Departmental decisions, which declare leasing on refuges to be ultimately subject to the exercise of Secretarial discretion based upon considerations including conservation, wildlife protection, and other purposes in the public interest. See, e.g., T. R. Young, 20 IBLA 333, 335 (1975).

The issue on appeal, as framed by the stated basis for the decision and appellant's contentions on appeal, therefore, concerns the effect of the language employed by the orders establishing the refuge. Whether the language used by the Executive orders establishing the refuge operated to withdraw the lands for the protection of all species of wildlife within the sense used by 43 CFR 3101.3-3(a) so as to bar leasing for oil and gas is the question to be decided.

[1] Numerous past decisions of the Department have equated the meaning of the words "withdraw" and "reserve" where the terms are used to indicate the dedication of governmental lands to a specific purpose such as the protection or preservation of wildlife. For example, in Appeal of Paug-Vik, Inc., 3 ANCAB 49, 85 I.D. 229, 235 (1978), a provision of the Pickett Act, 43 U.S.C. § 141 (1982), was interpreted to determine the effect of action taken pursuant to the statute to insure the use of lands for military purposes. The

fn. 2 (continued)

are in units of the National Wildlife 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."

words "withdrawn" and "reserved" in the context used were there found to have been "used interchangeably and in conjunction with each other." In David A. Provinse, 38 IBLA 347, 349 n.1 (1978), the word "withdrawal" is described as a term of art defined by the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1702(j), to include, inter alia, "reserving the area for a particular public purpose or program." In Mobil Oil Corp., 20 IBLA 296 (1975), lands "withdrawn" or "reserved" for defense purposes are found not subject to lease where consent to lease by the military is withheld as inconsistent with defense needs.

Similarly, this Department has officially recognized that the phrase "set apart," used here by Exec. Order No. 7229, when employed by Congress to authorize a specified use for certain land, is tantamount to a congressional withdrawal of the land. Solicitor's Opinion M-36540 (Jan. 8, 1959). Reasoning by analogy, a similar effect should be given to the Executive orders used to create the Delta Refuge. Clearly, the circumstance and purpose of the use of the words and phrases "reserved" and "set apart" must be considered in the context in which used, especially considering the purpose for which the action is proposed in order to determine the effect intended. In this case, where the words "reserved" and "set apart" are employed to create a refuge for the protection of wildlife without limitation to species, the circumstances indicate an intention to withdraw the Delta land for the purposes of wildlife conservation.

Further, Exec. Order No. 8517, which added to the refuge the lands sought by appellant, also changed the designation of the reservation area from that of a "migratory waterfowl" refuge to a "wildlife refuge," in keeping with amendments to the 1929 Act which had broadened the scope of the Act to include wildlife other than waterfowl. See Act of June 15, 1935, 49 Stat. 381, 16 U.S.C. § 715e (1982). As amended, the 1929 Act provided for acquisition of lands to be used for "wildlife refuges" and "or as refuges for wildlife." Id. It was, therefore, not inconsistent with the amended 1929 Act that a withdrawal be made under the authority of the Act for all wildlife in a particular refuge. This Board so found in T. R. Young, supra at 336, where the dedication of lands for "waterfowl production areas" under the 1929 Act, as amended, was considered to be a sufficient basis for a finding that the lands had properly been withdrawn by Secretarial order for the protection of all species. Following Young, D. M. Yates, 73 IBLA 353, discussed the effect of the addition of the words "other wildlife" to describe the purposes for which a refuge was established by a public land order. In Yates, supra at 358, this Board construes the words "other wildlife" as used in the withdrawal order to constitute a withdrawal for all forms of wildlife. Id. at 358. As a consequence, Yates found the use of the words "other wildlife" without limitation, to indicate an intention to create a withdrawal for all forms of wildlife on the reservation under consideration. Given the language of the Executive orders reserving and setting apart the Delta Refuge for the conservation of wildlife and the purpose for which the refuge was established under the 1929 Act, this same conclusion is required here. Under the circumstances, BLM properly found the lands appellant offered to lease to be unavailable for leasing, for the reason they had been withdrawn for the protection of all species of wildlife in the area.

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

Franklin D. Arness
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge

