

INTERIOR BOARD OF LAND APPEALS

George G. Witter

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GEORGE G. WITTER

IBLA 90-499

Decided June 6, 1994

Appeal from a decision of the Utah State Office, Bureau of Land Management, rejecting noncompetitive oil and gas lease offer UTU-66505, in part.

Set aside and remanded.

1. Oil and Gas Leases: Discretion to Lease -- Oil and Gas Leases: Noncompetitive Leases

The provision in 43 CFR 3110.1(b) that land not sold at a competitive sale will be available for noncompetitive leasing for a 2-year period does not preclude a decision not to issue a lease. The fact that an oil and gas lease offer is pending when lands are made unavailable for leasing, either by exercise of Secretarial discretion or by operation of law, does not invest the offeror with legal or equitable title, claim, interest, or right to receive the lease.

2. Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior has the discretion to choose not to lease lands for oil and gas purposes, in favor of considerations such as wildlife, endangered species preservation, recreational use, and aesthetic or scenic values. When the record contains evidence of the dedication of land to a worthy public purpose, supports a finding that oil and gas development would be incompatible with that public purpose, and the public interest clearly favors preserving the status quo, BLM's rejection of the lease offer will be affirmed.

3. Environmental Quality: Generally -- Oil and Gas Leases: Discretion to Lease

When the record on appeal indicates that certain lands have been generally closed to mineral leasing, subject to BLM reconsideration of the exclusion if it can be shown that leasing would not impact the critical habitat, it is error for BLM to reject an oil and gas lease offer for such lands without first affording the

offeror an opportunity to show that leasing subject to a no-surface occupancy stipulation would protect the critical habitat.

APPEARANCES: George G. Witter, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

George G. Witter has appealed a July 12, 1990, decision of the Utah State Office, Bureau of Land Management (BLM), rejecting noncompetitive oil and gas lease offer UTU-66505, in part, after finding the public interest would best be served by the rejection. The rejection applied to the offer to lease land within the House Range Resource Area (HRRA) found to contain fragile habitat of the least chub. 1/

The BLM decision provided the following explanation in support of the rejection:

This decision is based upon an existing land use plan which weighed various land and resource uses. Consideration was also given to various alternatives. As a part of the land use planning decision process, an oil and gas environmental analysis was prepared in accordance with the National Environmental Policy Act of 1969 for those lands within the area administered by the Richfield District Office, Bureau of Land Management.

Warm Creek near Gandy, Bishop Springs, Salt Marsh Lake and Tule Springs are various water holes that provide habitat to small non-game fish such as Utah chub, the rare least chub, and could provide habitat possibly for the introduction of rare Nevada pup fish. Fish habitat is quite limited in the district.

The least chub is one of the aberrant minnows found only in the Bonneville Basin. It has been identified in streams near Salt Lake City and in fresh water ponds and swamps around the Great Salt Lake. It was also once found in Utah Lake, Beaver River, Parowan Creek, Clear Creek and Provo River. The least chub is no longer found in many of these waters because of population and other habitat changes. Tule Valley and Snake Valley aquatic habitat areas are believed to be some of the few areas where the least chub can still be found. Throughout its range, the least chub is considered rare.

1/ The lease offer was rejected for the following lands in T. 15 S., R. 18 W., Salt Lake Meridian, Utah:

Sec. 19, lots 9-12, W2NE
 Sec. 20, lots 6-13, W2E2
 Sec. 29, lots 5-12, W2E2
 Sec. 30, lots 1, 2, 7, 12, 14-22
 Sec. 31, all.

A part of the least chub's vital function as an element of the aquatic ecosystem is its value as a natural predator of mosquito larvae.

Oil and gas activities at or near the aquatic habitat areas could drastically change the fragile habitat and destroy the remaining least chub population.

(Decision at 1).

The HRRRA Resource Management Plan (RMP) was approved by the Utah State Director on October 8, 1987. BLM had examined a series of alternatives set out in the RMP and chose the alternative deemed to represent the best balance of resources in the HRRRA. Under the RMP, four categories of oil and gas lease restrictions are applicable in the HRRRA: Category 1 (Standard Stipulations); Category 2 (Special Stipulations); Category 3 (No-Surface Occupancy); and Category 4 (No Leasing). The nine areas within the HRRRA designated as subject to restrictive oil and gas leasing (RMP at 3-4) are listed in Table 2-5. One of these areas, the 3,360-acre "Least Chub" area, was placed in Category 4 (RMP at 71).

Following approval of the RMP, BLM undertook an environmental analysis (EA). This EA was deemed necessary because the then current National Environmental Policy Act (NEPA) documentation did not address oil and gas development scenarios or the stipulations to be applied to leases in Category 2 and Category 3 areas. On December 21, 1988, the Richfield District Manager approved an EA evaluating oil and gas leasing in HRRRA, which was tiered to the RMP/environmental impact statement (EIS) (including the categories and procedures described in that document) and the RMP. The final EA explained steps necessary for NEPA compliance and conditions for continued oil and gas leasing within HRRRA (including compliance with the RMP), but was not intended to modify the RMP (EA at 1). A development scenario and details of site-specific special stipulations applicable to leases in Category 2 and Category 3 areas were also addressed in the EA (EA at 2-3).

The "Fluid Mineral Leasing Categories" described in the EIS (Table 2-29 at 116) and the RMP (Table 2-6 at 76) are replaced by extended Table 2-29 found on pages 4 through 12 of the EA. This table lists the Salt Marsh Lake Least Chub Habitat, containing 3,360 acres in Category 4, as "Closed to Leasing" and states:

All of the land in the designated area is included in the Salt Marsh Lake Least Chub Habitat and is closed to leasing. Exceptions to this stipulation 2/ in any year may be specifically authorized in writing by the BLM if it can be shown that the activity would not impact the least chub habitat.

(EA at 11).

2/ The word "stipulation" is not correctly used in this context. A stipulation is a condition attached to issuance of a lease. If no lease is issued there will be no stipulation. Fortune Oil Co., 68 IBLA 288, 289 n.1 (1982).

In his statement of reasons, Witter sets out his belief that allowing this area to be leased would promote viable exploration and orderly development, even under the constraint of no-surface occupancy. He also speculates that, if the area is not leasable, drainage by wells located on adjacent non-Federal land will be encouraged, with a loss of Federal royalty revenue.

Witter asserts that the rejection was contrary to the goals and objectives of the RMP, which requires "the least restrictive stipulations necessary to adequately protect other resources" (EIS at 119; RMP at 75). He notes that lands bordering the rejected land are all under lease, either from the Federal Government with standard stipulations (Category 1) or from the State of Utah subject only to normal State oil and gas regulations, but his offer was rejected because oil and gas activity would further endanger the least chub. According to Witter, all of the rejected lands can be reached from these bordering lands by directional drilling. He urges issuance of a no-surface occupancy lease, arguing that it is the least restrictive stipulation necessary to protect the least chub habitat.

Witter also asserts that BLM's decision is contrary to the public interest because the Impact Documents (Draft RMP and EIS ("Draft EIS") dated March 1986; Final EIS and Proposed RMP ("Final EIS") dated August 1986 and September 1986; and RMP, dated October 1987) do not adequately analyze the oil and gas potential of the area. According to Witter, a number of oil companies have been actively exploring the area because it is in a very favorable portion of the Snake Valley and could contain large reserves of petroleum. He stresses that exclusion of this area from oil and gas exploration and production totally disregards the public interest, especially when environmental concerns can be protected with a no-surface occupancy stipulation.

Witter further argues that Salt Marsh Lake is properly categorized as riparian habitat, which is Category 3 in the Impact Documents, and thus open for leasing with no-surface occupancy. He concludes that the existence or possible existence of least chub is apparently the only reason for classifying the rejected lands as Category 4. Witter asserts that the least chub has never been and is not now on the list of threatened and endangered wildlife.

Finally, Witter asserts that the Impact Documents show that a portion of the rejected land was classified as Category 1 which is leasable with standard stipulations. In support of this contention Witter points to Figure 2-21 in the Final EIS, which shows only the W 1/2 of sec. 29, and all of secs. 30 and 31, T. 15 S., R. 18 W., as Category 4, making the E 1/2 of sec. 19, the W 1/2, W 1/2, E 1/2 sec. 20, and the W 1/2 E 1/3 sec. 29 Category 1 land (open to leasing with standard stipulations). Witter asserts that these leasing category boundaries are further confirmed by Map 9, Oil and Gas Categories and Locatable Minerals, of the RMP which also shows only the W 1/2 of sec. 29, sec. 30, and sec. 31 as Category 4, and all other parts of the rejected lands as Category 1. Witter argues that the Category 1 status of the E 1/2 of sec. 19 was recognized when that land was offered for competitive

bid on September 12, 1989. He notes that under 43 CFR 3110.1(b) the E 1/2 of sec. 19 was available (for over the counter leasing) for 2 years, beginning on the first business day following the last day of the competitive oral auction.

On the same point, Witter notes that Table 3-8 of the Draft EIS and Chapter 2, paragraph 46 of the RMP show secs. 20, 30, and 31, T. 15 S., R. 18 W., as riparian habitat, subject to Category 3 leasing with no-surface occupancy. According to Witter, the most restrictive category applicable to sec. 20 is Class 3, no surface entry, because that section is not shown in Category 4 on any map or table found in the Impact Documents.

[1] Witter argues that under 43 CFR 3110.1(b) those portions of the rejected land offered for competitive leasing should have remained open for Category 1 leasing for 2 years after the competitive sale. ^{3/} The provision in 43 CFR 3110.1(b) that land not sold at a competitive sale will be available for noncompetitive leasing for a 2-year period does not preclude a decision not to issue a lease. The fact that an oil and gas lease offer may be pending when lands are made unavailable for leasing, either by exercise of Secretarial discretion or by operation of law, does not invest the offeror with a legal or equitable title, claim, interest, or right to receive the lease. Justheim Petroleum Co., 67 IBLA 38 (1982).

[2] The Secretary of the Interior, through his authorized representative, BLM, has the discretion to choose not to lease lands for oil and gas purposes, even if the lands have not been withdrawn from the operation of the general mining and mineral leasing laws. Udall v. Tallman, 380 U.S. 1, 4, rehearing denied, 380 U.S. 989 (1965); United States v. Wilbur, 283 U.S. 414 (1931); Burglin v. Morton, 527 F.2d 486 (9th Cir. 1975); Chevron U.S.A., Inc., 80 IBLA 324, 330 (1984); David A. Provinse, 76 IBLA 340, 342 (1983). This discretion may be exercised in favor of considerations such as wildlife, endangered species preservation, recreational use, and aesthetic or scenic values. Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966); Eagle Exploration Co., 69 IBLA 96, 98 (1982); Connie Mull, 63 IBLA 317, 318 (1982).

[3] BLM may reject a lease offer if it outlines the reasons for refusal and the record supports the conclusion that the public interest would be served by rejection. Eagle Exploration Co., *supra*; Connie Mull, *supra*; Placid Oil Co., 58 IBLA 294 (1981). When the record describes a dedication of land to a public purpose worthy of preservation, and supports a finding that oil and gas development would be incompatible with this public purpose and that the public interest favors preserving the status quo, BLM's rejection of the lease offer will be affirmed. Eagle Exploration Co., *supra*; Connie Mull, *supra*; Rosita Trujillo, 21 IBLA 289 (1975).

^{3/} BLM's letter to Witter dated Jan. 19, 1990, confirms the fact that the lands in sec. 19, T. 15 S., R. 18 W., were offered at the Sept. 12, 1989, competitive sale and received no bids. The fact that they were offered for competitive sale supports Witter's argument that sec. 19 was not in Category 4.

Based on the record before us, ^{4/} Witter's assertion that the various maps do not indicate that all of the land which he sought was included in Category 4 appears to be correct. See, e.g., Map 9 of the RMP and the map appended to the EA. However, we note a patent ambiguity in both the RMP and EA in this regard. Both documents indicate that the Salt Marsh Lake Chub Habitat aggregates 3,360 acres. See EA at 11; RMP at 76 (Table 2-6). As depicted on the various maps, the only lands included in the Habitat would be the W 1/2 sec. 29, secs. 30 and 31, T. 15 S., R. 18 W., and sec. 6, T. 16 S., R. 18 W. If it is limited to these parcels, the Habitat would approximate 2,279 acres in size. By including the rejected lands (together with the NW 1/4 sec. 7, T. 16 S., R. 18 W.) the acreage would approach the 3,360 acres called for in the RMP and EA. Moreover, we note that, as depicted on the maps, the Habitat fails to include all of the land abutting Salt Marsh Lake. We need not resolve this inconsistency, however, as, for reasons explained below, we are setting aside BLM's decision and remanding the case file to BLM for further consideration. BLM may find it appropriate to clarify the status of secs. 19 and 20 and the W 1/2 E 1/2, sec. 29, T. 15 S., R. 18 W., in the context of its further consideration.

Witter complains that the impact documents do not fully analyze the oil and gas potential of the area identified on the maps as being within Category 4. It is clear that BLM did not intend to totally preclude oil and gas leasing in HRRA. On the contrary, the purpose of the EA was to consider the impact of oil and gas leasing within HRRA undertaken in compliance with RMP (EA at 1). When preparing the RMP, BLM designated four fluid mineral leasing categories and assigned the lands within HRRA to one of the four categories. Category 3, leasing with no-surface occupancy, was one of the options available. BLM concluded that Salt Marsh Lake should be placed in Category 4, closed to leasing. ⁿ⁵ BLM weighed the competing interests for the lands and resource uses in HRRA. It determined that, for Category 4

^{4/} The record before the Board does not contain copies of either the Draft or Final EIS.

^{5/} Ida Lee Anderson, 70 IBLA 259 (1983), and Rachalk Production, Inc. (On Reconsideration), 71 IBLA 360 (1983), involved BLM rejection of oil and gas lease offers for land designated under oil and gas leasing category systems similar to the one in this case. In Anderson, Category 4 was entitled "Suspended or No Lease." The record in that case indicated that the categories, which had been established in Instruction Memorandum (IM) UT 81-169, dated Mar. 12, 1981, contemplated issuance of a no-surface occupancy lease in certain circumstances. The Board held that, under those circumstances, it was error to reject the lease offer without affording an opportunity to accept a lease containing no-surface occupancy and other applicable stipulations. Id. at 262. In Rachalk Production, Inc., the Board noted that IM UT 81-169 had expired on Sept. 30, 1982, and that the State Director issued IM UT 83-70 on Dec. 27, 1982. Category 4 in IM UT 83-70 was entitled "No Lease Areas" which specifically provided that no lease would issue. There was no indication of which definition of Category 4 would be applied to the lands sought by Rachalk Production, and the Board set aside BLM's decision and remanded the case. In this case Category 4 is clearly identified, and reasons for assigning that category are set out in the record.

lands, fish habitat protection was of greater public interest than oil and gas leasing. Witter disagrees. The Board's remarks in *Rosita Trujillo*, *supra*, are applicable:

Appellant's contentions are neither erroneous nor unreasonable. They represent only another point of view; a different side of the ongoing controversy over the identification and priority of concerns which compromise the public interest. However, where the responsibility for making such judgments has been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal.

Id. at 291.

Had BLM chosen to totally preclude leasing that option would be supported by the record. When a determination that the land should be closed to leasing is properly made in the context of an RMP and EIS, BLM is not required to revisit the question every time an oil and gas lease application is filed. We note, however, that when it assigned Salt Marsh Lake Chub Habitat to Category 4, BLM left open the possibility of leasing the lands "if it can be shown that the activity would not impact the least chub habitat" (EA at 11). It is well settled that BLM has authority to issue an oil and gas lease subject to protective stipulations. *Questa Petroleum*, 33 IBLA 116, 118 (1977); 43 CFR 3101.1-2, 3101.1-3. Complete rejection of a lease offer is more extreme than the most stringent stipulation imposed for the protection of the environment, and when an offer is rejected to protect the environment the record should show that BLM considered imposing stipulations to protect the public interest. See Robert G. Lynn, 76 IBLA 383, 385 (1983); *Connie Mull*, *supra* at 319; *Stanley M. Edwards*, 24 IBLA 12, 18, 88 I.D. 33, 35 (1976).

Witter asserts that oil and gas underlying the rejected lands may be reached by directional drilling and a no-surface occupancy stipulation would serve to protect the habitat in question. Witter also speculates that if the lands in question are not leased, they could be drained by wells located on adjacent non-Federal lands. In *Connie Mull*, *supra*, the Board addressed this possibility, stating that the fact that other land may be available for mineral development cannot, and should not, forestall the United States from managing its own lands in a manner that protects those values it desires to safeguard. The Board noted that in the event that a successful well were completed on adjacent private land which was draining reserves underlying Federal land, the United States could consider issuing a lease for the drained land. *Id.* at 319.

However, since the EA, itself, indicates that BLM would reconsider the closure of the lands to leasing if it can be shown that leasing would not impact the least chub habitat, Witter should have been afforded the opportunity to make such a showing prior to the partial rejection of his application. Accordingly, we will set aside BLM's decision and remand this matter so that it may consider the arguments relating to leasing subject to a no-surface occupancy stipulation which Witter has presented.

Therefore, on remand, Witter should be afforded an opportunity to present his arguments in favor of leasing with a no-surface occupancy stipulation, and BLM's decision should contain responses to his arguments.

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 remanded for action consistent with this decision.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski]
Administrative Judge