

BEARTOOTH OIL AND GAS CO.

IBLA 85-394

Decided October 9, 1986

Appeal from a decision of the Utah State Office, Bureau of Land Management, denying a request for a suspension of operations and production for oil and gas lease U-44434.

Affirmed as modified.

1. Federal Land Policy and Management Act of 1976: Wilderness--Oil and Gas Leases: Suspensions

When an oil and gas lease of lands located within a wilderness study area is issued after enactment of the Federal Land Policy and Management Act of 1976, subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability, and the lessee is denied an application for permit to drill for failure to meet the nonimpairment standard, the denial is not a restriction tantamount to a suspension under 30 U.S.C. § 209 (1982).

APPEARANCES: Gary G. Broeder, Esq., Billings, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Beartooth Oil and Gas Company (Beartooth) has appealed from the January 18, 1985, decision of the Utah State Office, Bureau of Land Management (BLM), denying appellant's request for a suspension of operations and production for oil and gas lease U-44434. This lease, a 5-year competitive lease issued on March 1, 1980, was due to expire less than 2 months from the date appellant filed its request for a suspension.

Oil and gas lease U-44434 was issued after the effective date of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1982), and is subject to the Wilderness Protection Stipulation set forth in the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP) of December 12, 1979. <sup>1/</sup> 44 FR 72014 (Dec. 12, 1979). Chapter III(J)(1)(b) of the IMP states:

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<sup>1/</sup> The IMP was revised on Apr. 6, 1981 (46 FR 20607), and on July 12, 1983 (48 FR 31854).

Regardless of the conditions and terms under which these leases [post-FLPMA leases issued prior to the IMP] were issued, there are no grandfathered uses inherent in post-FLPMA leases. Activities on post-FLPMA leases will be subject to a special wilderness protection stipulation as stated in Appendix A.

(IMP at 24, 44 FR 72029 (Dec. 12, 1979)). This stipulation, which was made a part of the lease, states that "[a]ctivities will be permitted under the lease so long as BLM determines they will not impair wilderness suitability" (IMP at 27, 44 FR 72031 (Dec. 12, 1979)).

The lease includes land in secs. 26 and 35 of T. 15 S., R. 22 E., Salt Lake Meridian, Utah, which is within the boundary of a wilderness inventory unit designated as the Winter Ridge Unit UT 080-730. Although BLM initially determined the unit did not qualify as a Wilderness Study Area (WSA), the Board set aside BLM's decision and remanded the matter to BLM. On remand BLM was directed to reassess the naturalness of the area with special attention to whether boundary adjustments might eliminate imprints of man which would disqualify the area from wilderness consideration. Utah Wilderness Association, 72 IBLA 125, 189-90 (1983). BLM subsequently designated 42,462 acres of the 43,963 acres included in the inventory unit as a WSA. 48 FR 46858 (Oct. 14, 1983). No appeal was taken from this determination.

On June 8, 1984, Beartooth filed an Application for Permit to Drill (APD) a well in the SE 1/4 NW 1/4 of sec. 35. By letter dated August 6, 1984, BLM denied appellant's application, noting the well site was within a WSA and that APD approval would not be consistent with the IMP.

Subsequently, by letter dated January 3, 1985, Beartooth requested a suspension of operations (SOP). <sup>2/</sup> Beartooth stated that it spent more than \$500,000 in drilling a directional well in an attempt to save the lease; that this well was a dry hole; and that it is not technically feasible to drill directionally to the western portion of sec. 35, the most favorable geologic location. Appellant cited its inability to drill to the target area as the basis for requesting an SOP. On January 18, 1985, BLM issued a decision denying Beartooth's request. The decision stated in part: "Where leases are subject to wilderness protection, and there has been no discovery and a lessee's request for application for permit to drill has been denied, the Secretary's policy generally has been to not grant relief from the denial by granting a suspension." Appellant has appealed from this decision.

[1] In its statement of reasons, appellant asserts it does not question the authority of BLM to require adherence to stipulations issued with the lease. Appellant contends the Department has authority to grant suspension for environmental purposes, citing Rocky Mountain Mineral Law Foundation,

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<sup>2/</sup> Appellant's request for a suspension was not submitted in triplicate, as required by 43 CFR 3103.4-2.

Law of Federal Oil and Gas Leases § 14.16[2] (1985), which refers to a memorandum from the Assistant Solicitor to the Director, Geological Survey, entitled "Suspension of Operating and Producing Requirements of Onshore Federal Oil and Gas Leases for Environmental Reasons" (July 14, 1975). Specifically, appellant contends that where legal procedures are instituted on environmental grounds which bar approval of the APD, the Secretary may grant a suspension. Appellant notes the land within the lease had initially been determined to be outside a WSA, and contends that, in the absence of the legal proceedings by the Utah Wilderness Association, the stipulation would not have been applicable and Beartooth would have been able to obtain the APD at its preferred location. However, those proceedings concluded in 1983 when BLM designated the Winter Ridge Unit as a WSA. Because those proceedings have concluded, they provide no basis for granting a suspension in the instant case. Moreover, the 1975 memorandum anteceded the enactment of FLPMA and its mandate to inventory land for wilderness review, and the memorandum may not be accepted as a statement of policy if it has been superseded by a later policy more particularly directed to land under wilderness review.

Notwithstanding our conclusion, we agree with appellant's general proposition that the Department has authority to grant suspension for environmental reasons. Section 39 of the Mineral Leasing Act states:

In the event the Secretary of the Interior, in the interest of conservation, shall direct \* \* \* the suspension of operations and production under any lease granted under the terms of this chapter any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and productions; and the term of such lease shall be extended by adding any such suspension period thereto.

30 U.S.C. § 209 (1982); 43 CFR 3103.4-2. This section of the Act was considered by the court in Copper Valley Machine Works, Inc. v. Andrus, 653 F.2d 595 (D.C. Cir. 1981), which involved the imposition of a "winter season only" restriction in an APD on an oil and gas lease because of the fragile nature of the tundra. The lease terms did not include such a restriction. The court found imposition of the restriction constituted a suspension of operations and production within the meaning of 30 U.S.C. § 209 (1982), and that Copper Valley was entitled to an automatic lease extension equal to the period of suspension.

In Copper Valley the question was whether the Secretary had, in essence, suspended a lease by limiting drilling thereon to a specified period of time to protect the tundra. The court ruled the Secretary had done so and that such action was in the interest of conservation under the suspension provision of the Mineral Leasing Act, 30 U.S.C. § 209 (1982). The court held the Secretary's failure to suspend the running of the lease term at the same time he effectively suspended beneficial use of the lease was not justified under the Mineral Leasing Act.

Section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1982), specifically directs BLM to carry out a wilderness review of the public lands and section 603(c), 43 U.S.C. § 1782(c) (1982), instructs BLM to manage the lands under review "in a manner so as not to impair the suitability of such areas for preservation as wilderness." Section 603(c) provides a special exemption from the nonimpairment mandate for mining, grazing, and mineral leasing uses existing as of October 21, 1976. Section 701(h) of FLPMA, 90 Stat. 2786, recognizes valid existing rights.

As noted in the IMP, these FLPMA mandates establish as a matter of law that, while some development activities are permissible on lands under wilderness review, they are subject to important limitations and must be carefully regulated. All activities except those specifically exempted must be regulated to prevent impairment of wilderness suitability. If a nonexempt activity on lands under wilderness review cannot meet this condition, the activity cannot be permitted. Under the general standard for interim management, lands under wilderness review must be managed so as not to impair their suitability for preservation as wilderness. This is known as the "nonimpairment" standard (IMP at 6-7, 44 FR 72015 (Dec. 12, 1979)). Because the lease in question was issued after the effective date of FLPMA, the activity on this lease must meet the nonimpairment standard.

The critical distinction between Copper Valley and the present case is the applicability of section 603 of FLPMA, 43 U.S.C. § 1782 (1982). Appellant holds an oil and gas lease which has been impressed with the wilderness protection stipulation prohibiting activities which would impair the suitability of the leased lands for inclusion in a wilderness area. This affirmative limitation was mandated by Congress when it enacted section 603 of FLPMA, and was not a suspension authorized by administrative decision pursuant to the Mineral Leasing Act, 30 U.S.C. § 209 (1982).

In Rocky Mountain Oil and Gas Ass'n v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), Judge Kerr rejected the Department's attempts to impose post-FLPMA leases with the wilderness protection stipulation. He stated, "such a system of issuing 'shell' leases with no development rights is clearly an unconstitutional taking and is blatantly unfair to lessees." Id. at 1345. Judge Kerr found the imposition of a restriction that would allow the Government to continue to collect rental at the same time it might never authorize beneficial use of the leases to be inequitable. The U.S. Court of Appeals for the Tenth Circuit in Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1983), expressly cited his reasoning on this point (696 F.2d at 740) and rejected it.

In its Rocky Mountain Oil and Gas Ass'n decision the Tenth Circuit Court of Appeals relied on the clear congressional intent underpinning section 603 of FLPMA to find Congress directed the Secretary to take such steps as were necessary to prevent impairment of lands suitable for wilderness designation until such time as Congress could determine what course of

action it should take. Thus, the issue in cases involving the imposition of the nonimpairment standard is not whether by the application of such standard the Secretary has effectively suspended a lease pursuant to 30 U.S.C. § 209 (1982), but the authority of the Secretary to issue leases in which ultimate beneficial use may never occur. The Tenth Circuit Court of Appeals found in Rocky Mountain Oil and Gas Ass'n that Congress had given the Secretary that authority and that such limitations on beneficial use did not constitute a compensable taking.

These cases were recently discussed by this Board in Amoco Production Co., 92 IBLA 333 (1986), <sup>3/</sup> an appeal involving a factual situation similar to the appeal in issue. Amoco also concerned post-FLPMA leases for lands located within a WSA which were apparently subject to the wilderness protection stipulation prohibiting impairment of wilderness suitability. The lessees in Amoco also were denied APD's for failure to meet the nonimpairment standard.

The Board held in Amoco that the imposition of the wilderness protection stipulation and denial of the APD's did not constitute a suspension under 30 U.S.C. § 209 (1982), but in fact, implemented the will of Congress, as expressed in section 603 of FLPMA. <sup>4/</sup> We find this holding applicable in the present case. This is not to say the Secretary may not suspend leases in these cases. Rather, the circumstances of this case are not, under the reasoning of Copper Valley, equivalent to a suspension under 30 U.S.C. § 209 (1982). Appellant has presented no evidence that an automatic suspension would be appropriate herein. Section 603 of FLPMA was in existence when appellant obtained its lease, and appellant must be considered to have known that beneficial use of the leases might be restricted or denied. Appellant took that risk when it filed its offer.

We note BLM based its decision denying appellant's request for a SOP on "the Secretary's policy \* \* \* not to grant relief from denial [of an APD] by granting a suspension." There is a question of whether the IMP represents Secretarial policy. See Amoco, supra at 335-36, 338. Because we have concluded appellant is not entitled to suspension of its lease on the grounds set forth above, we need not address the issue of whether the IMP represents Secretarial policy and, therefore, is binding on the Board and controlling in this case.

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<sup>3/</sup> A petition for reconsideration has been filed with this Board.

<sup>4/</sup> In Texaco, Inc., 68 I.D. 194 (1961), an oil and gas lessee had been denied a drilling permit in order to protect potash deposits. The Department held, however, that the refusal to permit drilling on the leases amounted to an order prohibiting operations; that the order was in the interest of conservation; and that suspension under 30 U.S.C. § 209 (1982), was appropriate. The same rationale set forth above is applicable to distinguish the Texaco case from the present case.

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 affirmed as modified.

R. W. Mullen  
Administrative Judge

We concur:

C. Randall Grant, Jr.  
Administrative Judge

Will A. Irwin  
Administrative Judge

