

SUZANNE WALSH

IBLA 85-489

Decided July 31, 1987

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, cancelling competitive oil and gas lease NM-58068 (OK).

Set aside and remanded.

1. Oil and Gas Leases: Lands Subject to -- Public Lands: Leases and Permits -- School Lands: Grants of Land -- State Lands -- Surveys of Public Lands: Generally -- Title

A congressional grant of a numbered school section, fractional in nature, to the State of Oklahoma pursuant to sec. 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), vests title in the State upon its admission to the Union to the extent the land is then surveyed.

Where, upon the date of the acceptance of a resurvey, the resurvey includes additional land in the section that is then available, such land is not thereafter available for Federal oil and gas leasing.

2. Oil and Gas Leases: Cancellation

Where it is shown that an oil and gas lease which improperly issued embraces lands presently known to contain valuable deposits of oil or gas, the Department may not, consistent with 43 CFR 3108.3(c), administratively cancel such lease, but must commence suit in Federal district court to obtain a judicial cancellation of the lease.

APPEARANCES: Suzanne Walsh, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Suzanne Walsh has appealed from a February 26, 1985, decision of the New Mexico State Office, Bureau of Land Management (BLM), cancelling her competitive oil and gas lease NM-58068 (OK).

Effective February 1, 1984, BLM issued a competitive oil and gas lease to appellant for 132.08 acres of public domain land situated in lots 1 through 5, sec. 36, T. 1 N., R. 28 E., Cimarron Meridian, Beaver County, Oklahoma, pursuant to section 17 of the Mineral Leasing Act, as amended,

30 U.S.C. § 226 (1982). In its February 1985 decision, BLM cancelled appellant's oil and gas lease because, based on a February 12, 1985, memorandum from the Field Solicitor, the mineral estate in the leased lands had been determined not to be owned by the United States.

Pursuant to section 18 of the Act of May 2, 1890, ch. 182, 26 Stat. 89 (1890), Congress, in creating the territory of Oklahoma, in part "reserved" sections numbered 36 within the townships of the territory for public school purposes. Subsequently, on February 20, 1891, the Commissioner, General Land Office, approved a survey of the township involved herein by Lemman G. Bennett, which depicts only lots 1 through 4 in fractional sec. 36, totalling 111.84 acres. Moreover, by virtue of the fact that sec. 36 was fractional, the State was permitted to file indemnity selections to make up for the deficiency of land in that section, pursuant to Revised Statutes §§ 2275, 2276, as amended by the Act of February 28, 1891, ch. 384, 26 Stat. 796 (1891), subsequently amended and codified at 43 U.S.C. §§ 851, 852 (1982). The record indicates that the State filed indemnity selections with respect to sec. 36 for 518 acres of land, which land was then reserved for school purposes by the Secretary on August 8, 1894. 1/ This is reflected on a copy of Indemnity List No. 1 contained in the record. In a September 28, 1984, memorandum to the State Director, the Area Manager, Oklahoma Resource Area Headquarters, stated: "All of the other indemnity lists stored at the Oklahoma Commissioners of the Land Office were reviewed. No other lands in Section 36 were used as base lands."

Pursuant to section 7 of the Act of June 16, 1906, ch. 3335, 34 Stat. 272 (1906), Congress, in providing for the creation of the State of Oklahoma, in part "granted" to the State for the use and benefit of the common schools, "upon the admission of the State into the Union," sections numbered 36 within the townships of the State, and "all indemnity lands heretofore selected in lieu thereof." The record indicates that lots 1 through 4 of sec. 36, T. 1 N., R. 28 E., Cimarron Meridian, Beaver County, Oklahoma, were patented by Oklahoma to Roy G. Terrel on September 14, 1925. There is no indication that lot 5 of sec. 36 was ever patented by the State. On January 22, 1936, the Assistant Commissioner, General Land Office, accepted a survey of the township involved herein by Hugh B. Crawford, which depicts lots 1 through 5 in fractional sec. 36. Lot 5 is described as containing 20.24 acres. 2/

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1/ Revised Statute § 2275, as amended by the Act of Feb. 28, 1891, provided for a waiver of a State's right to land within a school section used as base land for an indemnity selection. However, in Leonard R. McSweyn, 28 IBLA 100 (1976), we concluded that this waiver did not apply in the case of an indemnity selection made to compensate for deficiencies in school sections, e.g., in the case of fractional townships and sections. In such circumstances, the indemnity selection would not affect the State's entitlement to land under an outright grant of a numbered school section by Congress. But see State of Montana, 28 IBLA 124 (1976).

2/ The inclusion of lot 5 in sec. 36, according to the record, was based on a reestablishment of the Cimarron base line, which moved that land from Texas into Oklahoma. On appeal, appellant further elucidates the history of

In his September 1984 memorandum, the Area Manager reported that the "State of Oklahoma has no record of ever reconveying the minerals in Lots 1 through 4 back to the United States." The Area Manager also requested an opinion by the Solicitor regarding whether lot 5 was owned by the United States or the State. In his February 1985 memorandum, the Field Solicitor concluded that title to lots 1 through 4 had vested in the State. Likewise, "[a]s to Lot 5, based upon the 1935-36 survey," the Field Solicitor concluded, "title thereto became vested in the State." The Field Solicitor noted that there was no evidence that lots 1 through 5 had ever been used as the basis for an indemnity selection. Appellant has offered no evidence to the contrary.

In her statement of reasons for appeal, appellant contends that she "at least" holds a valid Federal oil and gas lease to the lands in lot 5, sec. 36, because the United States holds title to the mineral estate. Appellant bases this conclusion on the fact that neither State nor Federal "records" clearly establish that the State of Oklahoma holds title to the land and the fact that, with the passage of the Mineral Leasing Act in 1920, the United States was retaining title in mineral estates for leasing purposes.

In creating the territory of Oklahoma, Congress included two tracts of land, the western part of the "Indian Territory" and the "Public Land Strip," which is now the panhandle of Oklahoma. 26 Stat. 81 (1890). The Public Land Strip is described in section 1 of the Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890), as "bounded east by the one-hundredth meridian, south by Texas, west by New Mexico, north by Colorado and Kansas." 26 Stat. 82 (1890). The exact location of the 100th meridian, however, as noted supra, has over the years been subject to some dispute. According to information provided by appellant, the meridian was originally surveyed by Darling in conjunction with locating the western boundary of the Indian Territory. The 1936 survey plat indicates that, had Darling's 100th meridian been accepted, lot 5 would originally have been included in sec. 36. However, relying on another placement of the 100th meridian, the 1891 survey excluded lot 5. It was not until the 1936 survey that lot 5 was included in sec. 36. In any case, at the time of the admission of Oklahoma to the Union in 1907, lot 5 was not included in the survey of sec. 36.

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fn. 2 (continued)

lot 5, which hinges on the location of the northeast corner of Texas, at the intersection of the Cimarron base line and the 100th meridian. Appellant explains that the 1891 survey relied on an 1881 terminal monument established by Deputy Surveyors Chaney and Smith as the northeast corner of Texas and ran a line northeast from that monument to the "43rd mile marker" set by one Darling, thereby excluding triangular lot 5 from sec. 36. It was not until the 1936 survey that the northeast corner of Texas was relocated east of the terminal monument along the Cimarron base line. This resulted in the inclusion of lot 5 within sec. 36.

[1] Title to sec. 36, to the extent it was then surveyed, clearly vested in the State of Oklahoma upon the date of its admission to the Union. Navajo Tribe of Indians v. Utah, 12 IBLA 1, 80 I.D. 441 (1973), appeal dismissed, Navajo Tribe of Indians v. Morton, Civ. No. C-308-73 (D. Utah Jan. 4, 1979); see also 43 CFR 2621.0-2; Louisiana v. William T. Joyce Co., 261 F. 128 (5th Cir. 1919), cert. denied, 253 U.S. 484 (1920); State of Wyoming, 27 IBLA 137, 151, 83 I.D. 364, 372 (Frishberg, A.J., dissenting), aff'd, Wyoming v. Andrus, 436 F. Supp. 933 (D. Wyo. 1977), aff'd, 602 F.2d 1379 (10th Cir. 1979). Therefore, title to lots 1 through 4 of sec. 36 must be deemed to have vested in the State of Oklahoma in 1907. This land was not available for oil and gas leasing by the United States. Lee E. McDonald, 68 IBLA 272 (1982).

The question arises whether title to lot 5, which was not included in a survey of sec. 36 until 1936, is also deemed to have vested in the State of Oklahoma. We conclude that title to this lot also vested in the State of Oklahoma upon the completion and acceptance of the 1936 survey. It is generally held that title to an unsurveyed numbered school section will vest in the state upon completion and acceptance of a survey of that land, even after admission of the state to the Union. United States v. Morrison, 240 U.S. 192 (1916); Navajo Tribe of Indians v. Utah, supra. That survey identifies the land which Congress intended to grant to the newly formed state for purposes of supporting public schools therein. See Louisiana v. William T. Joyce Co., supra at 131-33. We conclude that, in order to effectuate its intent, a congressional grant of numbered school sections applies equally to whole sections originally surveyed after admission of a state to the Union, and portions of sections determined by resurvey to be properly included therein. Indeed, this was essentially the holding by the court in United States v. Aikins, 84 F. Supp. 260 (S.D. Cal. 1949), aff'd sub nom. United States v. Livingston, 183 F.2d 192 (9th Cir. 1950).

Aikins involved the question of title to a numbered school section, specifically sec. 36, T. 29 S., R. 20 E., Mount Diablo Meridian, California, granted to the State of California by section 6 of the Act of March 3, 1853, ch. 145, 10 Stat. 246 (1853). The land had originally been surveyed by one Reed in 1869. However, in a resurvey, approved 1894, by one Carpenter, sec. 36 shifted southward and eastward:

The result of such shift was to show Section 36 on the Carpenter survey to include only a portion of the lands previously included in Reed's Section 36, and also to include in Carpenter's Section 36 additional lands not theretofore designated on any survey as being in any Section 36, or even being within the township above mentioned. [Footnote omitted.]

Id. at 261-62. All of the land originally surveyed and the additional land in the resurvey was patented by the State. Recognizing that the grant to the State did not become effective until survey (citing United States v. Morrison, supra), and that the United States has the power "to make surveys, to correct surveys and to make re-surveys" (United States v. Aikins, supra at 264), the court concluded that, by virtue of the resurvey:

[T]he Government confirmed the grant to the State of California, as school lands, of the lands designated as Section 36 in the Carpenter re-survey which had not been included in the previous Reed survey. And upon the approval of the Carpenter re-survey the title to such additional land designated as Section 36 therein, immediately passed to the State of California. [3/]

Id. at 265. The resurvey, thus, had the effect of vesting title to the additional lands in the State by virtue of their inclusion in sec. 36. Likewise, in the present case, the 1936 resurvey had the effect of vesting title to lot 5 in the State of Oklahoma by virtue of its inclusion in sec. 36. 4/

There is, however, an important exception to the Aikins rule which must be mentioned. That exception was enunciated in United States v. State of Wyoming, 195 F. Supp. 692 (D. Wyo. 1961), aff'd, 310 F.2d 566 (10th Cir. 1962), cert. denied, 372 U.S. 953 (1963). That case involved numbered school sections granted to the State of Wyoming by section 4 of the Act of July 10, 1890, ch. 664, 26 Stat. 222 (1890), which land was originally surveyed in 1883 and 1884 and then subjected to resurveys approved between 1902 and 1919. The resurveys resulted in additional land being designated as included in the numbered school sections due to a shift in the location of the sections. The State claimed title to land designated in both the original surveys and the

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3/ The only limitation stated in Aikins on the holding that a resurvey may confirm a grant of land within a numbered school section to a State is that such a resurvey cannot "deprive anyone of title who has received it in dependence upon the previous survey." United States v. Aikins, supra at 265. The land must then be "available." Robert R. Perry, 87 IBLA 380, 391 (1985) (Burski, A.J., concurring). The 1936 resurvey in the present case, however, merely added lot 5 to sec. 36 but did not subtract any land from the section, as depicted in the 1891 survey, in which the State or its successors had already acquired an interest, specifically lots 1 through 4. Moreover, there is no evidence that anyone had acquired an interest in lot 5 in reliance on the 1891 survey.

4/ The court in Aikins also noted that the Congressional grant to the State, as well as similar statutes, was not limited to a specified acreage, e.g., 640 acres, but applied to numbered school sections. United States v. Aikins, supra at 263. The court concluded that, although sections would generally be limited to 640 acres (citing 43 U.S.C. § 751 (1982)), a numbered school section could deviate from this norm. In the present case, excess acreage results not from combining land originally surveyed and land resurveyed as within a numbered school section, but from adding land included within fractional sec. 36 under the 1936 survey (132.08 acres) to that land attributed to sec. 36 for indemnity selection purposes (518 acres). That total is 650.08 acres. To the extent that the State has taken title pursuant to its indemnity selections, that title will not be disturbed even though it may have been based on an erroneous assumption of the amount of the shortage of acres (less than 640) in fractional sec. 36 which stemmed from the original 1891 survey. See State of Wyoming, 9 IBLA 22, 80 I.D. 1 (1973), and cases cited therein.

resurveys as being within the numbered school sections. The circuit court concluded that

when the boundary lines of original school sections were reestablished by resurveys thereof and such sections were identified by tract or lot numbers and the words "School Section" inscribed on such tracts or lots, on the official plats of such resurveys, the State is entitled, under the grant to it of such school sections, only to the lands within such original school sections, unless it elected to waive its claim to such original school sections and to select in lieu thereof lands embraced in resurveyed school sections and in such case, it is only entitled to the lands embraced within the resurveyed school sections.

State of Wyoming v. United States, 310 F.2d at 580-81. The court held that the State was only entitled to either the land designated in the original survey or that designated in the resurvey. However, the circuit court in State of Wyoming expressly distinguished the Aikins case on its "facts." Id. at 581. In State of Wyoming, the court relied on the fact that the State had actively participated in the resurveys of the nine sections involved therein as well as other sections "on the premise that Congress intended that either the original school sections or the resurveyed school sections, but not both, should be \* \* \* designated as school sections granted to the State." Id. at 570. In many instances, the State specifically elected either to retain original school sections or to select resurveyed school sections or simply waived its claim to original school sections. In the absence of any action, it was presumed that the State had elected to retain original school sections because the State had always executed a waiver of its claim to original school sections and a waiver of resurveyed school sections was deemed unnecessary. See State of Wyoming, 15 IBLA 194 (1974). Based on the State's action or inaction, the resurvey plats were prepared. These plats specifically designated school sections, whether original or resurveyed school sections, and, thus, "indicated by implication that the remaining lands were public lands." Id. at 571-72. The plats also broke the acreage in each township down into public lands, segregated school lands, and lands patented or disposed of by the United States. Id. at 572. As the district court stated, the remaining lands were "resurveyed as public lands." United States v. State of Wyoming, 195 F. Supp. at 698. Moreover, the circuit court relied on the fact that the United States had, after the resurveys, treated these lands as public lands, in many cases patenting the land to private persons. The circuit court distinguished Aikins on the basis that the State in Aikins had treated the additional land designated by the 1894 resurvey, as well as the land designated in the original 1869 survey, as school land and the United States had asserted no contrary claim for 44 years. State of Wyoming v. United States, 310 F.2d at 581. Indeed, in Aikins, the court had noted that the State had not waived any "excess acreage," i.e., land added to the numbered school section by the resurvey. United States v. Aikins, supra at 266.

The present case is clearly distinguishable from State of Wyoming, and, while not completely similar factually to Aikins, will be adjudicated on the basis of the Aikins rule. The principal difference between the present case

and State of Wyoming is the fact that the resurvey plats, which are contained in the casefile, do not designate either the original or resurveyed land within sec. 36 as a school section, or otherwise indicate that the State had elected to take title to either land. Moreover, there is no evidence in the record that the State had made such an election as to sec. 36 or other numbered school sections granted to the State. Lot 5 was simply included in sec. 36.

We are unable to determine, however, how lot 5 was treated by either the State of Oklahoma or the United States for any of the years after the 1936 survey until the land was designated as within a known geologic structure (KGS) and thereafter leased by means of competitive bidding to appellant. The earliest document in the record is an August 11, 1982, memorandum from a geologist with the Minerals Management Service to the Chief, Geothermal and Competitive Oil and Gas Unit, BLM, which states that lot 5 is "within a KGS." The land was never patented by the State or the United States. Thus, one of the principal concerns in Aikins and State of Wyoming was not present, *i.e.*, the concern that a contrary holding would disrupt private land titles created by either the State (Aikins) or the United States (State of Wyoming). See State of Wyoming v. United States, 310 F.2d at 582.

The problem with the Aikins rule, which the court in State of Wyoming found to be a compelling reason for carving out an exception to that rule, is that, in the case of a shift in the location of a school section by virtue of a resurvey, the State would obtain title not only to land included in the resurvey (and in the original survey where there is an overlap) but also land to which it was clearly not entitled, *i.e.*, land erroneously included in the original survey of the numbered school section. The court in State of Wyoming was expressly unwilling to accord such a material advantage to the State where Congress had not compelled such a result, and neither the State nor the United States had clearly provided for such a result but instead for an election. As the court stated:

Only clear language would warrant imputing to Congress an intention that the State would be entitled to lands embraced in an original school section and also in a resurveyed school section and thereby enlarge, in some cases very materially, the amount of the grant to the State. [Footnote omitted.]

State of Wyoming v. United States, 310 F.2d at 580. This concern is absent from the present case which involves only land which properly should have been included in the original survey, as recognized by the resurvey. Applying the Aikins rule does not result in the State of Oklahoma being vested with title to land erroneously included in the original survey and eliminated by the resurvey. Any excess acreage allotted to the State as a result of the holding herein (see note 4) arises not from the resurvey but from the previous indemnity selections. Moreover, even assuming, as appellant asserts, that no State or Federal records since the 1936 resurvey recognize title to lot 5 as being in the State, title must be deemed to have actually vested in the State by virtue of section 7 of the Act of June 16, 1906.

Thus we conclude that the State of Oklahoma was vested with title to lot 5, sec. 36, on the date of approval of the resurvey of that section, *i.e.*, January 22, 1936. <sup>5/</sup> As noted *supra*, where title is in the State, the land is not available for oil and gas leasing by the United States. Lee E. McDonald, *supra*.

The land involved herein, however, has already been leased to appellant. We therefore reach the question of whether BLM may properly cancel appellant's lease because title to the land is vested in the State of Oklahoma. Appellant intimates that BLM cannot cancel the lease except by judicial proceedings where the land is known to contain valuable deposits of oil or gas, citing 43 CFR 3108.3(c). Appellant states that fractional sec. 36 was "force pooled" with sec. 35, T. 1 N., R. 28 E., Cimarron Meridian, Beaver County, Oklahoma, by order of the Oklahoma Corporation Commission, Order No. 270938, on January 3, 1985, and that initial tests on a gas well completed March 16, 1985, in sec. 35 indicates that the well "has excellent potential making the acreage in Section 35 and 36 very valuable." A copy of the completion report submitted to the Oklahoma Corporation Commission indicates initial flowing production of 1800 MCFD of gas from the Morrow Formation.

[2] It is well established that an oil and gas lease issued for land where title to the oil and gas is not in the United States is a nullity, and must be cancelled by the Department. O. D. Presley, 21 IBLA 190 (1975). Indeed, such a lease violates the express provisions of the Mineral Leasing Act. Section 1 of the Mineral Leasing Act, as amended, 30 U.S.C. § 181 (1982), provides for the "disposition" of lands containing oil and gas deposits "owned by the United States." An attempt to lease oil and gas in lands owned by a State would, thus, clearly be at variance with the statute.

The authority to cancel a lease by an appropriate judicial proceeding where the lease is owned "in violation of any of the provisions of this chapter [including 30 U.S.C. § 181 (1982)]" is set forth in section 27(h)(1) of the Mineral Leasing Act, as amended, 30 U.S.C. § 184(h)(1) (1982). Section 31(a) and (b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 188(a) and (b) (1982), also provides cancellation authority, but this statutory provision applies only to cancellations on the basis of post-lease events. Boesche v. Udall, 373 U.S. 472 (1963). Thus, there is no express statutory authority for administrative cancellation of oil and gas leases based on pre-lease events. However, the court in Boesche v. Udall recognized that the Secretary, under his general powers of management over the public lands, has the inherent authority to cancel an oil and gas lease on the basis of pre-lease factors. Id. at 476-79.

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<sup>5/</sup> At one time, the Department was authorized to issue confirmatory patents to States in the case of grants of numbered school sections where title had vested, pursuant to the Act of June 21, 1934, ch. 689, 48 Stat. 1185 (1934), codified at 43 U.S.C. § 871a (1970). See 43 CFR Subpart 2624. However, that statute was repealed by section 705(a) of the Federal Land Policy and Management Act of 1976, P.L. 94-579, 90 Stat. 2792 (1976), effective Oct. 21, 1976.

Departmental regulation 43 CFR 3108.3(b) states that "[l]eases shall be subject to cancellation if improperly issued." However, 43 CFR 3108.3(c) provides: "Leases for lands known to contain valuable deposits of oil or gas may be cancelled only by judicial proceedings in the manner provided in sections 27 and 31 of the Act." In James W. Smith, 6 IBLA 318, 79 I.D. 439 (1972), the Board concluded en banc that this regulation, which is longstanding, constitutes an administratively imposed limitation on the Secretary's traditional authority to cancel oil and gas leases which were improvidently issued, and that the Department is bound by that regulation. See Lee Oil Properties, Inc., 85 IBLA 287, 290 n.2 (1985). Thus, the Department cannot administratively cancel appellant's lease even though it covers land which is not subject to Federal oil and gas leasing if it is determined that the lands leased are "known to contain valuable deposits of oil or gas."

The fact that appellant's lease contains KGS lands does not resolve the question of whether these lands are known to contain valuable oil or gas deposits "since KGS classification merely establishes the limits of presumptive productivity." (Emphasis added.) Lee Oil Properties, Inc., supra at 293. Nevertheless, we conclude that the fact that fractional sec. 36 was pooled with sec. 35 and production from a gas well on sec. 35 was subsequently allocated on a pro rata basis to the mineral interests therein, including the Federal mineral interest, establishes that fractional sec. 36 is known to contain valuable deposits of oil or gas. Id. at 293-94. Appellant has submitted a copy of a Division Order, setting forth the respective mineral interests, including a royalty interest in the "United States of America (NM 58068 OK)" and an overriding royalty interest in appellant. An attached letter, dated October 28, 1985, from Essex Exploration Co., the disbursing agent for production receipts, requests assent to the accuracy of the percentages of interest reflected in the Division Order. Having determined that appellant's lease in fact contains valuable deposits of oil or gas, we hold that the Department lacks authority to administratively cancel appellant's oil and gas lease. It is incumbent on BLM to request the Department of Justice to commence suit in Federal district court seeking a judicial cancellation of the lease.

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 case file is remanded to BLM with instructions to refer the matter to the Department of Justice for initiation of judicial proceedings to cancel lease NM-58068 (OK).

John H. Kelly  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Gail M. Frazier  
Administrative Judge

