

Editor's note: Reconsideration denied by Order dated January 17, 1995.

BUREAU OF LAND MANAGEMENT

v.

EUGENE SIMONS

IBLA 91-149

Decided December 20, 1993

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., finding the applicant for sodium preference right leases W-9026 and W-9027 entitled to leases.

Affirmed as modified.

1. Mineral Leasing Act: Generally--Sodium Leases and Permits: Leases--Sodium Leases and Permits: Permits--Sodium Leases and Permits: Preference Right Leases

The date of expiration of the permits is the critical date for determination of a discovery on sodium prospecting permits entitling the holder to the issuance of sodium preference right leases. Evidence concerning costs and market conditions after that date have relevance only to the extent they reflect what may have reasonably been anticipated at the expiration of the permits. Yankee Gulch Joint Venture v. BLM, 113 IBLA 106 (1990).

2. Mineral Leasing Act: Generally--Sodium Leases and Permits: Leases--Sodium Leases and Permits: Permits--Sodium Leases and Permits: Preference Right Leases

Where the Board has held that a hearing is required before an Administrative Law Judge to determine whether a valuable deposit of sodium has been shown by a prospecting permittee applying for a preference right lease, evidence of the quantity and quality of the deposit is admissible to the extent it tends to show whether the deposit can be mined, processed, and marketed at a profit. A prior stipulation by BLM as to the sufficiency of the initial showing as to quantity and quality will not preclude evidence on the quantity and quality of the deposit of sodium.

3. Mineral Leasing Act: Generally--Sodium Leases and Permits: Leases--Sodium Leases and Permits: Permits--Sodium Leases and Permits: Preference Right Leases

The test for determining whether a permittee has discovered a valuable deposit of sodium justifying issuance of a preference right lease is similar to the test for determining whether the locator of a mining claim under the 1872 Mining Law, 30 U.S.C. § 21 (1988), has discovered a valuable mineral deposit, *i.e.*, whether the mineral deposit found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and funds with a reasonable prospect of success in developing a paying mine. This standard has been further refined to include a showing of marketability, a reasonable expectation that the mineral can be extracted, processed, and marketed at a profit.

APPEARANCES: Eugene V. Simons, *pro se*; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The Bureau of Land Management (BLM) appeals from a December 20, 1990, decision (Decision) of Administrative Law Judge John R. Rampton, Jr., issued after a hearing, finding Eugene V. Simons entitled to issuance of two sodium mineral leases pursuant to preference right lease applications (PRLA's) W-9026 and W-9027. Judge Rampton held in essence that Simons had shown a reasonable prospect of developing a paying mine, *i.e.*, "sufficient mineralization to cause a prudent person to expend further time and money with a reasonable expectation that a profitable mine will be developed," entitling Simons to leases under section 24 of the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 262 (1988) (Decision at 14). ^{1/}

Applications for sodium prospecting permits bearing the same serial numbers were filed in October 1967 and prospecting permits were issued effective December 1, 1968. By statute enacted October 1, 1968, Congress created the Flaming Gorge National Recreation Area (FGNRA), 16 U.S.C. § 460v (1988). ^{2/} The two PRLA's embrace approximately 4,706 acres of public land in Sweetwater County, Wyoming, all but 320 acres of which lie within the FGNRA.

^{1/} The quote in Judge Rampton's opinion was taken from the Board decision in Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 143 (1990) (hereinafter cited as Yankee Gulch II).

^{2/} Construction and operation of the Flaming Gorge Dam and Reservoir were previously authorized by section 1 of the Colorado River Storage Project [CRSP] Act of 1956, *as amended*, 43 U.S.C. § 620 (1988).

The history of this case is detailed extensively in our prior decisions, cited as John S. Wold, 48 IBLA 106 (1980) (Wold I), and John S. Wold, 95 IBLA 69 (1986) (Wold II), and need not be repeated herein. In

Wold II, this Board vacated BLM's decision and ordered an evidentiary hearing. 95 IBLA at 76. The issues referred by the Board for a hearing were: (1) whether the lands are chiefly valuable for sodium; (2) whether the proposed mining will "have significant adverse effects on the purposes of the [CRSP]"; and (3) whether, in light of the requirements imposed to mitigate the impact of mining on the FG NRA and the CRSP, and the additional costs

of mining resulting therefrom, a discovery of a valuable deposit of sodium exists on the claims. See Wold II, 95 IBLA at 73-76; Administrative Law Judge Decision at 5.

Hearings in this case were held January 24 and 25, 1989, at Casper, Wyoming, and continued April 10-14 and 18-21, and November 1-3, 1989, inclusive at Denver, Colorado. The transcript of the first 2 days of hearing were preceded by a volume number (I and II, respectively) whereas the remaining days of hearings were transcribed in consecutively numbered pages of transcript without reference to volume number. Judge Rampton issued his decision on December 20, 1990, and from that decision this BLM appeal ensued.

Before reaching the ultimate issue of whether Simons has shown the discovery of a valuable mineral deposit of sodium, certain issues raised in the BLM brief may be disposed of as a threshold matter.

BLM challenges Judge Rampton's conclusion that, although a relevant statutory provision ^{3/} requires the consent of the Secretary of the Agriculture prior to the issuance of a prospecting permit or mineral lease, such consent has been deemed to have been given in this case, citing the prior Board decision in this matter. BLM argues that the only consent given by the Forest Service (FS), acting as a delegate of the Secretary of Agriculture, was to issuance of the prospecting permits; the right to decline to consent to the leases was reserved; and the hearing record confirms that FS opposes lease issuance. We held in our prior decision in this case that FS "has consented to the prospecting permits and, potentially, the preference right leases, subject to the condition of compliance with the mitigating measures set forth in the decision record and proof the deposits can be profitably developed in compliance with these mitigating measures." Wold II, 95 IBLA at 73. The consent of FS having been found to be established on the written record before the Board, Judge Rampton properly declined to reexamine the question of FS consent to the leases. ^{4/}

^{3/} Section 5 of the Act of Oct. 1, 1968, 16 U.S.C. § 460v-4 (1988).

^{4/} The relevant part of section 23 of the Mineral Leasing Act provides:

"Upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 261 of this

With respect to the potential impact of mining on the reservoir, Judge Rampton found there was no evidence presented that mining operations would have a significant adverse effect on the purposes of the CRSP (Decision at 7). ^{5/} On appeal, BLM has not taken issue with this finding. BLM does note that, pursuant to the stipulations attached to the prospecting permits, plans for mining operations shall be submitted to the Bureau of Reclamation for approval prior to commencement of operations.

Accordingly, the dispositive issue in this case is whether there has been a discovery of a valuable deposit of sodium in the form of trona. ^{6/} With regard to evidence of a discovery on the prospecting permits, BLM challenges Judge Rampton's decision on the ground that he erred when he dismissed as irrelevant all of BLM's evidence "showing that as of the time of the hearing there was not a reasonable expectation that Simons hypothetical sodium mining venture would be economically viable" on the basis that a discovery need not be shown at the time of the hearing (Statement of Reasons (SOR) at 52). BLM construes the Board decision in Yankee Gulch II differently than did Judge Rampton, arguing that Simons must demonstrate a discovery at the time of the hearing as well as at the expiration of the prospecting permits in 1970.

fn. 4 (continued)

title have been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor, the permittee shall be entitled to a lease."

30 U.S.C. § 262 (1988) (emphasis added). Similar statutory language regarding entitlement to preference right leases on discovery of valuable deposits on coal prospecting permits was considered by the court in Natural Resources Defense Council (NRDC) v. Berklund, 458 F. Supp. 925, 937-38 (D.D.C. 1978), aff'd, 609 F.2d 553 (D.C. Cir. 1979). The district court rejected the NRDC contention that having issued the permits the Government had discretion not to issue the lease if the land is discovered to contain commercial quantities of coal. Seizing on and distinguishing the "may" language in the section of the statute authorizing issuance of prospecting permits from the "shall be entitled" language in the preference right lease section, the court found "[t]he language 'shall be entitled' could not be clearer, and on its face it obligates the Secretary of the Interior to issue a coal lease to the permittee." 458 F. Supp. at 934; accord, Harry E. McCarthy, 128 IBLA 36, 40 (1993).

^{5/} William G. Fischer of FMC Corporation, an operator in the Green River Basin which includes the lands at issue here, testified that underground mining beneath the reservoir using the room and pillar technique leaving 50 percent behind for support would pose no subsidence problem for the reservoir (II Tr. 116-18). He further indicated that there was no potential for saline contamination of the river (II Tr. 122).

^{6/} Tom van Fleet, a mining engineer who managed mineral development on Union Pacific Railroad lands, testified that trona is sodium carbonate, a leasable form of sodium under the Mineral Leasing Act (II Tr. 72).

[1] In Yankee Gulch II, a case decided in 1990, the Board dealt with the question of whether the evidence developed at a 1986 hearing showed a reasonable prospect that a sodium deposit found within the bounds of prospecting permits issued in 1964 which expired in 1966 could be mined, processed, and marketed at a profit. In resolving this issue, we held that:

This determination must also be made as of the date on which applicants fulfilled all the prerequisites for determining their entitlement to a sodium preference right lease, *i.e.*, at the expiration of their prospecting permits. Cf. United States v. Whittaker (On Reconsideration), 102 IBLA 162, 166 (1988) ("where a patent application is involved and final certificate has issued, the question of present marketability must be determined by reference to the date on which the claimant fulfilled all the prerequisites to the making of entry").

Thus evidence concerning costs and market conditions after 1966 [the expiration date of the prospecting permits] have relevance only to the extent they reflect what may reasonably have been anticipated in 1966.

Yankee Gulch II, 113 IBLA at 134.

To the extent that BLM relies on language from our opinions in Wold, I, Wold II, and Yankee Gulch II, we are unable to conclude that the decisions support BLM's contention. We find the other precedents cited by BLM to be distinguishable from both the present case and Yankee Gulch II. Thus, the decision in NRDC v. Berklund, *supra* footnote 4 involved the applicability of environmental considerations developed after the expiration of the prospecting permits and prior to adjudication of the coal PRLA's. Although the court acknowledged that these considerations might be a relevant consideration in determining the marketability of the deposit, we find no support in the decision for a holding that marketability must be established as of the date of the hearing. Similarly, in Utah International, Inc. v. Andrus, 488 F. Supp. 962, 969 (1979), cited by BLM, the court found that regulations promulgated subsequent to the expiration of the prospecting permit were properly applied to determine the existence of a valuable deposit in adjudicating the PRLA. Again, this does not establish the date for determining marketability. Further, we think that a careful reading of the Solicitor's Opinion cited by BLM is consistent with both NRDC and with Utah International (which are cited therein) in holding that adjudication of PRLA's is properly governed by the regulations (whether relating to the proof of marketability or to environmental considerations) which govern lease issuance at the time of adjudication and which may impact on the economic viability of the deposit. Solicitor's Opinion, M-36920, "Reduction of Production Royalties Below Statutory Minimum Rates," 87 I.D. 69, 80-81 (1979).

The mining claim contest case cited by BLM, United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973), is also distinguishable. It is true that a mining claim is generally subject to contest for lack of discovery of a valuable deposit at any time prior

to patent and a locator of a mining claim on land subsequently withdrawn from mineral entry must establish the existence of a discovery as of both the time of the withdrawal and the time of the hearing. However, the PRLA's at issue in this case are more closely analogous to a mining claim for which a patent application has been filed, the purchase price paid, and a final certificate issued. In such a case the Board has held that marketability must be determined as of the date the "claimant fulfilled all of the prerequisites to the making of the entry, *i.e.*, no later than the date of the issuance of the final certificate." United States v. Whittaker (On Reconsideration), 102 IBLA 162, 166 (1988) (cited in Yankee Gulch II, 113 IBLA at 134).

Therefore, consistent with Yankee Gulch II, *supra*, we hold evidence concerning costs and market conditions after 1970 have relevance only to the extent they reflect what may have reasonably been anticipated in 1970.

The thrust of the BLM appeal is directed to the issue of a valuable mineral deposit. Error is asserted in the holding of the Administrative Law Judge that the stipulation dismissing the prior hearing in this case constituted a final determination regarding the sufficiency of the evidence as to the quantity and quality of the mineral deposit. BLM contends there is a lack of evidence as to the quality of the trona deposit particularly in terms of the minable width of the trona beds underlying the permits. Noting that only one core hole was drilled on each prospecting permit, BLM cites testimony at the hearing to the effect that more data on the underlying trona deposit is required to establish the existence of an economic deposit. Regarding the quantity of trona found in the mineral deposit, BLM contends that, before considering the economics of Simons' operations on the basis of inclusion of private lands within his logical mining unit (LMU), he must show that he controls these deposits. Further, BLM asserts that the Administrative Law Judge erred when he found that a 5-foot trona bed can be mined as profitably as an 8-foot bed, contending that the testimony did not support this conclusion. Finally, BLM challenges the evidence of marketability of the trona deposit in 1970.

As an initial matter, we find on the record in this case that deposits within the LMU are relevant to the issue of a valuable deposit. With respect to mining claims for locatable minerals, the Board has held that

the concept of "mine" development can contemplate operations on a series of contiguous claims and, hence, assuming exposure of a valuable locatable mineral on each claim, the claims may be considered as a group when determining whether a person of ordinary prudence would be justified in the further expenditure of labor and capital with a reasonable prospect of success in developing a paying mine.

United States v. New York Mines, Inc., 105 IBLA 171, 191, 95 I.D. 223, 234 (1988), *citing* United States v. Foresyth, 100 IBLA 185, 94 I.D. 453 (1987). In the context of mining claims for locatable minerals, the claimant must

show ownership or control of the adjacent properties and BLM argues that this standard should be applied to the lands within Simons' LMU. It appears from the record that public lands in the area of the PRLA's occur in a checkerboard pattern due primarily to the railroad grant of alternative sections of land in aid of construction of the transcontinental railroad. See Act of July 1, 1862, 12 Stat. 489; Act of July 2, 1864, 13 Stat. 356. Testimony of Tom van Fleet, a mining engineer with responsibility for managing mineral development on mineral lands held by the Union Pacific Railroad, successor-in-interest as to the railroad grant lands, established that the railroad was willing to negotiate with Simons for a lease of the railroad lands for sodium if he obtained a Federal lease for the interspersed lands (II Tr. 97-98; Exh. 55-A). In this context, where the Federal lands are interspersed with private lands, we find that reserves within the LMU including non-Federal lands may be considered in determining the existence of a valuable deposit.

[2] With regard to the legal effect of the stipulated dismissal of the prior hearing in this case (Exhs. 43, 43-B), Judge Rampton held that the stipulation as to the adequacy of Simons' initial showing was dispositive of the adequacy of Simons' showing regarding the quantity and quality of the deposit (Decision at 12). We find that this holding is not justified by BLM's acceptance of the initial showing. The Board remanded this case for a hearing because it found the issue of discovery of a valuable deposit of sodium involved material issues of fact requiring a hearing before an Administrative Law Judge. Wold II, 95 IBLA at 73. The issue of discovery of a valuable deposit is inextricably tied to questions of the quantity and quality of the deposit which effect whether the deposit can be mined, processed, and marketed at a profit. See Kerr-McGee Corp. v. Hodel, 630 F. Supp. 621 (D.D.C. 1986), vacated on other grounds, 840 F.2d 68 (D.C. Cir. 1988). Notwithstanding this fact, we find that the evidence establishes the discovery of a deposit of sufficient quantity and quality.

Simons proposed to mine three trona beds which he referred to as the upper, middle, and lower trona beds which were shown on isopach maps produced at the hearing (II Tr. 36; Exhs. 44, 45, 46). 7/ His reserve calculations were based on a minimum minable thickness of 5 feet (I Tr. 188). Simons described his calculation of reserves in the LMU based on thickness taken from the isopach maps and calculating the area excluding Federal lands under the reservoir or the adjacent buffer zone (II Tr. 36). 8/ The estimates of recoverable reserves for the three trona beds are set forth on the isopach maps. Estimated recoverable reserves total 85,384,000 tons with an average thickness of 7.2 feet and an average depth of 1,130 feet for the upper trona bed; 81,284,000 tons with an average thickness of

7/ Cumulative thickness of trona beds based on a 7-foot minable thickness were also shown on an isopach maps introduced at the hearing (Tr. 513-14; Exh. 27).

8/ The permit stipulations preclude mining on Federal lands under the reservoir (Tr. 502-03).

6.8 feet and an average depth of 1,300 feet for the middle trona bed; and 113,611,000 tons with an average thickness of 10 feet and an average depth of 1,500 feet for the lower trona bed (Exhs. 44, 45, 46). Simons characterized the deposit as "a viable, attractive reserve from the standpoint of trona mining" (II Tr. 39). This assessment was concurred in by William G. Fischer, a mining engineer with FMC Corporation experienced in trona mining in the Green River Basin whose firm had studied reserves in the area at issue. He testified "there is sufficient reserve there to justify the installation of a plant and mine" (II Tr. 125), noting there were two or three beds in the area that could be mined by conventional (room and pillar) techniques (II Tr. 127).

Stephen Wiig, a BLM geologist, identified the minable trona deposit as beds 17, 14, and 2 using "Culbertson's nomenclature" (Tr. 622-23; Exh. VV at 21). He prepared an isopach map with overlays showing the thickness of these beds within the LMU (Tr. 617; Exh. II). Wiig also prepared an analysis of the trona deposits within the LMU (Tr. 619-20; Exh. VV). The analysis was predicated on the criteria for a minable trona deposit established by Ted Murphy, a BLM mining engineer, including an 8-foot minimum net bed thickness, a minimum acceptable quality level of 85-percent trona for the net bed thickness, recoverable ore constituting 50 percent of the minable ore, a maximum mining depth of 1,800 feet below the surface, no mining under the reservoir buffer zone as provided in the permit stipulations, and a trona density of 133 pounds per cubic foot (Tr. 620-22; Exh. VV, Table 5, at 22). Applying these criteria and using a computer assisted analysis to develop trona isopach plots from certain drilling data, the study concluded there were 89.29 million tons of recoverable trona reserves within the LMU (Exh. VV at 26-29).

The vast difference in estimates of recoverable reserves between Simons and BLM are apparently attributable primarily to the 8-foot minimum thickness used by BLM employees (Tr. 232-34). Simons testified that elimination of reserves less than 8-feet wide is arbitrary and not based on minability (Tr. 234). FMC's Fischer testified that the capability is there to mine down to a 4-foot seam and that there is mining equipment that can be very competitive at a 5-foot thickness (II Tr. 134-35).^{9/} Similarly, Simons indicated that if the mining equipment was designed to mine at the 5-foot thickness, it would be competitive (Tr. 1022-23). In the context of the record before us, we conclude that Simons has shown a deposit of sufficient quality and quantity, assuming marketability.

[3] This Board has previously held that the test for determining whether a permittee has discovered a valuable deposit of sodium justifying issuance of a preference right lease is similar to the test for determining whether the locator of a mining claim under the 1872 Mining Law, 30 U.S.C. § 21 (1988), has discovered a valuable mineral deposit, i.e., whether the

^{9/} Fischer also recognized a "competitive break point" of 7 or 8 feet, but acknowledged that was based on the equipment that "operates in the eight- to ten-foot range" (II Tr. 134).

mineral deposit found within the limits of the claim is of such quantity and quality that a prudent person would be justified in the further expenditure of his labor and funds with a reasonable prospect of success in developing a paying mine. Yankee Gulch II, 113 IBLA at 130-31. This standard has been further refined to include a showing of marketability, a reasonable expectation that the mineral can be extracted, processed, and marketed at a profit. 113 IBLA at 131.

Regarding the finding of a discovery as of 1970, Judge Rampton stated:

Simons must show the reasonable prospect of developing a paying mine only as of the date of his preference right lease application: to wit, as of 1970.

As previously noted, the information concerning the anticipated costs and returns need not be exact. * * * [The applicant] need not prove with absolute certainty that a paying mine will result. * * * [He] need only prove that there is sufficient mineralization to cause a prudent person to expend further time and money with a reasonable expectation that a profitable mine will be developed.

Yankee Gulch II, 113 IBLA at 143.

This Simons has done for the relevant time (1970). He has provided a wealth of economic data concerning his projections of investment costs, start up costs, operating costs, etc., versus the market price for his finished products as of 1970 and the years immediately following (Exh. 97, 98, 100, 100c). The data show a reasonable expectation of success. Respondent has put forward no substantial evidence to rebut Simons's showing as of that time. [Emphasis in original.]

(Decision at 14).

BLM challenges Judge Rampton's conclusion that there was a wealth of economic data to show there was a reasonable expectation of success as of 1970. Initially, BLM notes there is no exhibit marked 100c. Further, BLM challenges Simons' estimate of capital investment used in revenue projections shown in exhibits 97, 98, and 100. Specifically, BLM disputes Simons use of \$45 million in capital costs in 1970 for a mine and soda ash plant complex with a capacity of 800,000 tons per year (TPY) in exhibits 97 and 98.

Simons prepared exhibit 97 entitled "Soda Ash--At end of permit period" to fulfill the requirement to show a valuable deposit at the expiration of the prospecting permit (Tr. 356). The exhibit is based on certain stated assumptions: a capital investment of \$45 million, a production capacity of 800,000 TPY of soda ash, and actual production at the rate of 700,000 TPY of soda ash. The exhibit displays a tabulation of production costs, net proceeds, depreciation, depletion, taxes, and after tax cash flow for a

20-year period (Tr. 909-11). Performing a type of discounted cash flow (DCF) analysis on the after tax cash flow, 10/ Simons determined that the value of the cash flow over the 20-year period when discounted at a rate of 10 percent to determine the value in 1970 was \$58.8 million. On exhibit 97, Simons calculated the PI as 13.5 percent. Exhibit 98 was prepared by Simons using a similar technique to show the profitability of the same soda ash operation over the period from 1970 to 1989 using the appropriate cost and prices as adjusted for each of the years through 1989 (Tr. 357). Discounting the annual profits at 10 percent to establish the value of the proceeds at the time of initial investment, Simons calculated a value of \$93.44 million (Exh. 98). The PI was found to be 18.5 percent (Exh. 98). 11/

John Young, a BLM employee with experience in DCF analysis, found problems with certain aspects of the computation in exhibits 97 and 98 (Tr. 1256-63). Thus, he noted that the calculation of the benefit on the tax deductions for depletion and depreciation was in error to the extent the addition to cash flow was calculated by multiplying the deduction by the figure of (1 minus the tax rate) rather than by the tax rate, i.e., in exhibits 97 and 98 the deduction was multiplied by 52 percent rather than the 48-percent tax rate (Tr. 927-29, 968-69, 1259). He also objected to the apparent failure to exclude royalty expenses from the value on which depletion was calculated (Tr. 925-26, 1257). 12/ With respect to exhibit 98 which calculated net cash flow using prices and costs adjusted for each of the years from 1970 through 1989, Simons acknowledged on cross examination that the calculated cash flow did not allow for the effect of inflation over the time period (Tr. 974). In order to correct for errors in cash flow computation from tax deductions and to show the effects of inflation on cash flow, BLM prepared its own tabulation (Tr. 1260-62; Exh. 98X). This calculation showed a rate of return of 17.65 percent or 10.9 percent when adjusted for the effects of inflation (Tr. 1262; Exh. 98X).

Exhibits 97 and 98 indicate that Simons used a capital investment figure of \$45 million in projecting the profitability of producing soda ash from trona mined on the permits. The hearing transcript reveals the source

10/ John Young, a BLM mineral economist, compared Simons' profitability index (PI) analysis with the Discounted Cash Flow Rate of Return analysis which he found to be a more contemporary method for calculating the "discount rate that makes the sum of present values of cost equal to the sum of present value of revenues" (Tr. 1244-45; Exh. GGG).

11/ Exhibit 100 cited by the Administrative Law Judge in support of his decision detailed a DCF analysis as of 1970 of the profitability of an operation to produce caustic soda similar to the analysis in exhibit 97 for soda ash production.

12/ Although he also noted that there is a 50-percent limitation on depletion which would effect the calculations in exhibit 98, he did not specify the impact of this provision (Tr. 1258).

of that figure to be exhibit 80, a one-page table entitled "Trona Project, Income & Expense (Per Ton Soda Ash)," dated "6/11/70" and attributed to "A.D. Hryck" (Tr. 263). The exhibit, which apparently was a part of a larger report not placed in evidence, 13/ contains two side-by-side tabulations of projected revenues and costs associated with a trona development project. 14/ One of the tabulations identifies the amount of capital investment for fixed assets as \$45 million and for working capital as \$3 million. The tabulation does not identify the components of the \$45 million charge for fixed assets. The testimony relative to exhibit 80 states:

MR. SIMONS: Exhibit No. 80 is a - the results, tabulation of a project in 1970, and these were consumers at the time interested in the soda ash business and this was a study of costs and prices during 1970. I submit this because I've made some economic determinations going back to 1970 and this is the type of thing that I used in 1970 and all the way from 1970 until the present in compiling costs throughout the period and economics throughout the period, from the lease application until the present time. I would have to say that all of this material was just gathered in the way that we've been discussing here, exchanges between companies and various methods of acquiring this type of information.

JUDGE RAMPTON: This is your work product?

MR. SIMONS: This is not. These costs were done by two different companies that were consumers, and I had an input into one of these sets of costs, but they had an outside expert determine these.

JUDGE RAMPTON: Do you wish to voir dire?

MR. MADSEN: I would object. I don't think its competent evidence. I don't think there is a foundation laid for the material that's there. We don't know who A.D.--

MR. SIMONS: Reisick.

MR. MADSEN: We don't know who he is. Mr. Simons didn't do it himself. It's entitled to no weight. There's no competence.

13/ The report is identified as Schedule I.

14/ This exhibit, BLM relates, was admitted as evidence over the objection of BLM as an exception to the hearsay rule (Tr. 263-66). Simons did not prepare the document and refused to fully identify the source (Tr. 263-64). BLM reasons that it had no opportunity to question anyone regarding the competency or reliability of the person or persons who prepared that document. Accordingly, BLM submits it should not be given any weight (SOR at 67).

MR. SIMONS: I could not disclose this information even at this time. One of these companies is still considering getting into the soda ash business. I can't disclose that.

JUDGE RAMPTON: How did you acquire the copies?

MR. SIMONS: Well, they sent me a report of their work, and my report. We had meetings. I went back east and had meetings with them, and we worked on this for a number of years, and this is an excerpt from the report that they sent me of their determination in 1970. As I say, they are still considering, looking at the entry into the trona business. I have the report, but I cannot disclose that.

JUDGE RAMPTON: The objection is overruled. The exhibit is admitted.

MR. MADSEN: Your Honor, may I ask him a question, then?

JUDGE RAMPTON: Yes.

MR. MADSEN: You say this was prepared by two companies-for two companies.

MR. SIMONS: No, two separate companies.

MR. MADSEN: Who are the two companies?

MR. SIMONS: That I can't disclose. [15/]

MR. MADSEN: This is by an unknown person. I don't know whether he's an economist or an animal trainer who put this together. I can't see what place this has in the proceeding. It's not competent or relevant evidence.

MR. SIMONS: I'll explain that, Mr. Madsen.

MR. MADSEN: The figures are there. I can understand what the figures are, but we don't know who it was that put them together, his competency. We don't know what the companies are involved with. I again would strenuously object to this type of evidence.

JUDGE RAMPTON: All right. He may object and I'm overruling that objection because I think it has not only relevancy but sufficient reliability, even though it may be hearsay based on Mr. Simon's explanation to admit it into evidence.

15/ In his brief on appeal Simons identified one of the involved companies, "Owens-Illinois (Exhibit 70)," in defense of his 1970 operating costs (Simons' Response to SOR at 11).

It may not be the primary source of my finding that I make as to cost, but it could corroborate or be different than what my final findings will be. I can't give it the weight that I could if who the person that prepared it were here to testify, but if nothing else, I can admit it as an exception to the hearsay rule, and that it is records kept in the ordinary course of business by Mr. Simons.

* * * * *

MR. MADSEN: Are the dollar figures there in 1970 dollars or do you know?

MR. SIMONS: They're in 1970.

MR. MADSEN: Do you know that for a fact?

MR. SIMONS: I know that for a fact.

(Tr. 263-66).

Simons' answer to the BLM brief references exhibit 90, a letter dated June 24, 1970, from F. C. Appleyard, Director - Mining and Exploration, United States Gypsum Company, to Simons. At the hearing, Simons testified that "At that time, I worked with U.S. on the possibility that we would develop a lease position and that we would go into the mining and processing of trona to soda ash" (Tr. 333). The writer relates that "I have reviewed the files to refresh my memory, and find that in making our analysis of the economics involved, we used a figure of \$7.50 per ton of soda ash loaded in cars" (Exh. 80 (emphasis in original)). Unfortunately Simons did not call the author as a witness and, consequently, we have limited knowledge of what went into this estimate. ^{16/} However, the letter makes it clear that the estimate of "costs do[es] not include depreciation, management and sales overhead, taxes or the cost of acquiring the property * * *" (Exh. 80 (emphasis in original)). Comparison of the two exhibits discloses that this estimate of costs excluding depreciation and taxes correlates well with the tabulation of such costs in exhibit 80 which was based on a projected \$45 million expense for fixed assets.

Testimony by Simons at the hearing discussed exhibit 75, a study of the costs associated with development of a trona mine and processing plant which was made by David Beiling, an engineer employed by David Wold, Simons'

^{16/} One of the possible reasons for the difficulty in obtaining the testimony of some of the industry experts with the most direct knowledge is addressed in the testimony of William G. Fischer, an employee of an operator in the Green River trona basin: "They [his employers] told me that it was not in their interest to have involvement in any project that would potentially bring another supplier on line" (II Tr. 147).

former partner in the PRLA's. Simons described the exhibit as "a bunch of costs and notes that Mr. Beiling determined from the trona producers and from the [S]tate of Wyoming and from various other sources, and this represents various notes and costs that go into the determination of the investment and the costs" (Tr. 267). The study refers to another estimate of investent costs: "Based on 1967 dollars, Cameron Engineers trona report estimates all underground and surface facility pre-production capital at \$50/ton of annual soda ash capacity" (Exh. 75 at 9). At a capacity of 800,000 TPY, the capital cost of \$40 million would compare favorably with Simons' estimate.

The estimate of \$45 million for capital costs in 1970 is challenged as unrealistic by BLM. Although BLM proffered no evidence regarding capital investment required in 1970, it cites the testimony of Fischer, a mining engineer with FMC Corporation. BLM observes that Fischer testified that FMC Corporation built a new 900,000 TPY soda ash plant and mine facility in the area in the 1972-1974 time frame at a cost of approximately \$150 million (Tr. 152-53). This cost, BLM contends,

when scaled down to Simon's proposed 800,000 TPY facility using the scaling formula demonstrated by Mr. Nation (Tr. 1693-1703) and adjusted to 1970 from 1973, using the Chemical Engineering Plant Cost Index (Exh. 74), produces a capital cost of \$122 million. The adjusted capital cost based on FMC actual data is nearly three times Simons' estimate of the capital costs and shows conclusively that he grossly underestimated the investment cost presented in exhibits 97 and 98.

(SOR at 68).

We find that BLM cannot rely on exhibit 74 before 1975 for purposes of cost indexing because the index in that exhibit commences in 1975 and does not go back to 1970. To the extent that BLM relies on other indices to index plant costs back to 1970, the indices were not introduced into evidence at the hearing. Application of indices to establish costs without a foundation in testimony is not sufficient to rebut the evidence tendered by Simons regarding the prospective profitability of development of the sodium leases at the time the prospecting permits expired in 1970. Despite the lack of detail regarding the basis for Simons' cost projections, it is clear from the record that the cost estimates Simons relied upon were provided by sources involved in the trona mining industry in the Green River Basin of Wyoming which he deemed reliable from his experience and his perspective as an investor in the industry. ^{17/} Indeed, it is clear from the testimony that Simons himself had input as a consultant in some of these studies. In this context we are unable to find that BLM has rebutted the evidence of discovery of a valuable deposit of sodium.

^{17/} It appears from Simons' resume of his professional experience that since 1960 he has been a consultant to many parties including Texas Gulf, FMC Corporation, Amax Exploration, and United States Gypsum regarding various aspects of trona mining and development in Wyoming (Exh. 33).

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 affirmed as modified.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Franklin D. Arness
Administrative Judge