

Editor's note: 78 I.D. 15

W. A. HUDSON, II
W. A. HUDSON
EDWARD R. HUDSON

IBLA 70-334

70-335

70-336

Decided January 15, 1971

Mineral Leasing Act for Acquired Lands: Discretion to Lease

The Secretary of the Interior exercises discretion in determining whether or not acquired lands under his jurisdiction should be opened to prospecting for sulphur, and where it is determined by the Bureau of Reclamation that lands under its administrative jurisdiction should not be opened to such prospecting because of potential damage to its surface works, and where the Geological Survey concurs in such recommendation, applications for sulphur prospecting permits on such lands will be rejected in the absence of compelling reasons otherwise.

1 IBLA 232

IBLA 70-334	:	NM-A 6364 (Texas)
70-335	:	NM-A 6387 (Texas)
70-336	:	NM-A 6388 (Texas)
W.A. HUDSON, II	:	Sulphur prospecting permit
W.A. HUDSON :		applications rejected
EDWARD R. HUDSON	:	Affirmed

DECISION

Separate appeals to the Director, Bureau of Land Management, 1/ have been filed by W.A. Hudson, II (IBLA 70-334), W. A. Hudson (IBLA 70-335), and Edward R. Hudson (IBLA 70-336), from separate decision by the Chief, Branch of Minerals, New Mexico land office, Bureau of Land Management, dated March 25, 1969, which rejected their respective applications for sulphur prospecting permits on 1,386.29 acres of acquired lands of the United States in Tom Green County, Texas, within the San Angelo Project because the Bureau of Reclamation, the agency exercising jurisdiction over the surface of the lands, has refused to give consent to issuance of such permits. Because the three appeals involve identical issues concerning the consent of an agency to an acquired lands prospecting permit, and a joint statement of reasons for the appeals has been submitted, the appeals have been consolidated for the purpose of this decision.

Appellants state that the Bureau of Reclamation refused to consent to issuance of the permits because it feared interference with its surface use of the lands due to subsidence from removal of sulphur at depth. They argue to the contrary, stating:

1/ The Secretary of the Interior, in the exercise of his supervisory authority, transferred jurisdiction over all appeals pending before the Director, Bureau of Land Management, on July 1, 1970, to the Board of Land Appeals, effective the same date. Circular 2273, 35 F. R. 10009, 10012.

It is the writer's understanding, based on a reading of attached letters and conversations with geologists familiar with the area, that free sulphur, if it exists on the subject tracts, has been deposited by percolating sulphur-rich ground water in pre-existing pore spaces (vugs and Fractures) in the Clearfork limestone. Further, that prior to and during this secondary deposition, the overburden which was supported by the Clearfork formation was greater than it is today, due to subsequent diminution by erosion. Thus, even assuming a super-rich concentration of 25% free sulphur, its removal by Frash process would leave intact the original host rock skeleton, with little or no reduction in its competence.

Sulphur core drilling has occurred in this area, and the largest areal extent of probable commercial sulphur encountered is four to five acres. Mining such a deposit or a somewhat larger one would not cause a threat of subsidence. In the improbable event of encountering a deposit substantially larger than this, further engineering and geological work would be possible based on actual known and existing conditions prior to issuance of the actual lease. A decision based on such information and the probable value of the sulphur to the operator and royalty owner could be made at that time.

Their position is buttressed by written statements from Harry A. Miller, Jr., a geologist, and from Clyde S. McCall, Jr., a consulting engineer.

A supplemental report from the Commissioner of Reclamation agrees generally with the subsurface petrologic data submitted by the appellants, but suggests:

Extraction of sulphur would create voids in a highly skeletonized pattern following fractures, joints, and porous vuggy bedding in the rock. Porosity and permeability would be greatly increased. At the relatively shallow depths of 300 to 1,500 feet, the multitude of voids created by sulphur removal would cause relaxation of the structural framework and weakening of the rocks. This relaxation and weakening would probably result in opening up vertical joints extending downward to depth of sulphur removal. Eventually, surface subsidence might occur. However, more surely, gaping joints and fissures would develop; those in vicinity of Bureau-constructed works and privately owned building would result in damages. Equally important would be pollution of Twin Buttes Reservoir by flowing artesian sulphur water and salt water welling up along joints and fissures.

The Commissioner indicates that normal prospecting activities could be detrimental to the Bureau of Reclamation programs:

Prospecting, developing, and producing sulphur requires drilling of test holes and wells for injection and mining. Test holes may or may not be permanently cased; moreover, when abandoned they may or may not be effectively sealed permanently. Injection and production wells normally have permanent steel casing cemented in place; nonetheless, over periods of years, steel casing corrodes and fails and furthermore, over the long term cement deteriorates under the attack of sulphur water. Serious pollution problems of flowing sulphur water and salt water from abandoned test holes and wells cannot be discounted.

He then reiterates his original recommendation that no prospecting permits for sulphur should be allowed for acquired lands in the Twin Buttes Dam and Reservoir area.

The Director, Geological Survey, after reviewing both the appellants' contentions and the Commissioner's supplemental report, states:

In short the Bureau of Reclamation contends that sulfur prospecting or mining operations on these lands could cause damage to surface installations by ground subsidence as well as pollution of reservoir waters by sulfur and other saline compounds.

We recognize that sulfur mining operations in the United States which utilize the Frasch process do cause surface subsidence in some instances. Whether or not this would happen on the lands under application is difficult to predict with the information presently available. However, since a possibility of surface subsidence under the reservoir and only a mile from the dam does exist, we believe that the public interest would not be served by the issuance of sulfur prospecting permits which would entitle the permittees to a preference right lease if valuable deposits of sulfur were discovered on the lands.

We feel it would, at this time, be much more equitable to reject the permit applications at the onset rather than to deny or strongly circumscribe subsequent preference right lease applications after time and money have been spent prospecting and sulfur deposits may have been discovered on the lands.

It is within the discretion of the Secretary of the Interior to issue leases or prospecting permits on acquired lands of the United States, subject to the limitations imposed by the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351, *et seq.* (1964). Alexander Grinstein, A-27037 (March 7, 1955).

Even if it could be determined that exploration for and extraction of sulphur from the subject lands would not interfere with surface use thereof by the Bureau of Reclamation, engender subsequent water pollution problems through subsurface seepage, or cause subsidence to the detriment of the adjacent Twin Buttes Dam and other surface structures, and even though the Secretary of the Interior clearly has authority to issue the requested permits, he is not required to do so. His discretionary authority to refuse to issue a prospecting permit is well established. Pease v. Udall, 332 F.2d 62 (9th Cir. 1964); Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), cert. denied, 383 U.S. 912 (1966); cf. Thomas D. Chace, 72 I.D. 266 (1965).

It has not been shown by the appellants that any compelling public interest requires the issuance of the prospecting permits, nor has it been shown conclusively that impairment to Bureau of Reclamation structures will not occur if prospecting activities are undertaken. Rejection of the applications was well within the Secretary's discretionary authority. The Secretary of the Interior may, in the exercise of his discretion, refuse to issue prospecting permits for lands which are subject to permit and lease under the Mineral Leasing Act for Acquired Lands, supra, where such prospecting may cause hidden or latent damage to Bureau of Reclamation structures or projects for which the lands were acquired by the United States. Cf. H. T. Birr, III, et al., A-27947 (July 23, 1959); John R. Roderick and C. Calvert Knudsen, A-29044 (March 1, 1963).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F. R. 12081), the decisions appealed from are affirmed.

Newton Frishberg, Chairman

I concur:

I concur:

Martin Ritvo, Member

Edward W. Stuebing, Member

