

Appeal from a decision of the Montana State Office, Bureau of Land Management, requiring waiver of mineral rights on reclamation homesteads GF-063371, GF-063383, GF-063391 and KAL-03506.

Set aside and remanded.

1. Mineral Lands: Mineral Reservation -- Reclamation Homesteads

Where BLM reports that land within a reclamation homestead entry is valuable for oil and gas, after satisfactory reclamation final proof has been filed, that report may not be relied upon as a basis for imposition of a mineral reservation unless the Government is prepared to assume the burden, prima facie, that the land is known to be of mineral character at the date of acceptance of final proof. Where BLM issues a decision requiring consent to such a reservation, but the mineral report states the Government will not assume the burden of proving the reservation is proper and the record is unclear whether reservation is proper, the decision will be set aside and the case remanded for action in accordance with 43 CFR 2093.3-3(c) (2).

APPEARANCES: Robert T. Hartman, Esq., Billings, Montana, for appellants.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

George W. Hammer, Michael M. Boutsen, Evelyn B. Hammer, and Diane Prongua (appellants) appeal from a decision of the Montana State Office, Bureau of Land Management (BLM), dated February 13, 1985, which recognized assignments, required waiver of certain mineral rights, and which provided that, under certain circumstances, patents would issue to lands located in Sanders County, Montana. Appellants appeal only that portion of the decision which required waiver of certain mineral rights.

According to the decision which is the subject of this appeal, the lands encompassed by the entries GF-063371, GF-063383, GF-063391 and KAL-03506, were determined to be valuable for oil and gas by the BLM Resource Evaluation

Section on February 25, 1983. Satisfactory final proof of these entries was received by BLM on November 19, 1982. Clearly, under the circumstances, 43 CFR 2093.3-3(c)(2) applies. Under that regulation a determination that land is valuable for oil and gas made after the submission of acceptable final proof of homestead reclamation will not be relied upon as the basis for a mineral reservation unless the Government is prepared to assume the burden of proving, prima facie, that the land was known to be of mineral character as of date of submission of acceptable final proof of homestead. See Hulda Boutsen, 90 IBLA 310 (1986).

As appellants challenge the BLM determination to reserve oil and gas rights, the matter is properly remanded to BLM, consistent with this Board's decision in Hulda Boutsen, *supra*, to permit a determination by BLM whether it will assume the burden placed upon it by 43 CFR 2093.3-3(c)(2). Just as in the Boutsen case, the mineral report herein stated that the Government would not assume the burden of proving, prima facie, that the land was known to be mineral in character as of the date the final homestead proof was filed. Likewise, the record in this case is unclear whether a reservation is proper. Should BLM be prepared to assume the burden of proving that the land is of mineral character, BLM should notify appellants that a hearing at the State Office level will be ordered in accordance with 43 CFR 2093.3-3(c)(2). Otherwise, all else being regular, patents without the oil and gas reservation should issue.

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 set aside and the matter remanded to BLM for appropriate action consistent with this decision.

Franklin D. Arness
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Bruce R. Harris
Administrative Judge

