

JAMES A. MALESKI

IBLA 86-35

Decided May 3, 1988

Appeal from a decision of the Oregon State Office, Bureau of Land Management, rejecting desert land entry application OR 36106 (WA).

Set aside and remanded.

1. Applications and Entries: Generally -- Desert Land Entry: Applications -- Powersite Lands -- Withdrawals and Reservations: Generally -- Withdrawals and Reservations: Powersites -- Withdrawals and Reservations: Revocation and Restoration

Where the Federal Energy Regulatory Commission had made a determination pursuant to sec. 24 of the Federal Power Act of 1920, as amended, 16 U.S.C. § 818 (1982), that it had no objection to the termination of a powersite classification to the extent it pertained to lands described in a desert land entry application, BLM was required under sec. 24 of the Federal Power Act to act upon the determination and restore the land to entry within a reasonable time thereafter. The filing of and the preliminary injunction order issued in National Wildlife Federation v. Burford, Civ. No. 85-2238 (D.D.C. Feb. 10, 1986), wherein BLM withdrawal revocation procedures have been challenged, did not preclude BLM from fulfilling its statutory duty to restore, pursuant to sec. 24 of the Federal Power Act, the lands described in the desert land entry application, and thus, did not serve as a proper basis for the rejection of the application.

APPEARANCES: James A. Maleski, pro se.

OPINION BY ADMINISTRATIVE JUDGE KELLY

James A. Maleski has appealed from an August 28, 1985, decision of the Oregon State Office, Bureau of Land Management (BLM), rejecting Desert Land Entry Application OR 36106 (WA).

On April 4, 1983, appellant filed a desert land entry application with BLM for 120.2 acres situated in sec. 26, T. 28 N., R. 23 E., Willamette Meridian, in Chelan County, Washington, pursuant to section 1 of the Act of March 2, 1877, as amended, 43 U.S.C. § 321 (1982), and 43 CFR Part 2520.

The application specifically described the portions of sec. 26 applied for as follows:

Lot 7 (except the west 20 acres and right-of-way easements)	6.0 acres
Lot 8	34.2 acres
SW 1/4 NE 1/4	40.0 acres
NW 1/4 SE 1/4	<u>40.0 acres</u>
	120.2 acres

A portion of the lands described in appellant's application is presently subject to Powersite Classification No. 349, effectuated by the Geological Survey on June 22, 1944. Because a desert land entry can be allowed only for "unreserved" nonmineral public lands, 43 CFR 2520.0-8, appellant included with his application a request to have the powersite classification terminated pursuant to section 24 of the Federal Power Act (FPA) of 1920, as amended, 16 U.S.C. § 818 (1982), and 43 CFR 2320.3. In addition, all the lands applied for were withdrawn pursuant to Exec. Order No. 6910 (Nov. 26, 1934), from settlement and occupancy until "classified and opened to entry" pursuant to 43 U.S.C. § 315f (1982) and 43 CFR Part 2450. Accordingly, appellant properly filed a "Petition for Classification" requesting classification of the land as suitable for desert land entry.

Such requests are governed by section 24 of FPA, which provides in part that when the Federal Energy Regulatory Commission (FERC) 1/ determines that the value of any lands classified as a powersite will not be injured or destroyed for purposes of power development by location, entry or selection under the public land laws, the Secretary of the Interior "shall declare such lands open to * * * entry." 16 U.S.C. § 818 (1982). Accordingly, in a letter dated May 23, 1983, BLM communicated appellant's request to FERC and requested FERC action thereon. In its reply dated January 28, 1985, FERC stated that it had no objection to the "revocation of Power Site Classification [No.] 349" to the extent that it pertained to the lands described in appellant's application. 2/

1/ When originally enacted, section 24 of FPA gave this authorization to the Federal Power Commission. Section 402 of the Department of Energy Organization Act, 42 U.S.C. § 7172 (1982), transferred the authorization to FERC.

2/ In its reply, FERC expressed that it had no objection to the termination of Powersite Classification Nos. 349 and 400 to the extent they affected lots 7 and 8 and the SW 1/4 NE 1/4 and NW 1/4 SE 1/4 of sec. 26. However, the record reflects that the powersite classifications for lot 8 and NW 1/4 SE 1/4 were previously terminated on June 13, 1962, by Public Land Order No. 2702. Thus, the net effect of the FERC decision was to register its nonobjection to the termination of powersite classifications for the remaining sec. 26 lands (lot 7 and SW 1/4 NE 1/4) applied for. In addition, the FERC reply also formally vacated the withdrawal for Federal Power Project No. 2145 for those lands in lots 7 and 8 as described by appellant in his application.

On March 13, 1985, BLM informed appellant of the FERC decision, stating:

Pursuant to your request the Federal Energy Regulatory Commission (FERC) has vacated the withdrawal for Power Project No. 2145 as to lands outside the actual project boundary. In addition FERC has advised that it has no objection to our revocation of Power Site Classification Nos. 349 and 400. The appropriate revocation orders have been submitted to the Secretary of the Interior for issuance, and the revocation should be final within about two months.

In the letter, BLM also informed appellant that it had requested the BLM District Manager in Spokane to "begin action to determine if the land may be classified as suitable for Desert Land Entry pursuant to section 7 of the Taylor Grazing Act * * *. This should expedite the process somewhat." 3/

In August 1985, appellant wrote to BLM requesting an update on the progress in processing his petitions to have the land opened for desert land entry. It was in response to this request that BLM issued its August 28, 1985, decision, formally rejecting appellant's desert land entry application. BLM stated:

Revocation of Power Site Classification Nos. 349 and 400 have [sic] not been completed. Although the Public Land Orders have been prepared, we do not anticipate any action on these orders within the near future due to a lawsuit filed in the District Court for the District of Columbia. Therefore, since the public lands identified in your petition-application still remain in a withdrawn status and not available for entry under the Desert Land Act, your application is unacceptable and must be rejected.

The lawsuit to which BLM refers, and which is presently still in litigation, is National Wildlife Federation v. Burford, No. 85-2238 (D.D.C. Feb. 10, 1986) (preliminary injunction). This case, discussed further below, involved a National Wildlife Federation (NWF) challenge to BLM's revocation of certain public land withdrawals made pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701-1782 (1982).

On appeal, appellant states that he does not understand why the NWF lawsuit "can prevent the cancellation of the Geological Survey Power Site

3/ While outlining the progress that had been made in processing appellant's petitions to have the powersite classifications revoked and the lands classified as suitable for entry, the BLM letter also advised appellant that the land might ultimately be found unsuitable for entry, which would require rejection of the application. Further, because the revocation has not yet been completed, BLM found the application not to be acceptable at that time and returned appellant's filing fee.

Classification Nos. 349 & 400 when it did not prevent the cancellation of other Power Site Classifications during the past few years." He states: "[T]he Federal Energy Regulatory Commission approved my petition and vacated their water power withdrawals and offered no objection to the restoration of the * * * Power Site Classification[s] * * *. I feel the cancellation of the Power Site Classifications would not violate federal laws in relation to the lawsuits" (Appellant's Statement of Reasons (SOR) at 2).

Appellant's SOR raises the issue of whether the NWF lawsuit was a proper basis for BLM to decide not to proceed with the revocation of the powersite classification and to reject appellant's desert land entry application. The regulation at 43 CFR 2091.1 states that when "for any reason the land [applied for] has not been made subject, or restored, to the operation of the public land laws," the application "must be rejected and cannot be held pending possible future availability of the land." Apparently, BLM concluded that the lawsuit precluded further action on the termination of the classifications, and in accordance with the mandate in 43 CFR 2091.1, rejected the application. However, the issue raised by appellant must be addressed because generally, once FERC has made a determination under section 24 of FPA that a powersite classification can be terminated, the Department is required to revoke the withdrawal. Reeves v. Andrus, 465 F. Supp. 1065 (D. Alaska 1979). Accordingly, we must determine whether the lawsuit does preclude the Department from terminating the classifications.

Initially, we consider in greater detail the application of section 24 of FPA to the revocation of powersite classification. This section provides that when any public lands are included within any proposed power project, the lands are reserved from entry, location, or other disposal under the laws of the United States. Shirley A. Clark, 77 IBLA 51 (1983). Section 24 further provides that when FERC determines that the value of any lands classified as a powersite will not be injured or destroyed for purposes of power development by location, entry, or selection under the public land laws, the Secretary of the Interior "shall" declare such lands open to entry. In Reeves v. Andrus, *supra*, the district court construed this provision to mean that when a determination is made by FERC under section 24 that the value of lands classified for water powersites will not be injured by a public land entry, the Secretary "is required by statute [section 24] to revoke or modify the powersite classification within a reasonable period" unless the Secretary determines that the land should be withdrawn from entry for other purposes. 465 F. Supp. at 1070. See also Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317 (1982).

In the present case, FERC clearly made the determination in its January 28, 1985, letter to BLM, that it had "no objection to the revocation of Power Site Classification Nos. 349 and 400" to the extent they covered lands included in appellant's desert lands entry application. This finding comports with the section 24 provisions for revoking powersite withdrawals. BLM's letter of March 13, 1985, indicated to appellant that revocation procedures had been put into motion and that "the revocation should be final within about two months." At least at this state, BLM apparently intended to comply with the provisions in section 24 requiring revocation upon FERC's recommendation.

However, BLM's intentions changed upon the filing of the NWF lawsuit on July 15, 1985, in the U.S. District Court for the District of Columbia. In this suit, NWF requested, among other things, a preliminary injunction to prevent the modification, termination, or alteration of any withdrawal classification or designation in effect on October 21, 1976, and to require the execution of an emergency withdrawal to reinstate any withdrawals, classifications, or other public land revocation revoked since October 21, 1976. ^{4/}

While no judicial action had been taken in the case at the time BLM issued its decision rejecting appellant's application, BLM was apparently convinced that the act of filing the lawsuit was sufficient grounds for not proceeding with the termination of powersite classification covering the lands in the application. However, further developments in the NWF litigation show that the lawsuit should not be considered a barrier to revocations of powersite classifications under section 24 of the FPA.

On February 10, 1986, the district court issued a preliminary injunction order enjoining the Department from revoking or modifying any withdrawals or terminating any classifications that existed on January 1, 1981. ^{5/} However, the injunction is limited only to revocation or termination actions under the provisions of FLPMA. As the Solicitor, Department of the Interior, explained in a March 10, 1986, memorandum to all Departmental Assistant Secretaries and Bureau Directors, "if statutory authority exists, other than FLPMA, to reclassify, modify, or terminate classifications, that statutory authority may still be used" (Solicitor's Memorandum of Mar. 10, 1986, at 2; emphasis in original). Thus, whatever confusion may have existed at the time the lawsuit was filed has been resolved by the issuance of the district court preliminary injunction order. Because in the case presently under appeal BLM was under a statutory duty to terminate the powersite classifications once FERC made the

^{4/} In a memorandum dated Mar. 10, 1986, to all Assistant Secretaries and Bureau Directors, the Solicitor, Department of the Interior, set forth in detail the NWF allegations:

"In its complaint, and subsequently amended complaint which was filed on August 19, 1985, plaintiff alleges that the Department and the Bureau of Land Management (BLM) violated: (1) the policy and land use planning provisions of the Federal Land Policy and Management Act (FLPMA) (§ 202(d)) by failing to prepare Resource Management Plans (RMP) before terminating classifications covering over 160,000,000 acres of land; (2) the withdrawal under § 204(a) of FLPMA without providing presidential and congressional review; (3) the National Environmental Policy Act (NEPA), by not preparing an environmental impact statement (EIS) for each decision to end a classification or withdrawal and, also as to the cumulative effects of these actions; (4) FLPMA § 310 and/or the Administrative Procedures Act (APA), by failing to promulgate regulations for terminating classifications and revoking withdrawals; and (5) the public participation requirements of FLPMA §§ 202 and 309(e), by not providing notice and an opportunity for public comment."

^{5/} On Dec. 11, 1987, the Court of Appeals for the District of Columbia Circuit affirmed the district court's February 1986 preliminary injunction. National Wildlife Federation v. Burford, 835 F.2d 305 (D.C. Cir. 1987).

necessary findings, and the NWF lawsuit did nothing to preclude BLM from performing this duty, BLM should have proceeded with the processing of appellant's request that the powersite classifications be revoked.

Reaching the conclusion that BLM was obligated under the circumstances to proceed within a reasonable time with the termination of the powersite classifications does not, however, end the analysis in this case. A desert land entry is permitted only on "unreserved" public lands. 43 CFR 2520.0-8. As the Board stated in Gary E. Carter, 65 IBLA 338, 339 (1982), a "withdrawal operates as an absolute bar to the appropriation of the land under the desert land laws until the withdrawal is revoked and the land is restored to entry." The public lands for which appellant has made application are subject not only to the powersite reservations, but also to the general public land withdrawal effected in Exec. Order No. 6910 (Nov. 26, 1934). Lands withdrawn under this order which are not otherwise withdrawn from entry under the desert land laws can be opened for a desert land entry only pursuant to section 7 of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. § 315f (1982), and applicable regulation. See 43 CFR Part 2450. This provision authorizes the Secretary "in his discretion" to review lands withdrawn pursuant to Exec. Order No. 6910 to determine whether they should be classified as suitable for entry under the public land laws.

Classification of the land as suitable for entry pursuant to section 7 of the Taylor Grazing Act "is a prerequisite to the approval of all entries" made under the Desert Land Entry Laws. 43 CFR 2400.0-3. 6/ In the case presently on appeal, BLM informed appellant in its March 13, 1985, letter to appellant that it was requesting the BLM District Manager to "begin action to determine if the land may be classified as suitable for desert land entry pursuant to section 7 of the Taylor Grazing Act." There is not, however, any further indication in the record, including the final decision on appeal, that a classification determination was made in this case.

In light of the erroneous determination by BLM that it was precluded from processing further appellant's application, we find it appropriate to set aside the decision and remand the case for further processing of appellant's request for termination of the powersite classifications and for a determination as to whether the subject lands may be classified as suitable for desert land entry. 7/

6/ We note that, as with withdrawal revocation determinations made pursuant to section 24 of FPA, a classification determination under section 7 of the Taylor Grazing Act is not precluded by the preliminary injunction order issued in National Wildlife Federation v. Burford, supra. See Solicitor's Memorandum of Mar. 10, 1986, at 2.

7/ We emphasize that this decision, while providing for further consideration of appellant's requests to have the land opened for desert land entry, in no way vests any rights in appellant to make entry on or occupy the public lands described in his application, or even to an affirmative determination allowing an entry. The Secretary, when restoring land under section 24 of FPA, is obligated to provide a 90-day period after notice of the

Accordingly, 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 is remanded for further proceedings consistent with this decision.

John H. Kelly
Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Gail M. Frazier
Administrative Judge

fn. 7 (continued)

restoration during which the State in which the lands are located can exercise a preference right to the land. 16 U.S.C. § 818 (1982); see 43 CFR 2320.0-3. Further, the Secretary is free to determine that "other public values or interests in the land * * * require the site to be withdrawn from entry under other powers possessed by the Secretary." Reeves v. Andrus, supra at 1070. The regulations expressly provide that "[f]avorable action upon an application for restoration [pursuant to section 24 of FPA] shall not give the applicant any preference right when the lands are opened." 43 CFR 2320.3(b) (emphasis added). See Carmel J. McIntyre, supra at 327. Finally, the Board in McIntyre, when discussing the Reeves holding, explained that while the Secretary is required to restore the lands under section 24 of FPA, the lands do not become available until an order of restoration is issued, and no rights may be acquired by a settler on the public land who initiates settlement at a time when the records of the Department indicate that the land is not open to entry.