

VERNAL E. BESS ET AL.

IBLA 75-565 through 75-572, 75-640

Decided September 17, 1976

Appeal from decisions of the Nevada State Office, Bureau of Land Management, rejecting in their entirety or in part sodium prospecting permit applications.

Set aside and remanded.

1. Administrative Authority: Generally -- Bureau of Land Management -- Fish and Wildlife Service -- Mineral Lands: Prospecting Permits -- Sodium Leases and Permits: Permits -- Wildlife Refuges and Projects: Leases and Permits -- Withdrawals and Reservations: Generally

The issuance of sodium prospecting permits is discretionary with the Secretary of the Interior, and the Secretary may refuse to issue permits for lands withdrawn for wildlife purposes if the use of the lands for mineral prospecting and development activities would adversely affect the wildlife habitat.

2. Administrative Authority: Generally -- Bureau of Land Management -- Delegation of Authority: Generally -- Fish and Wildlife Service -- Mineral Lands: Prospecting Permits -- Sodium Leases and Permits: Permits -- Wildlife Refuges and Projects: Leases and Permits -- Withdrawals and Reservations: Generally

Where the regulations and Departmental and BLM Manuals do not specifically state how disputes between the Fish and Wildlife Service and the Bureau of Land Management over issuing sodium prospecting permits for lands within wildlife refuge

areas are to be resolved, but the Departmental manuals indicate that such decisions are to be made by the Secretary and the BLM Manual directs that such applications be forwarded to the Washington Office, a decision of a State Office rejecting an application for a sodium prospecting permit will be set aside and the case remanded for processing in accordance with the Departmental and BLM Manuals.

APPEARANCES: Vernal E. Bess, Jeff McDaniel, Mary Catherine Giessing, Mary F. Moore, G.E. ap Roberts, and Joycelyn M. McDaniel, each pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Nevada State Office, Bureau of Land Management (BLM), rejected in whole or in part appellants' individual sodium prospecting permit applications. 1/ In each instance the basis for the decision was the same, namely, that the amended environmental analysis record (EAR) (N 10718) for sodium-potassium prospecting in the Carson Sink area, Nevada, recommended that all applications for such permits be rejected to the extent that the applications included land within the Fallon Wildlife Refuge, the Stillwater Wildlife Management Area, and the Stillwater National Wildlife Refuge. For lands outside of the wildlife areas, some appellants' applications remained pending. 2/

In its decisions rejecting the applications, BLM stated that the EAR recommendation rested upon the United States Fish and Wildlife Service's (FWS) opposition to the issuance of permits within the wildlife areas. The position taken by FWS was that benefits gained from issuance of prospecting permits, and the possible issuance of preference-right leases based upon such permits, were outweighed by the possible adverse impact upon waterfowl habitat that might accompany withdrawal of groundwater from areas near such habitat.

1/ Vernal E. Bess: IBLA 75-565-566 (N 10812-13); Jeff McDaniel: IBLA 75-567-568 (N 9717-18); Mary Catherine Giessing: IBLA 75-569 (N 9716); Mary F. Moore: IBLA 75-570 (N 9649); G. E. ap Roberts: IBLA 75-571-572 (N 9650-51); Joycelyn M. McDaniel: IBLA 75-640 (N 10850-51).

2/ N10850 Joycelyn McDaniel

N10812 Vernal E. Bess

9718 Jeff McDaniel

N9716 Mary Catherine Giessing

N9649 Mary F. Moore

In their appeals, some of the appellants argue that rejection of their permit applications is uncalled for because there are no fish or wildlife habitating the lands involved and because protection of the wildlife habitat can be assured by imposing environmental stipulations for activities within the withdrawn areas similar to those required on other prospecting permits on lands adjacent to the wildlife areas.

Statement of the Facts

The Carson Sink is a playa which encompasses approximately 500 square miles of land. The land status presents a checkerboard pattern because of the grant of odd-numbered sections to the Central Pacific Railroad. In the EAR, BLM described the Sink as having little in the way of potential use except for mineral leasing purposes. The land is essentially barren with no vegetative cover. Recreational usage is negligible. Wildlife utilization is also minor with the exception of the Fallon National Wildlife Refuge, the Stillwater Wildlife Management area, and the Stillwater National Wildlife Refuge, which occupy the southwestern two-thirds of the Sink. The Carson River, along with associated tributaries, discharges about 120,000 acre-feet of water annually into the Carson Sink. Much of this water flows into the ponds and canals in the southern portion of the Sink to form the basis for the wildlife areas. A major portion of the discharged waters enters the groundwater system. A large part of the Sink is covered by sodium or potassium mineral prospecting permit applications, and some permits have been granted, subject to special stipulations, for lands not within the wildlife areas.

After reviewing the initial draft EAR prepared by BLM, FWS sent a memorandum to BLM, dated October 29, 1974, stating the following:

Because of possible adverse effects on the water supply of the Stillwater National Wildlife Refuge and the Stillwater Wildlife Management Area, we oppose the issuance of sodium and potassium prospecting permits and subsequent leasing arrangements until the applicants have accomplished adequate hydrologic research to substantiate that the proposed operation would not have an adverse effect upon present ground and surface water resources. If brine removal results in replacement by fresh water in the underground aquifers there is no present evidence to indicate that this replenishment would not occur at the expense of the present water resources on the refuge and wildlife management area.

Shortly thereafter, in a memorandum dated November 13, 1974, from the BLM District Manager, Carson City, to the State Director, the following was proposed:

The Fish and Wildlife Service has * * * recommended that no permits be issued, on either the wildlife withdrawn lands or on lands administered by [the Bureau of] Reclamation or BLM, until hydrologic data proving there is no danger to surface waters on refuges is obtained.

There is, however, another alternative that should be satisfactory to all parties concerned. I recommend that prospecting permits be issued subject to the special stipulation [supra] * * * making preference-right leases contingent upon the applicants' proving to the Fish and Wildlife Service and to BLM that there is no danger to wildlife habitat * * *.

In January and February of 1975, BLM contacted FWS and informed it of the District Manager's recommended alternative, namely, the imposition of protective stipulations on all lands within the Sink. BLM also proposed to implement a one-quarter mile buffer zone between prospecting operations and waterfowl sites as an additional precautionary measure. In a response dated February 21, 1975, FWS objected to BLM's recommended action and reiterated its opposition to any prospecting activities within the Sink and particularly within the withdrawn wildlife areas.

By letter dated March 18, 1975, BLM informed FWS that it had reached the following compromise to the dilemma:

1. We are recommending that no prospecting permits be issued within either the Fallon National Wildlife Refuge or the Stillwater Wildlife Management Area. [Stillwater National Wildlife Refuge added later.]
2. We are recommending that each prospecting permit [within the remainder of the Sink] shall carry a special stipulation which will require the permittee, if he discovers an economically-recoverable source of sodium and/or potassium, to develop hydrologic data which will be used in a subsequent environmental analysis; the granting of a lease will be contingent upon proof that no major environmental impact will occur.

We feel that the above measures are a realistic and sincere attempt to satisfy the concerns, if not

the terms, of the U.S. Fish and Wildlife Service. These measures should adequately protect wildlife values.

On March 25, 1975, the District Manager sent a copy of an amended EAR to the State Director, and stated the following:

The U.S. Fish and Wildlife Service has recommended that no prospecting permits be issued for the Carson Sink area, whether on established wildlife management lands or not. The reason expressed for this position is the unknown character of the groundwater system; withdrawal of groundwater in one area may effect a lowering of surface water levels in another area. This type of interaction could have a dramatic adverse impact upon waterfowl habitat within a management area.

We feel that a blanket denial of all applications for the above reason is untenable and contrary to Bureau policy of fostering orderly development of Federal mineral resources. However, we also recognize our obligation to protect wildlife values. Accordingly, we feel that we can satisfy the goals of the U.S. Fish and Wildlife Service by excluding from prospecting those lands identified above [withdrawn areas] and by employing a special stipulation [on adjacent lands]. * * * The special stipulation * * * has, as its primary goal, the final resolution of the enigmatic groundwater-surface water problem. * * *

Thereafter, BLM issued its decisions rejecting sodium prospecting permit applications for lands within the wildlife areas.

Applicable Law

Pursuant to 30 U.S.C. § 261 (1970), the Secretary of the Interior is authorized, under such rules and regulations as he may prescribe, to grant to any qualified applicant a sodium prospecting permit. 43 CFR Part 23 provides regulations for the protection and conservation of nonmineral resources during operations for the discovery, development, surface mining, and onsite processing of minerals under permits, leases, or contracts issued pursuant to the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181-287 (1970).

43 CFR 23.5(a) provides that the District Manager, BLM, shall make a technical examination to determine the effects of the proposed prospecting activities, "and take into consideration the need for the preservation and protection of other

resources, including * * * the protection of fish and wildlife and their habitat * * *." Based upon the results of the technical examination, the District Manager shall formulate requirements which the applicant must meet for the protection of nonmineral resources during the conduct of exploration or mining operations. 43 CFR 23.5(b).

43 CFR 23.5(d) provides that whenever it is determined that any part of the area under consideration is such that previous experience under similar conditions has shown that operations cannot feasibly be conducted by any known methods or measures to avoid "* * * (5) [t]he destruction of key wildlife habitat * * * the district manager may prohibit or otherwise restrict operations on such part of an area."

43 CFR 23.8(a) and (b) provide that before surface mining operations may commence under any permit or lease, the operator must file a mining plan with the mining supervisor (U.S.G.S.) which includes, in part, an estimate of the quantity of water to be used, and a description of measures to be taken to prevent damage, inter alia, to fish and wildlife.

The appellants urge that BLM should have permitted sodium prospecting activity within the wildlife areas, as well as adjacent thereto, subject to protective stipulations which would have assured protection against possible damage to the wildlife habitat. In its final EAR recommendations, and in the decisions issued to the appellants, BLM determined that in view of FWS's unwavering opposition to prospecting and development activities within the Carson Sink, permit applications for areas within the wildlife areas would be rejected despite BLM's conclusion that no harm would occur to the wildlife habitat if buffer zones as well as protective environmental stipulations were required for activities within these areas. One of the special stipulations provided:

If the prospecting under this permit results in the discovery of a workable deposit of sodium and/or potassium, no preference right lease will be issued until and unless an environmental analysis and Environmental Impact Statement, if required in accordance with the National Environmental Policy Act of 1969, indicates that the ore can successfully be extracted without significant adverse environmental impact. One major consideration will be the effect of brine withdrawal on the present water resources of the Stillwater National Wildlife Refuge, the Fallon National Wildlife Refuge, and the Stillwater Wildlife Management Area.

In its letter to FWS, dated March 18, 1975, BLM voiced its discomfort with this final compromise and stated that in the event appeals were taken from decisions of BLM which were predicated upon FWS recommendations, FWS would be expected to demonstrate the rationale supporting its objections to any and all prospecting in the Sink area. The letter ended with the comment that "[f]ailure to satisfactorily support this position could result in a legal determination that prospecting (and leasing) shall be permitted not only in the Carson Sink proper, but in the [wildlife areas] * * * as well." ^{3/}

On the other side of the coin, the record reflects the FWS's strong and adamant opposition to mineral leasing activities within any portion of the Sink so long as there exists incomplete data available concerning the potential adverse effects which leasing activities could have upon wildlife resources. However, we note also that after receiving a copy of the final EAR, FWS transmitted a memorandum to BLM, dated March 27, 1975, stating that while it believed it to be against the public interest to encourage mineral leasing activities within the Carson Sink, it determined that BLM had:

* * * made a sincere effort to recognize the needs of wildlife and other resources on public lands outside the refuge boundaries by stipulating that a lease be granted only after the permittee has provided satisfactory proof that no environmental impact would occur as a result of the proposed mining activity.

FWS also concurred with BLM's decision to exclude from leasing activity areas withdrawn for wildlife purposes.

While BLM acceded to FWS's views as to lands within the wildlife areas, albeit reluctantly, the appellants ask the Board to reverse BLM's decisions. To resolve these appeals we must consider where final authority lies within the Department to determine whether and in what manner mineral leasing activities should be initiated on areas withdrawn for wildlife purposes.

[1] Under the Mineral Leasing Act, the issuance of sodium prospecting permits as well as permits for other leasable minerals is discretionary with the Secretary of the Interior. United States v. Wilbur, 283 U.S. 414 (1931); Stanford R. Mahoney, 12 IBLA 382, 388 (1973); Powhatan Mining Co., 10 IBLA 308 (1973). The Secretary

^{3/} The record does not reflect that FWS was notified of the BLM decisions, nor has FWS made an appearance in any of the cases. Pursuant to 43 CFR 23.12(c) the authorized officer of FWS should have been named as an adverse party in these decisions.

has long refused to issue permits if the use of land for mineral prospecting and development activities would adversely affect a use for which the land was reserved. Earl J. Boehme, 62 I.D. 9 (1955). Therefore, from a legal standpoint, it is permissible for the Secretary to exclude the withdrawn areas from mineral prospecting and development activities. 4/

[2] As a means of harmonizing the objectives of the Department's mineral leasing activities with the goals of the Department's wildlife conservation programs, as well as other nonmineral resource programs, the Secretary has issued regulations, infra, in order to implement a process for determining the existence and mitigating the impact of conflicts in the use of the public lands. By issuance of these regulations, the Secretary has formally exercised his discretionary authority with regard to the procedures necessary to assure protection of segregated or withdrawn public lands under consideration for mineral prospecting and development activity.

Regulation 43 CFR 23.5(c) provides, in part, the following:

If the lands covered by an application or offer are under the jurisdiction of a bureau of the Department of the Interior other than the Bureau of Land Management, the district manager shall consult representatives of the bureau administering the land.

In the event a disagreement arises, the regulation does not set out a method for its resolution. This omission is in direct contrast to guidance provided in other situations where conflicts occur. 5/

4/ In its most recent consideration of mineral development activities within wildlife areas, the Congress has expressly forbidden geothermal leasing for lands within wildlife areas. 30 U.S.C. § 1014 (1970); see 43 CFR 3201.1-6(c).

5/ For example, 43 CFR 23.5(b) provides that:

"If the application or offer is made under the Mineral Leasing Act of February 25, 1920, or the Materials Act, and if the lands are under the jurisdiction of an agency other than the Department of the Interior, the district manager shall consult representatives of the agency administering the land and obtain their recommendations, the issues shall be referred for resolution to the Under Secretary of the Department of the Interior and the comparable officer of the agency submitting the recommendations. In the case of disagreement of the issues which are so referred, the Secretary of the Interior shall make a determination on the recommendations which shall be final and binding." (Emphasis added.)

In a situation analogous to the one at hand, namely, for instances where oil and gas leasing activity is being considered for areas within wildlife refuges, the Secretary has promulgated the following. 43 CFR 3101.3-3(1) provides:

Leasing. No offers for oil and gas leases covering wildlife refuge lands will be accepted and no leases covering such lands will be issued except as provided in § 3101.3-1. There shall be no drilling or prospecting under any lease heretofore or hereafter issued on lands within a wildlife refuge except with the consent and approval of the Secretary of the Interior with the concurrence of the Fish and Wildlife Service as to the time, place and nature of such operations in order to give complete protection to wildlife populations and wildlife habitat on the areas leased, and all such operations shall be conducted in accordance with the stipulations of the Bureau of Land Management on a form approved by the Director. [Emphasis added.]

43 CFR 3101.3-1 states that:

In instances where it is determined by the Geological Survey that any of the lands mentioned in § 3101.3-3 of this section and defined in this section as not available for leasing are subject to drainage, the Bureau of Land Management, with the concurrence of the U.S. Fish and Wildlife Service, will process an offering inviting competitive bids in accordance with the then existing regulations relating to competitive oil and gas leasing. Such leases shall be issued only upon approval by the Secretary of the Interior and shall contain such stipulations as are necessary to assure that leasing activities and drilling shall be carried out in such a manner as will result in a minimum of damage to wildlife resources. [Emphasis added.]

See also, 43 CFR 3101.3-3(b)(1).

While there is no specific prohibition against issuance of leases for other minerals, the Secretary has further emphasized his particular concern for wildlife areas as reflected in the Departmental Manual which provides in 242 DM 1.2C that the authority to make final decisions respecting mineral leasing within wildlife refuges has not been delegated to FWS, but that "Such decisions will be made only by the Secretary." (Emphasis added.)

Whether this specific authority has been delegated to BLM is not clear. The Departmental Manual specifically states that BLM may not approve oil and gas leases on lands within wildlife refuges unless prior authorization is obtained from the Secretary. 235 DM 1.2(A)(5). There is no limitation covering other leasable minerals. However, it is apparent from the Departmental Manual and from provisions in the BLM Manual that applications for permits and leases covering lands in areas withdrawn for wildlife purposes are to be treated in a special manner. An earlier BLM Manual set forth the following procedures for the handling of sodium prospecting permits:

All applications for permit or lease covering lands within a Fish & Wildlife Area should be processed, and reports thereon requested, on an individual case basis. However, if applications cover wildlife refuge lands, the case file should be forwarded to the Washington Office for consideration and appropriate instruction.

VI BLM Manual Ch. 217.10A. This instruction has not been superseded by a release in the new BLM Manual format. However, part 3509 of the BLM Manual contains instructions for implementing the provisions within 43 CFR Part 23. Section 3509.1, Step 10, sets out the procedure for resolving conflicts:

10a. If impossible to resolve conflicts at this level, [the District Manager] submits problem in writing to the State Director with recommendations for resolution.

10b. If State Director cannot resolve conflicts, [he] refers [the conflict] to Secretary of the Interior through Director, BLM, and comparable official of other agency or bureau for resolution.

Accordingly, in view of the regulations and directives set out above, we are left with a situation which suggests that the matter before us may properly be a subject requiring review by the Secretary.

The Board, therefore, concludes that the cases should be remanded for further consideration by BLM, FWS and the Secretary. First of all, in light of FWS's acceptance of BLM's proposed special stipulation respecting lands adjacent to the wildlife areas, we direct FWS to reassess the basis for its recommendation against prospecting activity within the wildlife areas. Such reconsideration may resolve the present conflict between the positions of the two Bureaus. Second, regardless of the final positions on the matter as between BLM and FWS, each Bureau is directed to submit its recommendations

to its respective Director in Washington, D.C. Thereafter, resolution of the question of where final authority lies within the Department regarding the issuance of sodium prospecting permits and leases within areas withdrawn for wildlife purposes should be determined by the Secretary. 43 CFR 4.5.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the cases are remanded to BLM for further action consistent with the views expressed herein.

Martin Ritvo
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Joan B. Thompson
Administrative Judge

