

Editor's note: Reconsideration denied by order dated Nov. 23, 1973

STANFORD R. MAHONEY

IBLA 72-412

Decided August 24, 1973

Appeal from the decision of the Bureau of Land Management's Utah State Office rejecting phosphate prospecting application Utah 12759.

Set aside and remanded.

Environmental Quality: Generally -- Mineral Lands: Prospecting Permits -- National Environmental Policy Act of 1969: Environmental Statements

Where a technical examination has established that phosphate prospecting operations, if conducted under appropriate permit stipulations, would not have any significant impact on the environment, but it is feared that if the prospecting resulted in the discovery of commercial deposits damage to the important watershed might result from actual mining operations, the prospecting permit may be allowed subject to the express condition that no preference right lease will issue until and unless an environmental impact analysis, accomplished in accordance with the National Environmental Policy Act of 1969, indicates that the ore can be successfully extracted without significant adverse environmental effect.

Mineral Lands: Prospecting Permits

Except in cases where knowledge of the mineralization is so conclusively established that the failure of a prospecting venture can be anticipated with near absolute assurance, it is error to deny

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an application for a prospecting permit for the reason that prospecting and mining would not be a sound venture because of the depth and scattered nature of the deposits of the mineral sought.

APPEARANCES: Stanford R. Mahoney, pro se; David C. Branand, Esq., Division of Public Lands, Office of the Solicitor of the Department of the Interior, for the Bureau of Land Management.

OPINION BY MR. STUEBING

On October 20, 1970, the Utah State Office of the Bureau of Land Management conducted a drawing to determine the priority of consideration to be accorded two conflicting simultaneously filed applications for phosphate prospecting permits. The application of the appellant was the first drawn.

The Mahoney application involves 320 acres in T. 7 N., R. 3 E., S.L.M., Weber County, Utah, consisting of 160 acres in section 22, of which 80 acres are in the Cache National Forest, plus the reserved federal mineral estate in 160 acres of privately-owned land in section 12.

In the course of adjudicating the application, the Utah State Office requested reports from the Geological Survey and the Forest Service. The Chief, Conservation Division, Geological Survey, recommended that prospecting be authorized subject to certain proposed stipulations which provided for advance approval of a prospecting plan, including waste disposal and restoration procedures. The report also expressed the Survey's willingness to participate in a technical examination of the land, if desired by the Bureau.

The report of the Regional Forester recommended denial of the Mahoney application on the grounds that the subject lands are situated in one of the major drainages of the Pineview Reservoir which constitutes a major source of the developing water supply of the city of Ogden. The report also noted that only the N 1/2 NE 1/4 of section 22 has national forest status, and that this parcel was being considered for exchange to Elmer P. Bastian (application U-13602). Bastian is the surface owner of the land applied for in section 12. The Regional Forester appended to his report some proposed stipulations which he requested be incorporated in the permit in the event that the Mahoney application is allowed.

Subsequently, pursuant to 43 CFR 23.5, there was a technical examination of the subject lands conducted jointly by a BLM Land Use Planner, a BLM Watershed Specialist, a mining engineer from the Geological Survey, the Cache National Forest District Ranger and Mr. Bastian. Each of these individuals, with the exception of Mr. Bastian, prepared his own report, and these reports were incorporated in a comprehensive report prepared by the BLM Salt Lake District Manager and submitted to the Bureau's State Director.

The District Manager, concurring with the Forest Service, recommended against allowing the permit. He acknowledged that prospecting operations would consist principally of drilling and perhaps some trenching, which should not unduly upset the watershed, and that public access to the area would be enhanced by the road improvement incident to bringing the necessary equipment. However, he noted that actual mining operations could have a serious environmental impact, based upon the importance of the value of the land as a watershed. He concluded that if the permit were allowed and commercial deposits of phosphate were located, a preference-right lease could not issue until an environmental impact statement was accomplished as specified in the National Environmental Policy Act of 1969, 42 U.S.C. § 4231 (1970). The Manager stated that since it appeared that mining would probably never be allowed, there is valid reason for denying the prospecting permit.

Information gleaned from the various reports indicates that the land slopes are 20 to 30 percent, with some steeper. There is no commercial timber but there is good grass cover. The Forest Service manages the land under its jurisdiction for a maximum watershed protection. The watershed is stable at present, and although one report states that erodability is high, it is also reported that there does not appear to be any severe erosion in progress. The watershed drains into Dry Bread Hollow and into Causey Reservoir. Causey Reservoir is on the south fork of Ogden River, which drains into Pineview Reservoir. These are said to be important sources of domestic water supply for the City of Ogden. In addition, these waters are reported to afford substantial recreational opportunities and are used extensively for agricultural, industrial and domestic purposes throughout Weber, Davis and Box Elder counties.

The District Manager's report states the BLM administers no surface rights in this land and has no plans regarding it. The primary use of the land is for summer sheep grazing. There is little recreational use. There is no commercial timber, but there

is good low ground cover, consisting mainly of sage grass. There is no public access. The area affords habitat to deer and sage-grouse. The fire hazard would be minimal; prospecting would generate no toxic materials; there is no landslide potential associated with the proposed prospecting activities; there are no scenic values which would be affected; dust generated by drilling would be localized and of no consequence. Prospecting activities would not affect any existing or potential flooding conditions if proper diligence were employed, and small dams could be constructed in gullies below the trench areas to prevent any runoff from reaching existing drainage to the reservoir. The land is not located within any natural, scenic, historic, or other aesthetic feature areas. The need for reclamation after prospecting activities are concluded would be minimal. Proper reclamation would actually enhance future land use, according to the report, through reseeded which would benefit livestock and wildlife, and through the road improvement incident to bringing in the necessary equipment.

The report observes further that the economy of this area of the State of Utah is somewhat depressed, and that while prospecting activities would not have much economic impact, "the exploration and development of new phosphate reserves would aid the ailing mining industry in the State by providing much-needed jobs and would, as a result, increase the tax base and improve the local economy."

Nevertheless, the District Manager notes that if prospecting resulted in discovery of an economic deposit, an environmental analysis of the mining activity would be required. He anticipates that if such an analysis was performed it would probably show that mining would have serious environmental impact, and he concludes "that if we would probably not allow mining, then there is a valid reason for the denying the prospecting operation."

The State Office decision rejecting Mahoney's application cited the importance of the drainage to the Ogden water supply and stated the following reasons for rejection:

It has been determined that prospecting and the resulting mining on this land would not be a sound venture because of the depth of the beds, the dip of the strata in the area, and the scattered nature of the deposits; and would be contrary to the principles of the National Environmental Policy Act

of 1969, and the basic principles of the Act of May 11, 1938 (52 Stat. 347) entitled "An Act to Facilitate the Control of Soil Erosion and Flood Damage Originating Upon Lands Within the Exterior Boundaries of the Cache National Forest in the State of Utah," as amended.

We find the above-quoted reasons for rejection to be unpersuasive. First, the essential concept of prospecting permits is to enable the permittee to seek to discover commercial deposits which are unknown. To pre-judge what the permittee will find if the permit is allowed is to foreclose the possibility that his effort might disclose mineralization which is unknown to the adjudicator. This defeats the basic intent of the statute. Such prejudgment of the result should be applied only in cases where knowledge of the mineralization is so conclusively established that it can be anticipated with near absolute assurance. This is not such a case.

It has not been established that the allowance of the permit would violate the principles of the National Environmental Policy Act. On the contrary, almost all the reports contained affirmative statements to the effect that operations under the permit would not jeopardize the watershed or other environmental values if the permit contained appropriate stipulations for their protection.

Likewise, we accord little significance to the Act of May 11, 1938, as amended, supra, as it relates to the lands at issue. That Act provides funds for the acquisition of private lands in the Cache National Forest which, in the judgment of the Secretary of Agriculture, should become the property of the United States in order that they may be so managed with other lands in the United States as to minimize soil erosion and flood damage. In light of the Forest Service's proposal to convey the only portion of the subject lands under its jurisdiction to Mr. Bastian, thereby removing the land from the Cache National Forest and the ownership of the United States, it would appear that this land is not regarded by the Forest Service as within the contemplation of the Act. Cf. Henry N. Gerritsen, 3 IBLA 90 (1971).

The brief filed on behalf of the Bureau of Land Management concedes that the conclusions contained in the decision with respect to the workability of the phosphate beds are not a proper basis for denial of a prospecting permit, but argues that the workability of the beds is a factor to be considered in determining whether issuance

of the permit would be contrary to NEPA. The Bureau asserts that "[a]n economically marginal operation cannot justify the quantum of environmental damage which might be acceptable from a sound economic venture."

Here, again, we find the judgment of the Bureau turning upon what is presently known about the deposits without regard for what might be learned through prospecting. The anticipated mining operation is characterized as economically marginal before the deposit to be mined has even been discovered, on the presumption that what will be found is nothing more than is already known. As noted above, such pre-judgment tends to defeat the very object of prospecting permits.

In his statement of reasons for appeal, appellant notes that this land was previously under a prospecting permit which expired, whereupon the Bureau, by public advertising, offered to receive simultaneous filings of applications for prospecting permits, to which he responded. Appellant's application was drawn first, and he maintains that under these circumstances he has a legal right to issuance of the permit.

In this contention appellant is in error. He gained no legal right to receive a permit by reason of the filing of his application or through the result of the drawing. The Department of the Interior has no obligation to issue the prospecting permit. The granting of a permit is a discretionary act. See United States v. Wilbur, 283 U.S. 414 (1931); Powhatan Mining Co., 10 IBLA 308 (1973).

Appellant, a geologist, asserts further that the land applied for is not situated in a "major" drainage of Pineview Reservoir; that in fact it is near the head of a minor drainage; that there is no perennial stream at the site of the permit; and that because of the very small catchment area, proper mining practices would eliminate any chance of soil erosion and flood damage and avoid the prospect of pollution of the waters draining into the reservoirs.

Appellant notes that the land embraced by his application consist of two parcels situated, respectively, on the north and south ends of a large phosphate body sampled and mapped by the Geological Survey. He asserts that the several published maps and reports of this deposit agree with his own geologic studies and indicate that this is an outstanding and economically feasible deposit for development.

Appellant says further that this phosphate area is very important economically to the State of Utah. It is situated close to a large populated and agricultural area. It is of a good grade over large thicknesses. It is situated close to Great Salt Lake, a source of potash for production of a balanced fertilizer. It is, he says, one of only two areas in the State that is capable of producing economical phosphate rock, and the only one not presently under development.

We note that the land use plat prepared by the Bureau indicates that several tracts along the same drainage have been withdrawn as phosphate reserves, and on this drainage between the north and south tracts applied for by appellant, the Bureau has, on its own motion, issued a phosphate lease, U-5063, part of which is adjacent on the south end of the northern tract sought by appellant, and another portion of which touches the south tract applied for at its northeast corner. Presumably mining could proceed on these lands.

Under ordinary circumstances, if prospecting under a permit results in the discovery of an economically operable deposit, a preference right to receive a lease will have been earned. It is alleged on behalf of the Bureau that at that point the Secretary would have no power but to issue the lease, having fully exercised his discretion at the time the permit was granted. However, we need not decide the correctness of that assertion as a general proposition in view of our resolution of this particular case.

It is acknowledged that prospecting under properly controlled conditions cannot have any significant adverse effect on the environment. We can perceive no reason why the permit may not be granted subject to the express stipulation and understanding that the issuance of any lease pursuant thereto will be conditioned upon the prior rendition of an environmental impact statement, the findings of which shall determine whether and under what terms the lease may issue. Of course, if prospecting under the permit fails to disclose commercial deposits of phosphate, no further environmental analysis need be undertaken. Perhaps the appellant would be unwilling to accept a permit so conditioned, in which event action on his application shall be deemed to be concluded with final effect. An applicant for a prospecting permit is properly required to agree to certain stipulations as a condition precedent to the issuance of the permit where those stipulations conform to the Department's obligations under the National Environmental Policy Act of 1969. J. D. Archer, 2 IBLA 303, 78 I.D. 189 (1971).

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 set aside and the case is remanded to the Bureau of Land Management for further action consistent herewith.

Edward W. Stuebing, Member

We concur:

Douglas E. Henriques, Member

Joseph W. Goss, Member

