



RED RIVER OIL & GAS, LLC

188 IBLA 216

Decided August 31, 2016



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
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RED RIVER OIL & GAS, LLC

IBLA 2014-77 & 2014-78

Decided August 31, 2016

Appeal from decisions of the Chief, Branch of Fluid Minerals Adjudication, Wyoming State Office, Bureau of Land Management, cancelling, in whole and in part, competitive oil and gas leases. WYW-173119 & WYW-172432.

Affirmed as modified.

1. Mineral Leasing Act for Acquired Lands: Consent of Agency;
Oil and Gas Leases: Cancellation

BLM properly cancels an oil and gas lease issued for acquired lands, the surface estate of which is under the administrative jurisdiction of the Forest Service, having been reconveyed to the United States, along with the mineral estate, for the benefit of the Forest Service, where BLM failed to obtain the Forest Service's prior consent to leasing, as required by section 3 of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 352 (2012), and 43 C.F.R. § 3101.7-1(a) and (c), and thus the lands were not subject to leasing at the time of lease issuance.

2. Mineral Leasing Act: Consent of Agency;
Oil and Gas Leases: Cancellation;
Oil and Gas Leases: Consent of Agency

BLM properly cancels an oil and gas lease issued for National Forest System lands reserved from the public domain, whether the surface and mineral estates were never patented or the mineral estate was reserved to the United States at the time of patent and the surface estate was later reconveyed to the United States, and, in both instances, the surface estate is under the administrative jurisdiction of the Forest Service and the lands are withdrawn by an Executive Order, where BLM failed to

obtain the Forest Service's prior non-objection to leasing, as required by section 17(h) of the Mineral Leasing Act, 30 U.S.C. § 226(h) (2012), and 43 C.F.R. § 3101.7-1(a) and (c), and therefore the lands were not subject to leasing at the time of lease issuance.

APPEARANCES: Thomas J. Tinney III, Denver, CO, for appellant.

OPINION BY ADMINISTRATIVE JUDGE KALAVRITINOS

Red River Oil & Gas, LLC (Red River) has appealed from separate decisions of the Chief, Branch of Fluid Minerals Adjudication, Wyoming State Office, Bureau of Land Management (BLM), dated December 18, 2013, cancelling, in whole and in part, competitive oil and gas leases, WYW-173119 and WYW-172432 (Leases).¹ BLM essentially concluded that the Leases had been improvidently issued, since it had failed in relevant part, as required by Federal law, to consult with or obtain the consent of the Forest Service (FS), U.S. Department of Agriculture, which has administrative jurisdiction over the surface estate of the affected lands.

As discussed below, section 3 of the Mineral Leasing Act for Acquired Lands (MLAAL), 30 U.S.C. § 352 (2012), and section 17 of the Mineral Leasing Act (MLA), 30 U.S.C. § 226 (2012) and their implementing regulations require BLM to obtain FS consent or non-objection to leasing certain public lands, such as those at issue here. When, as here, BLM issues leases for Federal lands without obtaining such consent or non-objection to leasing, they are legal nullities and properly cancelled. Red River has not preponderated in demonstrating any error of fact or law in BLM's determination to cancel the Leases, and we therefore affirm as modified BLM's December 2013 decisions.

Status of Lands Encompassed by Leases

BLM issued the Leases to Red River effective December 1, 2006 (WYW-173119), and June 1, 2006 (WYW-172432), for 10-year primary terms and so long thereafter as oil or gas is produced in paying quantities. Each of the Leases noted that it was issued for "Public Domain Lands," with no listing of a surface managing

¹ The appeal from the BLM decisions, canceling the two Leases, in whole and in part, was separately docketed as IBLA 2014-77 (WYW-173119) and IBLA 2014-78 (WYW-172432).

agency other than BLM.² They were issued following August 1, and February 7, 2006, Competitive Oil and Gas Lease Sales at which Red River, which had nominated the lands for leasing on January 9, 2006, and August 5, 2005, was the high bidder for Parcels WY-0608-023 (WYW-173119) and WY-0602-020 (WYW-172432).

At the time of BLM's December 2013 decisions, the Leases encompassed 80 acres of Federal land in sec. 34 (WYW-173119) and 1,000 acres of Federal land in secs. 14, 15, 23, 26, and 35 (WYW-172432), T. 40 N., R. 68 W., Sixth Principal Meridian, Converse County, Wyoming. The lands in the township are within the boundaries of the Thunder Basin National Grassland (NG), which is administered by FS.³ The administrative record contains an Oil and Gas (OG) Plat for T. 40 N., R. 68 W., Sixth Principal Meridian, Wyoming, current as of August 7, 2006. The Master Title Plat (MTP) and Historical Index (HI) for T. 40 N., R. 68 W., Sixth Principal Meridian, Wyoming, note that all of the township was temporarily withdrawn, pursuant to a May 13, 1937, Executive Order (EO) (No. 7616) for the "USDA [U.S. Department of Agriculture] Thunder Basin Proj[ect][.]"⁴ See 2 Fed. Reg. 834 (May 18, 1937). Section 2 of the EO states, in relevant part, that, subject to valid existing rights,

all vacant, unappropriated, and unreserved public lands [in the subject and other townships] . . . are hereby *temporarily withdrawn* from settlement, location, sale, or entry, *and reserved and set apart for use and development by the Department of Agriculture* for soil erosion control and other land utilization activities in connection with the Thunder Basin Project, LA-WY 1: Provided, that nothing herein contained shall restrict prospecting, locating, developing,

² Each of the Leases was issued on a form entitled "Offer to Lease and Lease for Oil and Gas" (Form 3100-11b (October 1992)) which stated that Red River offered to lease all or any of the listed lands available for lease pursuant to the MLA, 30 U.S.C. §§ 181-287 (2012), and the MLAAL, 30 U.S.C. §§ 351-360 (2012). Leasing occurred upon the execution of the form by BLM, on behalf of the United States.

³ See http://www.fs.usda.gov/detail/mbr/home/?cid=fswdev3_008649 (last visited July 15, 2016); 26 Fed. Reg. 2467 (Mar. 23, 1961); 45 Fed. Reg. 9305 (Feb. 12, 1980); Record of Decision (Thunder Basin NG Land and Resource Management Plan Revision), Regional Forester, Rocky Mountain Region, FS, dated July 31, 2002 (http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5166414.pdf (last visited July 15, 2016)).

⁴ See <http://www.wy.blm.gov/mtps/search.php> (last visited July 15, 2016).

mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws.^[5]

Id. at 834-35 (emphasis added).⁶ Section 3 of the EO also stated, in relevant part, that it was “applicable to all lands [in the subject and other townships] . . . upon the cancellation, termination, or release of prior . . . rights[] [and] appropriations, . . . or upon the revocation of prior withdrawals, unless expressly otherwise provided in the order of revocation.” *Id.* at 835. Section 4 of the EO stated that “[t]he reservation made by section 2 of this order shall remain in force until revoked by the President or by act of Congress.” *Id.* We find no evidence in the HI that the temporary withdrawal has ever been revoked.

The OG Plat and MTP also disclose that most of the lands encompassed by the Leases were originally patented by the United States. The record also contains copies of two General Warranty Deeds (GWD), dated April 6, 1998, and April 29, 2005, under which private parties conveyed surface and/or mineral estates of certain of the leased lands, along with other lands, to the United States. Under the 1998 GWD, the Fiddle 2 Limited Liability Co. conveyed to the United States, in relevant part, the N½ sec. 14 and NW¼SE¼ sec. 15.⁷ Neither GWD nor any other party could have conveyed the remainder of the lands in Lease WYW-172432 (NE¼SE¼ sec. 14; and S½SE¼ sec. 15) to the United States, because these lands had never been patented by the United States. Under the 2005 GWD, Barbara H. Dilts and Jerry J. Dilts, Trustees under the March 11, 1997, Barbara H. Dilts Living Trust, conveyed to the United States, in relevant part, the W½SW¼, SE¼SW¼ sec. 35. FS was reported, in each GWD, to be the “acquiring agency[.]”

⁵ The withdrawal did not preclude oil and gas leasing, or the drilling and development of oil and gas resources underlying the leased lands.

⁶ EO 7616 was issued pursuant to the authority vested in the President by section 1 of the Act of June 25, 1910 (Pickett Act), 43 U.S.C. § 141 (1970) (repealed, effective Oct. 21, 1976, by section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 2743, 2792, subject to “[a]ll withdrawals . . . in effect as of the date of approval of this Act [Oct. 21, 1976][.]” § 701(c), FLPMA, Pub. L. No. 94-579, 90 Stat. at 2786); see *Duncan E. Miller*, 2 IBLA 309, 311-13 (1971).

⁷ With respect to the N½ sec. 14, the United States acquired both the surface and mineral estates that had originally been patented. However, in the case of the NW¼SE¼ sec. 15, the United States acquired only the surface estate, since it already owned the mineral estate, which was reserved by the United States at the time of patent, and therefore not patented. The GWD noted the outstanding reservation.

Importantly, in a May 3, 2006, decision, dismissing protests to the February 7, 2006, competitive lease sale, the Deputy State Director (DSD), Minerals and Lands, Wyoming State Office, noted that the surface estate of certain lands in the Thunder Basin NG was under FS' or BLM's administrative jurisdiction. In the case of lands where FS administers the surface estate, the DSD stated that BLM would not lease such lands, since "[t]he BLM mistakenly did not realize these lands were Forest Service parcels and consequently did not send the parcels to the [FS] for their consent to lease." BLM Decision, dated May 3, 2006, at 9. With respect to lands where BLM administers the surface estate, he stated that BLM would lease these lands, which "do not need consent to lease from the [FS]." *Id.*

By e-mail dated September 4, 2013, Sharon Deuter, Leasable Minerals Program Specialist, FS, inquired of Susan R. Moberley, BLM, regarding whether the files for the Leases contained documentation of FS' consent to leasing, since FS' records disclosed that certain lands in the Leases were National Forest System lands.⁸ Moberley responded, by e-mail dated November 29, 2013, informing Deuter that BLM needed to cancel the Leases as to the affected lands, since such lands were "under the jurisdiction of the [FS] & we didn't get their consent to lease prior to leasing." In so responding, BLM concluded that the Leases encompassed Federal lands, and that the surface estate was under FS' administrative jurisdiction. The affected lands were the entirety of Federal lands in Lease WYW-173119, and part of the Federal lands in Lease WYW-172432.⁹

In its December 2013 decisions, the State Office cancelled the Leases on the basis that they were improvidently issued, to the extent that they encompassed Federal lands, the surface estate of which was under FS' administrative jurisdiction and for which it had failed to either consult with FS regarding leasing or obtain FS' consent to leasing, as required by Federal law. It cancelled Lease WYW-173119 in its entirety, and Lease WYW-172432 to the extent it encompassed Federal lands in

⁸ The affected lands were the entirety of Lease WYW-173119 (N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 34), and part of Lease WYW-172432 (N $\frac{1}{2}$ and NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 14; W $\frac{1}{2}$ SE $\frac{1}{4}$ and SE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15; and W $\frac{1}{2}$ SW $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 35).

⁹ In the case of Lease WYW-173119, the surface estate of all of the leased lands was under FS' administrative jurisdiction. The mineral estate of these lands was public domain minerals. In the case of Lease WYW-172432, the surface estate of the leased lands in secs. 14, 15, and 35 was under FS' administrative jurisdiction. The mineral estate of these lands was acquired minerals (N $\frac{1}{2}$ sec. 14) and public domain minerals (NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 14 and secs. 15 and 35). FS does not have administrative jurisdiction over the surface estate of the remaining lands encompassed by the Lease in secs. 23 and 26.

secs. 14, 15, and 35.¹⁰ BLM noted that, having made an appropriate request of FS, the affected lands would be posted to the next available competitive lease sale after receipt of FS' response.

Red River appealed timely from BLM's December 2013 decisions. It principally contends that issuance of the Leases for the lands at issue was not contrary to the MLA or the MLAAL, since (1) the surface estate of the lands was not owned by FS at the time of lease issuance, and therefore BLM was neither required to consult with or obtain the consent of FS prior to leasing; or (2) although the surface estate of the lands was owned by FS at the time of lease issuance, the lands encompassed "public domain minerals" that were leasable under the MLA (not the MLAAL). Notice of Appeal/Statement of Reasons (NA/SOR) at 1. Red River concludes: "I don't believe that it is clear here . . . there has been any violation of the [MLA]." *Id.* However, in the event the Board decides that BLM was barred from leasing the affected lands absent consultation with or the consent of FS, Red River further contends that cancellation was "discretionary," in accordance with the Board's decision in *Earth Power Energy & Minerals*, 132 IBLA 8 (1995), and so BLM erred by cancelling the Leases as to the affected lands. Red River asks the Board to reverse BLM's December 2013 decisions, and that its Leases "be allowed to remain in effect as they were issued," whether because BLM erred by holding that issuance of the Leases was statutorily barred absent consultation with or the consent of FS, or by holding that cancellation was statutorily required. NA/SOR at 2.

The Leased Lands May be Grouped in Three Categories

We consider now whether, at the time it issued the Leases, BLM was authorized to lease the Federal lands with a surface estate under FS' administrative jurisdiction, and whether it properly cancelled the Leases after determining it had failed to consult with FS regarding leasing or obtain FS' consent to leasing. In order to facilitate our discussion, we note that the leased lands at issue may be grouped in three categories: (1) where lands patented by the United States included their mineral estate, which were reconveyed to the United States by the 1998 GWD (N½ sec. 14 in Lease WYW-173119); (2) where lands were patented by the United States with a reserved mineral estate and the surface estate was reconveyed to the United States by the 1998 GWD or the 2005 GWD (NW¼SE¼ sec. 15, N½NW¼ sec. 34, W½SW¼ and SE¼SW¼ sec. 35 in Lease WYW-172432); and (3) where lands were never patented by the United

¹⁰ BLM also provided for refunds of bonus bids, rentals, and administrative fees, in relevant part, at the end of the 30-day appeal period, in the absence of the filing of an appeal.

States (NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 14 in Lease WYW-173119 and S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 15 in Lease WYW-172432). We discuss each category separately.

Under the first category, oil and gas, along with the rest of the mineral estates constitutes acquired minerals. The surface and mineral estates are clearly “lands acquired by the United States,” within the meaning of the MLAAL. See 30 U.S.C. § 351 (2012) (“‘Acquired lands’ or ‘lands acquired by the United States’ include all lands . . . hereafter acquired by the United States to which the [MLA] ha[s] not been extended”); Decision WYW-172432 at 1. Thus, they are subject to leasing under section 3 of the MLAAL, which applies to oil and gas “hereafter . . . acquired by the United States and which are within the lands acquired by the United States[.]”¹¹ 30 U.S.C. § 352 (2012); see 30 U.S.C. § 181 (2012); *Tana Oil & Gas Corp.*, 151 IBLA 177, 181 (1999) (“The [MLAAL], by definition, applies to the mineral interest in lands acquired by the United States, including interests acquired by deed”); *Atlantic Richfield Co.*, 105 IBLA 61, 62, 63 (1988) (Lands patented without a reservation of minerals to the United States and subsequently conveyed back to the United States are subject to leasing under the MLAAL).

The second category involves lands where only the surface estate was patented by the United States (*i.e.*, the mineral estate was reserved to the United States). This encompasses the NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15, N $\frac{1}{2}$ sec. 23, N $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 26, N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 34, and W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 35 (all included in Lease WYW-172432). Where the surface estate of some of these patented lands (NW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 15; N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 34; W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 35) was reconveyed to the United States in the 1998 or 2005 GWD, they had no effect on the mineral estate because it was and remained held by the United States. Thus, the oil and gas, along with the remainder of the mineral estate, are considered *public domain minerals*, subject to leasing under section 17 of the MLA.¹²

¹¹ Excepted from leasing under section 3 of the MLAAL are “lands . . . acquired by the United States for the development of the mineral deposits,” which is not the case for any lands acquired pursuant to the 1998 GWD. 30 U.S.C. § 352 (2012).

¹² Section 34 of the MLA, 30 U.S.C. § 182 (2012), provides that the MLA applies to all deposits of oil and gas and other leasable minerals “in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits[.]” Hence, where lands have been patented subject to a mineral reservation to the United States, the oil and gas may be leased pursuant to the MLA, provided leasing is otherwise authorized by the MLA. See *The Texas Co.*, 61 I.D. 367, 370 (1954); *Davidson Hill*, A-25883 (Sept. 5, 1950), at 4; *Perley M. Lewis*, A-25684 (May 17, 1949), at 2. Further, this provision remains applicable even when the surface estate of the lands is later reacquired by the United States. See *The Texas Co.*, 61 I.D. at 370.

The third category involves never patented lands. Since the oil and gas has never been conveyed out of Federal jurisdiction, they are *public domain minerals*. Indeed, this was BLM's decision. See Decision (WYW-172432) at 1. Therefore, this oil and gas is subject to leasing under section 17 of the MLAAL, which applies in the case of deposits owned by the United States, including those in national forests[.]” 30 U.S.C. § 181 (2012).

BLM Improvidently Issued the Leases since it did not Consult with or Obtain Consent or Non-objection from FS under the Applicable Statutory and Regulatory Framework

Section 1 of the MLA, 30 U.S.C. § 181 (2012), originally enacted on February 25, 1920, provides, in relevant part, that, except as otherwise provided, all oil and gas and other leasable mineral deposits “and lands containing such deposits owned by the United States, including those in national forests, but excluding . . . those acquired under other Acts subsequent to February 25, 1920, . . . shall be subject to disposition in the form and manner provided by th[e] [MLA][.]” See, e.g., *Natural Gas Corp. of California*, 59 IBLA 348, 350-51 (1981). Further, section 17(h) of the MLA, 30 U.S.C. § 226(h) (2012), provides that “[t]he Secretary of the Interior may not issue any lease on *National Forest System Lands reserved from the public domain* over the objection of the Secretary of Agriculture.”¹³ (Emphasis added.) See *Board of Commissioners of Pitkin County*, 173 IBLA 173, 180 (2007) (“[In the case of] oil and gas leases for public domain lands managed by the [FS][,] . . . the [FS] must consent to leasing”).

Section 3 of the MLAAL, 30 U.S.C. § 352 (2012), originally enacted on August 7, 1947, provides, in relevant part, that, except as otherwise provided, all oil and gas and other leasable mineral deposits “which are owned or may hereafter

¹³ “Section 5102 of the Federal Onshore Oil and Gas Leasing Reform Act of 1987 [(FOOGLRA), Pub. L. No. 100-203], 101 Stat. 1330-256, . . . amended section 17 of the MLA by adding, *inter alia*, . . . subsection [(h)][.]” *Clayton W. Williams, Jr.*, 103 IBLA 192, 204 n.5, 95 I.D. 102, 108 n.5 (1988) (citing 101 Stat. 1330-258). Prior to the enactment of subsection (h), BLM was not barred by section 17 of the MLA from leasing National Forest System lands reserved from the public domain, in the absence of FS’ consent or in the face of FS’ objection. See, e.g., *Colorado Environmental Coalition*, 125 IBLA 210, 213-14 (1993). While BLM would solicit and consider FS’ views regarding leasing, “the ultimate decision to lease and the terms under which leasing would be allowed were, under the provisions of the [MLA], within the sole discretion of BLM, not the [FS].” *Colorado Environmental Coalition*, 125 IBLA at 214.

be acquired by the United States and which are within the lands acquired by the United States . . . may be leased by the Secretary [of the Interior] under the same conditions as contained in the leasing provisions of the [MLA], . . . subject to the provisions hereof.” It further provides that

[n]o mineral deposit covered by this section shall be leased except with the consent of the head of the executive department . . . having jurisdiction over the lands containing such deposit, . . . and subject to such conditions as that official may prescribe to insure the adequate utilization of the lands for the primary purposes for which they have been acquired or are being administered[.][¹⁴]

30 U.S.C. § 352 (2012).

The statutory language is essentially mirrored in the Department’s applicable implementing regulation, 43 C.F.R. § 3101.7-1, which pertains to the leasing of Federal lands administered by an agency other than the Department, stating, in full:

- (a) Acquired lands shall be leased only with the consent of the surface managing agency, which[,] upon receipt of a description of the lands from the authorized [BLM] officer, shall report to the authorized officer that it consents to leasing with stipulations, if any, or withholds consent or objects to leasing.
- (b) Public domain lands shall be leased only after the Bureau has consulted with the surface managing agency and has provided it with a description of the lands, and the surface managing agency has reported its recommendation to lease with stipulations, if any, or not to lease to the authorized officer. If consent or lack of objection of the surface managing agency is required by statute to lease public domain lands, the procedure in paragraph (a) of this section shall apply.

¹⁴ Under 30 U.S.C. § 352 (2012), “the head of the executive department” having surface management jurisdiction has been construed to encompass agencies **other than those of the Department of the Interior**. See, e.g., *Harris R. Fender*, 33 IBLA 216, 218 (1977) (Bureau of Reclamation). Agencies of the Department are not accorded veto authority over BLM’s decision to lease their lands for oil and gas purposes, since they all act with the authority of the Secretary of the Interior.

- (c) National Forest System lands whether acquired or reserved from the public domain shall not be leased over the objection of the Forest Service. The provisions of paragraph (a) of this section shall apply to such National Forest System lands.

Further, 43 C.F.R. § 3101.7-2(b) provides, in relevant part, that “[t]he authorized [BLM] officer *shall not issue a lease* and shall reject any lease offer on lands to which the surface managing agency objects or withholds consent required by statute.” (Emphasis added.)

Red River argues that the MLA applies to all oil and gas underlying the lands at issue, since “the deposits of oil and gas are *not acquired lands*,” but “public domain lands.” NA/SOR at 1, emphasis added. Therefore, while it acknowledges that section 3 of the MLAAL requires FS’ consent to leasing, Red River maintains that it is not applicable to the public domain lands. It further states that section 17(h) of the MLA provides that BLM, as the delegate of the Secretary of the Interior, is statutorily barred from leasing any “National Forest [S]ystem lands ‘reserved from the public domain’ over the objection of [FS].” *See id.* at 1 (quoting 30 U.S.C. § 226(h) (2012)). However, Red River maintains that while the surface estate of the lands at issue was acquired by FS and are now “National Forest [S]ystem lands,” their mineral estates were not “reserved from the public domain” because they “never left [F]ederal ownership.”¹⁵ *Id.* As we will see, the status of the mineral estate as “acquired” or “public domain” is not alone determinative of the applicability of the MLA or the MLAAL and whether these oil and gas deposits can be leased without the consent or non-objection of FS.

In its December 2013 decisions, BLM properly concluded that FS had jurisdiction over the surface estate of the lands in secs. 14, 15, 34, and 35. The 1998 and 2005 GWDs expressly state that FS was the acquiring agency with respect to all of the lands originally patented by the United States. Thus, as to the surface estate conveyed back to the United States, FS assumed administrative jurisdiction

¹⁵ It is clear that Red River’s appeal is focused on BLM’s decision to cancel the Leases to the extent BLM concluded that it was required to obtain FS’ consent to lease *public domain minerals*, *i.e.*, minerals that, in Red River’s words, have “never left [F]ederal ownership,” thus excluding acquired minerals. NA/SOR at 1. Therefore, we construe the appeal to not raise any objection to BLM’s decision to cancel Lease WYW-173119 to the extent it covered acquired minerals in the N½ sec. 14, but we address it for a more comprehensive understanding of the legal framework.

over the surface estate of these lands.¹⁶ In addition, EO 7616 had earlier reserved all of the lands in the subject township, including secs. 14, 15, 34, and 35, for the Department of Agriculture. The withdrawal attached to the lands that had never been patented on April 8, 1955. With respect to lands that already had been patented, the withdrawal attached to the lands once they had been reconveyed to the United States. See Secretary's Opinion, 55 I.D. 205, 208-07 (1935). All these lands are also within the Thunder Basin NG, which is under FS' administrative jurisdiction.

[1, 2] It is well established that BLM may not lease any deposit of oil and gas acquired by the United States without the consent of the agency having jurisdiction over the lands containing such deposit, as required by section 3 of the MLAAL and 43 C.F.R. § 3101.7-1(a).¹⁷ See *Amoco Production Co.*, 69 IBLA 279, 281-82 (1982); *Altex Oil Corp.*, 66 IBLA 307, 308-09 (1982) (acquired Department of Energy lands); *Leeco, Inc.*, 23 IBLA 194, 195-96 (1976) (acquired Tennessee Valley Authority lands); *Susan D. Snyder*, 9 IBLA 91, 92-93 (1973) (acquired National Forest System lands); *Thomas B. Cole*, A-30444 (Dec. 6, 1965) (acquired Army Corps of Engineers land); *The California Co.*, A-28753 (July 30, 1962), at 2 (acquired Army lands); *Berenice H. Merrell*, A-26904 (July 13, 1954), at 2 (acquired Coast Guard lands); *W. R. Newman*, A-26239 (July 27, 1951), at 2-3 (acquired National Forest System lands).¹⁸

BLM concluded that the oil and gas underlying the N½ sec. 14 was acquired, having been patented and later conveyed back to the United States by the 1998 GWD, and that FS is the agency having jurisdiction over the lands containing that oil and gas. Since such oil and gas, was “acquired by the United States . . . within the lands acquired by the United States,” it may be leased pursuant to section 3 of the MLAAL

¹⁶ We also note that, in the case of the lands in the N½NW¼ sec. 34 and the W½SW¼, SE¼SW¼ sec. 35, the MTP and HI for the township bear the notation “Juris USFS,” indicating that FS has administrative jurisdiction over these lands. See HI at 16, 17.

¹⁷ See *Colorado Environmental Coalition*, 125 IBLA at 214, 215; *George A. Breene*, 13 IBLA 53, 56 (1973); and *Duncan Miller*, 6 IBLA at 223, 79 I.D. at 420 (all contrasting leasing of acquired National Forest System lands under 30 U.S.C. § 352 (2012)).

¹⁸ We note that 43 C.F.R. § 3101.7-1(c) is also applicable to the lands at N½ sec. 14, since it provides that “National Forest System lands [that are] . . . acquired . . . shall not be leased over the objection of the [FS].” See *Colorado Environmental Coalition*, 125 IBLA at 215 (“[L]easing will not occur without the consent of . . . the Forest Service with respect to all lands in the National Forest System whether *acquired* or reserved from the public domain (43 CFR 3101.7-1(c))” (Emphasis added)).

only with FS' consent, which means if BLM did not have such consent, its leasing was statutorily barred. 30 U.S.C. § 352 (2012).

The remaining oil and gas at issue were on National Forest System lands, and, as such, they were subject to section 17(h) of the MLA if “reserved from the public domain[.]” 30 U.S.C. § 226(h) (2012). It is clear that this oil and gas was never patented by the United States. Only the surface estate was patented, with the mineral estate reserved to the United States. The OG Plat and MTP both report that all of the lands in the township now at issue were withdrawn pursuant to EO 7616, for the Thunder Basin Project. Further, the EO provides that such lands were temporarily withdrawn, “*and reserved and set apart* for use and development by the Department of Agriculture . . . in connection with the Thunder Basin Project.” 2 Fed. Reg. at 835, emphasis added. This is confirmed by the HI for the township. At the time of Lease issuance, the subject land was “reserved from the public domain.” 30 U.S.C. § 226(h) (2012); see NA/SOR at 1 (“National Forest [S]ystem lands reserved from the public domain . . . refers to [F]ederal lands set aside for National Forest purposes by reservation from the public domain”). Accordingly, the oil and gas cannot be leased “over the objection of the Secretary of Agriculture.” 30 U.S.C. § 226(h) (2012); see 43 C.F.R. § 3101.7-1(c); *Board of Commissioners of Pitkin County*, 173 IBLA at 180; *Colorado Environmental Coalition*, 125 IBLA at 214 (“In adopting FOOGLRA, Congress essentially granted the [FS] the same authority over the leasing of public domain lands under the [MLA] that it had exercised over the leasing of acquired lands under the [MLAAL]”), 215 (“[T]he [FS], in effect, exercises a veto power over leasing [of acquired lands and public domain lands within the National Forest System]”).¹⁹ In sum, since this oil and gas remained public domain minerals, it was subject to leasing pursuant to section 17 of the MLA. See 30 U.S.C. §§ 181 and 182 (2012).

Since FS exercises the authority of the Secretary of Agriculture, BLM must first inquire of FS whether it objects to leasing, and only after it obtains FS' statement of non-objection may BLM proceed with leasing. Indeed, 43 C.F.R. § 3101.7-1(c), which pertains to the leasing of National Forest System lands reserved from the public domain, makes the leasing procedure and other provisions set forth in 43 C.F.R. § 3101.7-1(a), applicable to the leasing of such lands.²⁰ See H.R. Conf.

¹⁹ Were the lands at issue lands *not* reserved from the public domain, BLM could issue the Leases even over FS' objection. See *Clayton W. Williams, Jr.*, 103 IBLA at 203-04, 95 I.D. at 108.

²⁰ It is clear from the decision concerning Lease WYW-173119, carried over into the decision concerning Lease WYW-172432, that BLM concluded that leasing the public domain minerals in secs. 15, 34, and 35, which had been reserved in patents of
(continued...)

Rep. No. 100-495, at 779 (1987), *reprinted in* 1987 U.S.C.C.A.N. 2313-1, 2313-1525 (“Nothing in [section 17(h) of the MLA] . . . is to preclude the current consultation process between the Department of the Interior and the Department of Agriculture”). Therefore, these lands “shall be leased only with the consent of the surface managing agency,” which is FS.²¹ 43 C.F.R. § 3101.7-1(a); see *Colorado Environmental Coalition*, 125 IBLA at 215 (“With respect to [all lands within the National Forest System,] . . . leasing will not occur without the consent of any surface managing agency with respect to acquired lands (43 CFR 3101.7-1(a)) and the Forest Service with respect to all lands in the National Forest System whether acquired or reserved from the public domain (43 CFR 3101.7-1(c))” (Emphasis added)). BLM was required to provide a description of the lands to be leased to FS, which would object or not object to leasing.

(...continued)

the surface estate, was precluded by 43 C.F.R. § 3101.7-1(b). However, that regulation pertains to the leasing of “[p]ublic domain lands,” not lands that had been reacquired by the United States. 43 C.F.R. § 3101.7-1(b). The applicable regulation is 43 C.F.R. § 3101.7-1(c), which also applies to public domain minerals in secs. 14 and 15, which, along with the surface estate, had never been patented. Both cases involved “National Forest System lands whether acquired or reserved from the public domain,” under 43 C.F.R. § 3101.7-1(c). We, therefore, modify BLM’s decisions cancelling the Leases as to all these lands to cite the correct regulations.

²¹ The preamble to the final rule reflects BLM’s understanding that, with Promulgation of the FOOGLRA implementing regulations, effective June 17, 1988, FS’ consent to leasing was necessary before BLM could lease National Forest System lands, whether acquired or reserved from the public domain:

It is [BLM] policy to offer lands, the surface of which is administered by another agency, *only after*[,] . . . *when statutorily required, consent or lack of objection* and stipulation requirements *have been rendered from the surface managing agency*. The proposed provision is adopted without change in the final rulemaking.

Other comments suggested that specific language should be added in the final rulemaking to clarify the requirements for consent for [FS] administered lands. The comments have been adopted in the final rulemaking and a new paragraph (c) is added to address lands reserved from the public domain as well as acquired lands administered by the [FS]. [Emphasis added.]

53 Fed. Reg. 22814, 22816 (June 17, 1988). It also is clear that, in promulgating the regulations, BLM rendered the terms “consent” and “lack of objection” synonymous.

See 43 C.F.R. § 3101.7-1(a). If FS objected to leasing, BLM was barred by section 17(h) of the MLA and 43 C.F.R. § 3101.7-2(b) from leasing these lands. BLM concluded that since it had failed to consult with and obtain the consent or non-objection of FS, it was barred from leasing these lands.

Red River offers no argument or supporting evidence establishing that BLM, in fact, consulted with or obtained the consent or non-objection of FS. Red River merely questions whether the surface estate of the lands at issue was owned by FS at the time of issuance of the Leases: “I am not sure how the *BLM transfers ownership to the [FS]*, but if it was by a warranty deed, I don’t believe that was finalized by the time I purchased the [L]eases.” NA/SOR at 1, emphasis added. The surface estate of the lands at issue is clearly owned by the United States. What is at issue is not whether FS “own[s]” the surface estate, but whether FS had, at the time of issuance of the Leases, administrative jurisdiction over the surface estate of these lands, where ownership firmly resided in the United States. In the case of unpatented lands, administrative jurisdiction over the surface estate was vested in FS at the time of designation of the Thunder Basin NG. In the case of reconveyed lands, administrative jurisdiction over the surface estate vested in FS at the time of reconveyance, by virtue of inclusion in the Thunder Basin NG. That jurisdiction was noted in the 1998 and 2005 GWDs, which, contrary to what Red River appears to believe, were issued before it obtained the Leases in December and June 2006. Red River offers no evidence to the contrary in either case.

Since BLM failed even to consult with FS, we conclude that BLM failed to follow the required procedure for seeking FS’ consent or non-objection to lease *public domain minerals* that had never been patented, including those where the surface estate was patented and later reconveyed to the United States, but the mineral estate had been retained by the United States.

BLM Properly Cancelled the Leases Because They were Legal Nullities

The only remaining question is whether BLM properly cancelled the Leases to the extent they were issued without FS’ consent, as required by section 3 of the MLAAL and 43 C.F.R. § 3101.7-1(a) (N½ sec. 14), or its non-objection, as required by section 17(h) of the MLA and 43 C.F.R. § 3101.7-1(a) and (c) (NE¼SE¼ sec. 14; NW¼SE¼, S½SE¼ sec. 15; N½NW¼ sec. 34; and W½SW¼, SE¼SW¼ sec. 35). BLM’s authority to cancel leases that were improvidently issued is well established. *Clayton W. Williams, Jr.*, 103 IBLA at 202, 95 I.D. at 107 (citing *Boesche v. Udall*, 373 U.S. 472, 478-79 (1963); *D. M. Yates*, 74 IBLA 159 (1983); *Fortune Oil Co.*, 69 IBLA 13 (1982)).

Red River asserts that, under the Board's decision in *Earth Power Energy & Minerals*, 132 IBLA at 8, lease cancellation is only discretionary "if a lease is issued in violation of a regulation[.]" NA/SOR at 1. In *Earth Power*, we held BLM had the discretion to cancel a geothermal resources lease issued in violation of a regulation setting minimum acreage requirements. See 132 IBLA at 8, 11. However, the facts in that case sharply contrast with the situation at hand, where BLM's Lease issuance was in violation of a statute and/or its implementing regulation because the resources encompassed by the Leases were *not subject to leasing* at the time of lease issuance.

Here, BLM failed to obtain FS' consent to leasing acquired minerals on acquired lands, and was, therefore, barred by section 3 of the MLAAL and 43 C.F.R. § 3101.7-1(a) from leasing these lands. We reach that conclusion based on our reading of the applicable statute and regulation, which prohibit leasing. See 30 U.S.C. § 352 (2012) ("No mineral deposit covered by this section shall be leased except with the consent of the head of the executive department . . . having jurisdiction over the lands containing such deposit"); 43 C.F.R. § 3101.7-1(a) ("Acquired lands shall be leased only with the consent of the surface managing agency"). While the statute and regulation do not expressly require BLM to cancel the Leases as to such lands, they prohibit issuance of any lease for such lands, much as if the lands "ha[d] been legislatively or administratively withdrawn from leasing[.]" *Clayton W. Williams, Jr.*, 103 IBLA at 202-03, 95 I.D. at 107 (citing *Hanes M. Dawson*, 101 IBLA 315 (1988) (BLM properly cancelled oil and gas leases for lands designated by Congress as wilderness, which are statutorily withdrawn from mineral leasing)). Here, as in *Clayton W. Williams, Jr.*, BLM had no legal authority to issue the Leases, in violation of the statute and regulation, and thus the Leases were "a legal nullity." *Id.* at 203, 95 I.D. at 107.

In *L. D. Dale*, A-27166 (Nov. 14, 1955), at 3, which involved acquired lands under FS' surface management jurisdiction, BLM had issued an oil and gas lease in part with respect to lands where, unbeknownst to BLM, FS, during the pendency of the lease application, had retracted its earlier consent to leasing, and in part with respect to other lands where, after leasing, FS rescinded its consent to leasing, under 30 U.S.C. § 352 (2012). The Deputy Solicitor held that BLM properly cancelled the lease as to the former lands:

It follows that the decision of October 5, 1954, canceling the appellant's lease on sec. 20 must be affirmed with respect to the SW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$ because the Department had *no authority to issue a lease covering these lands after the [FS] had withdrawn consent to lease* at a time when the appellant's application was still pending, the issuance of a lease on these lands being contrary to section 3 of the [MLAAL]. [Emphasis added.]

L. D. Dale, A-27166 (Nov. 14, 1955), at 3. The Deputy Solicitor held that BLM improperly cancelled the lease as to the latter lands:

Because there is no statutory, regulatory, or lease provision authorizing the cancellation of an acquired lands lease when, after consent to lease has been given and a valid lease has been issued, the agency having jurisdiction over the lands wishes to withdraw consent to lease during the term of the lease, this Department would not be justified in canceling a lease on such grounds.

Id. at 5. The present case is analogous to the former situation in *L. D. Dale*, since, by the time of lease issuance, FS had not consented to leasing the acquired lands, together with acquired minerals, in the N $\frac{1}{2}$ sec. 14, and therefore issuance of the Lease as to these lands was “contrary to section 3 of the [MLAAL].” For all relevant purposes, FS’ failure to consent to leasing was the same as the withdrawal of FS’ consent prior to lease issuance. BLM properly cancelled the Leases in these circumstances.

With respect to public domain minerals on National Forest System lands, BLM was required to obtain FS’ non-objection to leasing, and, where it failed to obtain the non-objection of FS, BLM was similarly barred from leasing these lands. However, we reach that conclusion based on our reading of the applicable regulations, not the applicable statute. Section 17(h) of the MLA provides only that BLM, as the delegate of the Secretary of the Interior, “may not issue any lease on National Forest System Lands reserved from the public domain *over the objection of the [FS]*,” as the delegate of the Secretary of Agriculture. 30 U.S.C. § 226(h) (2012), emphasis added. Since FS has yet to express any opinion regarding whether it objects to leasing the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 14, NW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 15, N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 34, and W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 35, we cannot conclude that BLM is statutorily barred from leasing. Rather, BLM is barred from leasing because the applicable regulations require FS’ statement of non-objection to leasing in 43 C.F.R. § 3101.7-1(a) and (c). Hence, we conclude that, where BLM went forward with leasing such lands, contrary to the regulations, BLM was similarly required to cancel the Leases.

Earth Power stands for the proposition that, when BLM has discretionary authority to cancel a lease issued in contravention of a regulation, BLM must exercise that discretion and determine whether to cancel the lease. That is not the present case, which instead is akin to *D. M. Yates*, where we held that, since BLM was bound to follow a regulation that precluded the leasing of any lands withdrawn for a wildlife refuge, which already constituted an exercise of BLM’s discretion, BLM was required to cancel a lease issued in contravention of that regulation:

The general prohibition against oil and gas leasing in 43 CFR 3101.3-3(a) is a formal exercise of the Secretary's discretion under section 17 of MLA[.][²²] . . .

. . . .

. . . Appellant submitted offer OR 26403 (Wash.) for lands which were not available for leasing under 43 CFR 3101.3-3. The BLM authorized officer is bound by this regulation and was without authority to issue a lease on land embraced by this regulation. Such an unauthorized lease issuance is not binding on the Secretary. . . . Since lease OR 26403 (Wash.) was invalidly issued, we find that BLM properly canceled appellant's oil and gas lease. *See Oil Resources, Inc.*, 14 IBLA 333 (1974).

D. M. Yates, 74 IBLA at 161-62.

Similarly, in the present case, BLM has already exercised its discretion by promulgating 43 C.F.R. § 3101.7-1(a) and (c), which generally preclude BLM from leasing any National Forest System lands reserved from the public domain, absent FS' non-objection to leasing. In promulgating the regulations, the Department determined that BLM will not lease such lands absent FS' non-objection to leasing, much as BLM already determined that it would not lease wildlife refuge lands. BLM acted contrary to these regulations in leasing the lands in the NE $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 14, NW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ sec. 15, N $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 34, and W $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ SW $\frac{1}{4}$ sec. 35, without FS' non-objection to leasing, and, therefore BLM was required to cancel the Leases pertaining to these lands. *See B. E. Van Arsdale*, 62 I.D. 475, 476-78 (1955).

In *Van Arsdale*, the Deputy Solicitor held that BLM properly cancelled an oil and gas lease for lands that were not available for leasing because, at the time of leasing, the official public-land records had not been noted to reflect the relinquishment or cancellation of a prior lease. The lands were not available by virtue of a regulation, which provided that it was not the relinquishment or cancellation of the prior lease that rendered the lands available for leasing, but instead the notation of the relinquishment or cancellation on the official public-land records. He concluded:

²² 43 C.F.R. § 3101.3-3(a) (1982) provided, in subsection (1), that "[n]o offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued," except in the case of lands subject to drainage.

[T]he appellant is not entitled to a lease on land which the plat records showed was not available for leasing to anyone else, and *which, by departmental regulation, decisions, and administrative practice was not subject to leasing.* As the 40 acres here involved were not available for leasing[,] . . . the issuance of the lease on that tract violated a departmental regulation and the cancellation of the lease as to that land was correct. [Emphasis added.]

62 I.D. at 478. Similarly here, Departmental regulations render the public domain minerals on National Forest System lands at issue not subject to leasing, absent FS' non-objection to leasing.

We, therefore, conclude that the State Office properly cancelled Leases improvidently issued in whole and in part, to the extent that they encompassed Federal lands for which BLM had not obtained FS' consent or non-objection to leasing, as required by section 3 of the MLAAL or section 17 of the MLA and their implementing regulations. We will affirm the December 2013 decisions as modified to cite the correct statutory and regulatory authority.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we affirm as modified the decisions from which Red River appeals.

/s/
Christina S. Kalavritinos
Administrative Judge

I concur:

/s/
James K. Jackson
Administrative Judge