

Appeal from a decision of the Idaho State Office, Bureau of Land Management, which denied a protest concerning competitive phosphate lease sale I-8289.

Affirmed.

1. Rules of Practice: Appeals: Standing to Appeal -- Rules of Practice: Protests

Where a protest is filed to a competitive phosphate lease offering, which protest is denied, and a timely appeal is filed by the protestant, the protestant is "a party to the case" within the meaning of 43 CFR 4.410. In order to maintain the appeal, however, such a party must also show an interest which has been adversely affected by the decision appealed.

2. Environmental Quality: Generally -- Mineral Leasing Act: Environment -- Phosphate Leases and Permits: Leases

Allegations that stipulations included in a notice of a competitive phosphate lease offer improperly favored one bidder over all other potential bidders will not serve as a basis for disturbing the lease sale where the record does not support such allegations, but does, in fact, support a finding that the stipulations were reasonably directed toward environmental protection.

3. Mineral Leasing Act: Generally -- Phosphate Leases and Permits: Leases

Where, on appeal, the fair market valuation of an area involved in a competitive

phosphate lease offer is challenged in general terms, but no specific evidence of error is presented, and the record supports the evaluation, that evaluation will not be disturbed.

APPEARANCES: Curt R. Thomsen, Esq., Idaho Falls, Idaho, for John D. Archer; William D. Olson, Esq., Pocatello, Idaho, for Conda Partnership; Robert S. Burr, Esq., Office of the Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

John D. Archer has appealed the July 2, 1982, decision of the Idaho State Office, Bureau of Land Management (BLM), which denied a protest made by Archer concerning the lease form and stipulations to be used in Idaho phosphate lease I-8289, and which concluded that the phosphate lease sale, which had been set for July 8, 1982, should be held as scheduled.

A notice of phosphate lease offer was announced by BLM in the spring of 1982 and offered 640 acres of land estimated to contain 8,685,000 tons of phosphate recoverable by surface mining methods in two zones totaling 49.1 feet in thickness. The majority of the area in question is in the Caribou National Forest of which the United States Forest Service (Forest Service) is the surface managing agency. The lease was being offered by sale bid of \$246,400 or more followed by oral auction to the qualified bidder submitting the highest cash amount per acre or fraction thereof in accordance with the provisions of the Mineral Leasing Act of 1920, 30 U.S.C. § 211 (1976). It was stated that no bid would be considered which was less than \$385 per acre. In addition to the requirements of the phosphate lease form itself, stipulations were attached to the offer dealing with the conduct of any mining operation on the property. These special lease stipulations proposed by the Forest Service encompassed 15 paragraphs and dealt primarily with environmental issues. There was also a group of stipulations on form 3109-3 and an exhibit B that called for a monthly report to the Mining Supervisor.

This notice of lease offer generated protests from Archer and others. The protests were denied by the State Director, BLM, before the sale on July 8, 1982. None of the protestants bid at the sale. Archer is the only one of the group who has filed an appeal. The successful bidder at the sale was Conda Partnership (Conda). 1/

1/ In a letter dated June 25, 1981, from Conda to the Idaho State Director, BLM, Conda explained its formation as follows:

"On April 15, 1974, Agricultural Products Corp., which is now the Conda Partnership, submitted to the Bureau of Land Management an application for lease. Agricultural Products Corp. was acquired by Beker Industries Corp. in 1975. Beker Industries, in January 1979, sold a 50% interest in the mining and milling operations to Western Co-operative Fertilizers Limited and the Dry Valley leases were assigned to a new company, formed by Beker and Western Co-op., called the Conda Partnership."

Certain facts are necessary to an understanding of this appeal. Conda is the operator of the Maybe Canyon mine on a lease (I-04) just south of the area involved in this controversy. Archer holds interests in a number of phosphate leases in Idaho. Conda subleases the Mountain Fuel lease (I-012989) from Archer. ^{2/} In 1974, application for competitive lease offer I-8289 was filed by Agricultural Products Company. Apparently no action was taken on that application until November 1979 when there was renewed interest in having the application brought up for competitive bid. ^{3/} The chronological history following this renewed interest is contained in a memorandum dated June 10, 1982, from the BLM Chief, Division of Operations, to the Idaho State Director, which states in relevant part:

2. The Forest Service, in a letter dated October 10, 1980, to the Idaho State Director, initially recommended that no lease be issued unless it could be established that a mining operation on North Dry Ridge would be a logical extension of the existing North Maybe Canyon Mine (on lease I-04). They requested that USGS evaluate the proposal in that light.

3. On June 25, 1981, Beker Industries, operating a Conda Partnership, amended their application and requested that BLM, USFS and USGS update reports. By letter dated August 3, 1981, we requested the updated reports.

4. By letter dated January 20, 1982, the USFS responded and based on their EA [environmental assessment] recommended for lease 600 acres of lands administered by the Caribou N.F. with 15 lease stipulations to be incorporated into the terms of the lease.

5. By memo dated April 2, 1982, the Idaho Falls District Office responded, recommending for lease the 40 acres of BLM lands involved in the amended lease application, subject to the same lease stipulations required by the Caribou National Forest.

6. On April 1, 1982, the Minerals Management Service [MMS] responded concurring with the recommendations of the USFS. In addition, they recommended the lands be segregated as a leasing unit and be offered for sale by competitive bid. ^{4/}

^{2/} Counsel for Archer admits that relations between Archer and Beker (see note 1) have been adversary in nature. Counsel for Conda states that Archer has sought to force Conda to mine the Mountain Fuel lease. Counsel cites Archer v. Mountain Fuel Supply Co., 102 Idaho 852, 642 P.2d 943 (1982), in support of his statement.

^{3/} Counsel for Archer states that in December 1974 the Department of the Interior began preparation of an environmental impact statement concerning development of phosphate in southeastern Idaho, and that in 1978 the Department of the Interior and the Forest Service also prepared the Diamond Creek Land Management Plan for the Caribou National Forest.

^{4/} By Secretarial Order No. 3071 published in the Federal Register on Feb. 2, 1982, 47 FR 4751, the Secretary created the Mineral Management Service

7. On May 17, 1982, the lease offer package was sent out to prospective bidders. Included was a sale notice, detailed statement (including all terms and conditions) and a copy of the lease form to be used for this sale. Note: The lease form was mistakenly printed with a form number and date, giving the impression that the form was the official new phosphate lease form that would be used in all future actions, including readjustments of terms and conditions. A notice was then sent to each prospective bidder informing them that the form was to be considered as a manuscript for this particular sale, and not the final lease form.

8. First publication appeared in the Caribou County Sun, Soda Springs, Idaho, on May 20, 1982, stating the sale was to be held on June 8.

9. Because of concerns by industry, on June 4, 1982, a notice of publication was sent to the Caribou Sun, changing the sale date from June 8, 1982, to July 8, 1982. The change was made by mutual agreement between MMS and BLM.

On June 1, 1982, Archer filed a protest with BLM stating:

The stipulations, Exhibit "A" of the offer, contain many objectionable, and possibly unattainable, provisions. Stipulation 10 is particularly troublesome as it clearly favors the owner of Idaho Lease I-04. [5/] It offers no alternative transportation route to the other prospective bidders. Obviously no responsible bidder would submit a bid for ores that are locked up.

Hearings and review under the guidelines of the United States Forest Service in the EIS [environmental impact statement], Management Alternatives for the Diamond Creek Planning Unit, have not been held. The lands under I-8289 are within the planning unit.

The interest of the United States in obtaining the best possible bid are [sic] not served by the lease offer.

The offer should be withdrawn until hearings have been held and an alternate route for the transportation of the ores can be found.

fn. 4 (continued)

(MMS) to, inter alia, take over the function of the Conservation Division, Geological Survey. On Dec. 2, 1982, the Secretary transferred the onshore minerals management functions of MMS to BLM. Secretarial Order No. 3087. 48 FR 8983 (Mar. 2, 1983).

5/ Stipulation 10 stated: "10. Existing transportation facilities will be used and ore will be hauled through existing disturbed areas on the I-04 lease."

The Forest Service response to Archer's protest was contained in a memorandum dated June 18, 1982, prepared by a Forest Service mining engineer. He stated:

Stipulation 10 means that access to, and haulage from Lease I-8289 would be through the existing North Maybe Mine on lease I-04. That portion of the North Maybe Mine that would be involved will be depleted in 1983. Section 3(a) of Lease agreement I-04 reads as follows.

Sec. 3. The lessor expressly reserves:

(a) Rights reserved. -- The right to permit for joint or several use easements or rights-of-way, including easements in tunnels upon, through, or in the land leased, occupied, or used as may be necessary or appropriate to the working of the same or other lands containing the deposits described in the act, and the treatment and shipment of the products thereof by or under authority of the Government, its lessees, or permittees, and other public purposes.

Under the foregoing section the Federal government has the authority to grant any needed right-of-way across lease I-04. The use of haulroads presently existing on I-04 would have to be negotiated with the lessee. Right-of-way over private land lying between I-04 and the railroad and/or the public road would have to be negotiated with the landowner.

* * * * *

Proper public involvement was obtained on the Diamond Creek Environmental Statement as evidenced on pages 306 and 307 of that document.

BLM in the July 2, 1982, decision provided:

The stipulations developed by the Caribou National Forest are for environmental protection of the lands and resources on and near the North Dry Ridge tract. To minimize such impacts in developing the phosphate resources in North Dry Ridge, it is necessary to utilize to the maximum extent possible, adjoining lands already disturbed by mining activity. These are the reasons for precluding access and haul roads outside the I-04 pit area, utilizing existing transportation systems on Federal lands and backfilling of waste into lease I-04. Both the Bureau of Land Management and the Minerals Management Service have reviewed the stipulations and find them to be satisfactory. In addition, we have contacted the Forest Service regarding your concerns, and both the Caribou National Forest and the Intermountain Regional Office in Ogden, Utah agree that the stipulations should remain as written.

Regarding access and utilization of haul roads on lease I-04, the successful bidder for lease I-8289 could apply for and receive an easement across the I-04 lease utilizing the existing road network. Access across private lands, however, cannot be guaranteed or provided by the Government, as this has always been and remains the responsibility of the lessee.

The combination of geographic and geologic circumstances, and the fact that the I-04 lessee has an existing transportation system puts that lessee in a better position to develop and mine the offered lease tract than other parties. However, with completion of mining of the north segment of lease I-04 in the near future, the road system within the lease and on Federal lands adjacent to the lease will be available for use in developing and mining the offered tract.

Under the guidelines of the Southeast Idaho Phosphate EIS, the Caribou National Forest completed an environmental assessment. The Special Stipulations required on this lease offer were a result of that assessment. As addressed in their environmental assessment, the North Dry Ridge lease tract conforms with the guidelines established in the Diamond Creek Management Plan. Item 5c of the Diamond Creek Management Plan states:

Recommend issuing mineral leases only on those lands which form logical parts of existing mines. Withhold further prospecting permits and leases until mining is within 25 years of exhausting phosphate reserves.

Mining of the North Dry Ridge Segment is a logical part of an existing mine (North Maybe Canyon unit of lease I-04) whether it is mined by the present lessee or another party.

Public hearings regarding phosphate mining were held during preparation of the Southeast Idaho Phosphate EIS, but are not required for individual lease sales or offers.

For this lease sale only, we will use the lease format contained in the offering notice as any of the changes proposed in the terms and conditions would not alter the bidding positions of prospective lessees.

In the statement of reasons for appeal, Archer lists his reasons for requesting reversal of the lease offer as follows: Information was available to Conda which was not available to prospective bidders; the lease offer was structured to favor Conda; improper bid procedures were used by MMS; the offer of I-8289 for competitive leasing was inappropriate; and improper influence was exerted by Conda. Archer requests that the lease, I-8289, not be awarded to Conda and that the lease either be withdrawn pending completion of a complete EIS, or that the lease be reoffered after complete information has been provided to all bidders and after a restructuring of the lease terms so as not to favor Conda over other potential bidders. Archer further requests that the BLM decision allowing competitive lease offer, I-8289, be reversed.

Archer also charges that Conda trespassed in the I-8289 area prior to the lease sale and thereby gathered information unavailable to other prospective bidders.

Counsel for Conda has filed an answer to Archer's statement of reasons for appeal in which Archer's standing to appeal the matter is questioned. Counsel for Conda further states that the claim that Conda had information which was unavailable to other potential bidders has no merit; that the lease offering was structured to favor the environment rather than to favor Conda itself; that the bid procedures used, *i.e.*, use of a sealed bid followed by oral auction, was proper; that the lease offer was proper under the circumstances, *i.e.*, the lease offering was not inappropriate because I-8289 is "a logical extension of an existing mine" and the stipulations are not too site-specific; and that there was no improper influence exerted by Conda.

Counsel for BLM also submitted a brief concerning this matter which stated that any objections raised by Archer concerning mine plan revisions granted Conda on lease I-04, and the decision finding that a lease of I-8289 would be considered a logical extension of lease I-04, are outside the scope of this appeal since Archer could have objected to both actions at the time they were being considered, but he did not. Counsel for BLM further states that the special stipulations, the resource estimates prepared by MMS, the bidding procedures, and the fair market valuations of this area were all done within the parameters of the various agencies' authority and Archer has provided no argument to counter their authority nor has Archer presented any facts that would show error on the part of the agencies in making these decisions. As to information unavailable to bidders, counsel for BLM states that much of the information was proprietary to Conda and could not have been made available by MMS and that Archer has not shown any refusal by MMS to make available all information it could concerning the phosphate deposit on the lands covered by I-8289. Counsel for BLM also asserts that Archer has shown no facts establishing improper influence in the sale of the lease, nor established a trespass prior to the lease sale. Finally, counsel for BLM states that Archer has not shown himself to have been adversely affected by the dismissal of his protest to the lease sale so as to have standing to appeal the decision under 43 CFR 4.410. Accordingly, counsel for BLM urges that the appeal be dismissed under 43 CFR 4.410.

[1] We will first address the standing issue. The regulation, 43 CFR 4.410, provides in relevant part: "Any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management or by a decision of an administrative law judge, shall have a right to appeal to the Board * * *."

Archer cites numerous cases, as well as section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976), as supporting his standing to appeal this matter. ^{6/} In essence, Archer contends that, but for the fact

^{6/} Section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976) states: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." This section is, of course,

that the lease offer was improperly structured to favor Conda, he would have bid on I-8289.

Under the regulation, 43 CFR 4.410, there are two separate and distinct prerequisites to prosecution of an appeal: (1) that the appellant be a "party to the case"; and (2) that the appellant be "adversely affected" by the decision below. Denial of a protest makes an individual a party to a case. Such a denial, however, does not necessarily establish that an individual is adversely affected. See Elaine Mikels, 41 IBLA 305, 307 n.1 (1979); United States v. United States Pumice Corp., 37 IBLA 153, 158-59 (1977). An unsuccessful protestant must show that a legally recognizable "interest" has been adversely affected by denial of the protest. In Re Pacific Coast Molybdenum Co., 68 IBLA 325, 331 (1982).

Archer is clearly a "party to the case" since he filed a protest which was denied. The question is, therefore, whether Archer has a sufficient interest, adversely affected, to maintain this appeal. Archer's claim is that the offer favored Conda. Archer holds phosphate interests in southeastern Idaho, and it is undisputed that Conda's acquisition of this lease and subsequent development would adversely affect Archer economically. Under the guidelines established in In Re Pacific Coast Molybdenum, *supra*, Archer has shown that a legally recognizable "interest" has been adversely affected by denial of the protest and, as such, he has standing to appeal the denial of his protest. Relief could be accorded Archer, *i.e.*, the phosphate lease offering could be withdrawn and the offer could be revised if it were found that the offer had, in fact, been structured improperly in favor of Conda. Thus, we find that Archer has the right to appeal in this case.

Next we turn to an issue raised by counsel for Conda. He argues that Archer has improperly expanded the bases for his protest. He asserts that Archer has raised new issues on appeal. Counsel cites the case of Henry Alker, 62 IBLA 211 (1982), in which the Board found that where BLM dismissed a protest to the issuance of an oil and gas lease and the protestant sought to raise new issues in his statement of reasons on appeal, the Board would not consider those new issues. The Board stated "[e]xcept in extraordinary circumstances, this Board does not review issues which have not been the subject of a decision which is before us on appeal * * *." *Id.* at 212. In this case all issues raised on appeal have been fully briefed by all the parties. Under the circumstances of this case, we will consider the issues raised on appeal. See Utah Wilderness Association, 72 IBLA 125, 129 (1983).

The first ground asserted on appeal is that Conda possessed information concerning the phosphate formation on I-8289 that was not made available to other potential bidders. Both BLM and Conda acknowledge that Beker, and subsequently Conda, had detailed information on the Phosphoria Formation located along North Dry Ridge, due to the fact that the North Maybe Canyon lease I-04

fn. 6 (continued)

limited to judicial review of final agency action. Thus, it addresses a different question than that involved in this case. This case involves administrative review. See Koniag, Inc. v. Andrus, 580 F.2d 601, 606 (D.C. Cir. 1979).

abuts I-8289. Conda contends, however, that the information obtained by virtue of past mining on lease I-04 is proprietary and not available for public information, pursuant to 30 CFR 231.5 and 43 CFR Part 2, even though the information had been submitted to MMS by Conda. Counsel for BLM further notes that information regarding the thickness and grade of ore zones in the proposed I-8289 lease has been available since 1975 in the form of a Geological Survey geologic quadrangle map (GS-1194) which reports on trench No. 1258, located approximately 2,000 feet north of lease I-04, and provides the best available information on the unleased 2-mile segment of North Dry Ridge in proposed lease tract I-8289. Counsel for BLM states that this map was used in both reports leading to resource estimates of phosphate found in I-8289; that the reports were available to the public after advertising had commenced on I-8289 on May 20, 1982; and that no one, Conda included, requested copies of the reports until after July 8, 1982. Counsel for BLM states that only the thickness and grade of Conda's North Maybe Mine were withheld from the information provided by Conda to BLM (BLM's brief at 18). Counsel for Conda also asserts that appellant never asked for nor was denied any information which Conda had relevant to I-8289.

By the very nature of the guideline found in the Diamond Creek Management Plan, which recommends issuances of leases only on those lands that form logical parts of mines, Conda, as the operator of I-04, will have greater knowledge of the phosphate formation since the formation continues into the lands covered by lease I-8289 from the lands covered by lease I-04. Also as noted by Conda and BLM, the regulations state that certain information which must by regulation be submitted by a lessee need not become public information. The regulation, 30 CFR 231.5 provides:

Geological and geophysical interpretations, maps, and data and commercial and financial information required to be submitted under this part shall not be available for public inspection without the consent of the permittee or lessee so long as the permittee or lessee furnishing such data, or his successors or assignees, continues to hold a permit or lease of the lands involved.

Accordingly, there is no evidence that any information that by law should have been available was withheld from any prospective bidder.

Archer contends that the offer of I-8289 for competitive leasing was inappropriate because I-8289 is not a logical part of an existing mine and should not have been offered for leasing without the preparation of an EIS and, as such, the offering violates the Diamond Creek Management Plan.

The Second Circuit Court of Appeals has held that for an EIS to be required, Federal projects or actions must be both a "major" action and "significantly" affect the human environment. Hanly v. Mitchell, 460 F.2d 640 (2nd Cir. 1972), cert. denied, 409 U.S. 990, later appealed, 471 F.2d 823, cert. denied, 412 U.S. 908, on appeal following remand, 484 F.2d 448, cert. denied, 416 U.S. 936 (1974); Town of Groton v. Laird, 353 F. Supp. 344 (D. Conn. 1972).

Although the question of whether a proposed action is "major" cannot be determined solely on the basis of size, economics, or other nonenvironmental

considerations, the relatively small size of I-8289, the temporary nature of leasing, the fact that it is an extension of an existing mining operation, and the reclamation requirements all lead to the conclusion that no such statement is necessary in the present situation. See Citizen's Committee to Save Our Public Lands, 29 IBLA 48, 51-52 (1977), aff'd, C.C.T.S.O.P.L. v. Andrus, No. C-77-633 (N.D. Calif. May 20, 1977).

BLM and Conda acknowledge that an apparent contradiction exists between the Forest Service's recommendation in 1980 not to lease, because I-8289 was not a logical extension of an existing mine, and their January 1982 recommendation that the lease be offered. This change in recommendation, counsel for BLM states, resulted from approval of changes in the Maybe Canyon mine plan which were approved in December 1981.

The 1978 Diamond Creek Management Plan issued by the Forest Service provides a recommendation which reads as follows: "c. Recommend issuing mineral leases only on those lands which form logical parts of existing mines. Withhold further prospecting permits on leases until mining is within 25 years of exhausting phosphate reserves." In June 1980, a Forest Service team made a field inspection of tract I-8289 which resulted in the issuance of an environmental assessment and a decision notice which recommended that the lease not be offered because it was not a logical extension of an existing mine as required by the Forest Service's Diamond Creek Management Plan. The original conditions and changes made in the mining plan, as set forth by counsel for BLM, are as follows:

Under the North Maybe Canyon mining plan at the time of that decision, the subject tract (I-8289) could not be worked as a logical extension of the North Maybe Canyon Mine [lease I-04] for two reasons: (1) the waste backfill planned for the north end of the Maybe Canyon Mine effectively blocked access to North Dry Ridge, and (2) haulage trucks used are limited to under 8 percent grade and with the backfill in place there would be no suitable location for such a road. Also, with the north end of the North Maybe Mine backfilled there would be no waste disposal site available which would be accessible or environmentally acceptable for initial mining operations of the I-8289 lease tract.

In July and October of 1981, Conda submitted the mine plan modification * * *. The plan submitted in October 1981 was approved on December 2, 1981. This plan involves about 8.4 million cubic yards of waste to be backfilled into the pit. Under the October alternative, the backfill will be placed in the south two-thirds of the mine. The existing haul road would be retained in the bottom of the north end of the North Maybe Canyon pit. The north end of the mine would have little or no backfill, leaving access to I-8289. In the north end of I-04, volume would be available for the later placement of about 5 1/2 million yards of waste from I-8289, regardless of what company mined I-8289. This is in keeping with the MMS mission of orderly resource development and maximum mineral recovery.

(BLM's brief at 10-11).

In June 1981, as a result of Conda's revised application for lease I-8289, BLM requested a report and recommendations from the Forest Service. Three action alternatives together with the alternative of no leasing were evaluated in an environmental assessment dated October 1981. The decision notice dated January 20, 1982, recommended lease tract I-8289 be offered for competitive bidding, conditioned upon a list of stipulations to safeguard environmental values.

In effect the Forest Service found I-8289 to be a logical extension of an existing mining operation, regardless of who might become lessee, due to a change in the amount, distribution, and sequencing of backfill placement resulting from the approval of the modified North Maybe Canyon mine plan.

The environmental assessment prepared by Forest Service was approved by the Deputy Regional Forester on January 20, 1982. That report provides:

There is immediate need for a decision as mining of ore from Lease I-8389 can be included as a vital part of a revised mining plan submitted by the Conda Partnership, for North and South Maybe Canyon Mine on I-04 Lease. This revised plan is now under consideration by the Geological Survey and the Forest Service.

Several issues, concerns, and opportunities have been identified. More that 530 letters have been received from interested employees and other publics concerning the proposed revision of the Maybe Canyon Mines. Some of the comments helped identify issues and concerns for this North Dry Ridge leasing proposal.

The Mining and Mineral Policy Act of 1970 and the National Materials Minerals Policy, Research and Development Act of 1980 state that it is the policy of the Federal Government to foster and encourage private enterprise in the development of a sound and stable domestic mining industry. On the other hand, it is the duty of the Forest Service to protect and maintain the surface resources, which include air and water quality, soils, vegetation, fish and wildlife habitat, recreational opportunities, and aesthetic values. Conflicts between these directions is a major issue.

The environmental assessment deals with "Mitigating Measures and Management Constraints" and provides at page 5:

The land acreage leased as shown in the three action alternatives is not critical to us as the surface management agency. However, the descriptions and evaluations in this environmental assessment assume the lease will be developed from the existing Maybe Canyon Mine and that existing transportation systems will be utilized. This is necessary in order to comply with management direction in the Diamond Creek plan ("Recommend issuance of leases only on those lands that form logical parts of mines * * *.")

It lists "mitigating measures that will be used as needed to develop recommended stipulations for leasing." The listed mitigating measures as set forth on page 6 of the environmental assessment became, without change, the stipulations attached to the lease offering.

In a letter dated June 25, 1982, from the Deputy Regional Forester to the Idaho State Director, BLM, it was stated that, in the absence of an approved phosphate lease form and approved phosphate lease stipulations, the mitigating measures 1 through 15 should be included, as is, in lease I-8289. The Deputy Regional Forester further provided:

Site-specific stipulations are a common practice in most of our recommendations to the Department of Interior, namely coal, oil and gas, and geothermal exploration and development. We cannot develop similar stipulations for phosphate leases until the basic lease form is approved.

We are aware of the additional constraints and probable financial impacts these stipulations may have on the successful bidder. Again, the Assessment recommends the proposal, as submitted by industry, over the no-lease alternative.

[2] The specific stipulations objected to by Archer are stipulations 4 and 10 of the 15 special stipulations attached to the competitive lease offer, I-8289. Stipulation 4 specifies that "the North Maybe Mine pit, I-04, will be partly backfilled with waste from the Mill Canyon section of the lands included within lease I-8289." Stipulation 10 provides that "existing transportation facilities will be used and ore will be hauled through existing disturbed areas on lease I-04."

Archer contends that these stipulations would require all lessors, other than Conda, to obtain permission to fill up the North Maybe mine currently being operated by Conda and to use transportation facilities constructed and maintained by Conda on I-04; that although the Government can provide access to that portion of the I-04 mine on Government property, there is approximately 1-1/2 miles of the pit area which is private property owned by Conda and that the Government cannot guarantee access across this area just as it cannot guarantee access from the north end of I-8289 over private property. As such, under the stipulations, Archer states that Conda has the economic advantage in that it controls the use of the North Maybe Canyon mine pit which is still in production, and it controls access through I-04, all required terms of the lease offering. Further, Archer states that the lease stipulations would preclude any alternate means of transportation other than I-04, e.g., hauling ore would be prohibited from the north end of I-8289 over private land to the available roadway or from constructing slurry lines or other transportation facilities. Archer concludes that the direct effect of these lease stipulations is to lock the operator into working through I-04, thus imposing substantial economic disadvantage due to the length and difficulty of the haul required (Statement of Reasons at 17-18).

In response to Archer's charges concerning stipulation 4, counsel for Conda points out that under Conda's approved mine plan the company is required to backfill a substantial part of the North Maybe mine pit, and that stipulation 4 only required partial backfilling of the pit. He asserts that

no potential bidder was required to undertake any of Conda's obligations. Both counsel for Conda and counsel for BLM stated that the area proposed to be backfilled is on Government land and would be available to any successful bidder. As stated by counsel for BLM, "it seems that the opportunity to dispose of waste from the south end of the subject lease using a relatively short and easy haul would be a benefit to any successful bidder for I-8289" (BLM's brief at 12).

Archer has failed to show that this stipulation in any way was disadvantageous to any potential bidder. Likewise, Archer has failed to establish that stipulation 10 was prejudicial to any potential bidder. As noted by counsel for BLM, even if a successful bidder could not reach an agreement with Conda concerning access, Idaho law provides for actions to condemn rights-of-way over lands adjoining a minesite. ^{7/}

In effect, even though Conda owns 1-1/2 acres of land over which any successful bidder would have to pass under the terms of stipulation 10, a remedy exists should Conda be unwilling to allow a right-of-way. Accordingly, the stipulation is not unduly burdensome in this regard. Further, as stated by Archer, private land exists to the north of I-8289. As such, should ore be allowed to be transported from the north end, rather than from the south end as required by the stipulation, the same problem of acquiring a right-of-way would exist.

That Conda may be in a more unique position by virtue of its ownership of private lands and its lease operations on I-04 is not sufficient in itself to invalidate the lease offering provided the stipulations are in themselves reasonably designed to protect environmental and other land values.

In the June 18, 1982, response prepared by the Forest Service to the various protests filed against the lease offering, it was stated:

It is true that this is the first phosphate lease offer with site specific stipulations. These stipulations are justified by a sensitive environment. Mill Creek is a live water stream flowing into Spring Creek, one of the most important

^{7/} Section 47-903 of the Idaho Revised Statutes states, as follows:

"When the owner, claimant or occupant of any mine or mining claim desires to work the same, and it is necessary, to enable him to do so successfully and conveniently, that he have a right of way for any of the purposes mentioned in the foregoing sections, if such a right of way cannot be acquired by agreement with the claimant or owner of the lands or claims over, under, through, across or upon which he seeks to acquire such right of way, he may commence an action in the district court in and for the county in which such right of way, or some part thereof, is situated, by filing a verified complaint containing a particular description of the character and extent of the right sought, a description of the mine or claim of the plaintiff, and of the mine or claim and lands to be affected by such right of way or privilege, with the name of the occupant or owner thereof. He may also set forth any tender of compensation that he may have made, and demand the relief sought."

spawning streams in the Blackfoot River system. The Blackfoot River is a blue ribbon trout stream. The Blackfoot River Narrows is a scenic area about which there is great sensitivity. It is far more fair to the bidders to know of these constraints in advance than to have the lessee confronted with them at the mine planning stage after investing large sums in lease purchase, exploration and planning.

(Response 6 to objections raised by J. R. Simplot).

Stipulations reasonably designed to protect environmental and other land values are properly included as conditions precedent to a lease. James M. Chudnow, 67 IBLA 360, 362 (1982), and cases cited therein; 43 CFR 3109.2-1. As with stipulations generally, in the leasing of public domain lands for which the Forest Service is the surface management agency, this Department will give careful consideration to the recommendations of the Forest Service, but the latter does not have final authority over leasing public land. This Board will review proposed stipulations to determine whether there is a need for the stipulation, and whether the stipulations are a reasonable means to the intended purpose. Earl R. Wilson, 21 IBLA 392, 393 (1975).

In the present situation the 15 stipulations attached to the lease offer were listed in the environmental assessment prepared by the Forest Service and were taken verbatim from that document. Numerous justifications for inclusion of the stipulations are contained in the case file, including that provided in answer to the protests. 8/ The record does not support appellant's claim that the stipulations are discriminatory. We find that the

8/ A July 16, 1982, memorandum to the Regional Forester, R-4, from the Associate Deputy Chief, Forest Service, stated:

"Our review of the stipulations led to the conclusion that all or parts of four of the stipulations (Nos. 9, 11, 14, and 15) were deficient because they did not even address responsibilities to be borne by a lessee. The IMA [Idaho Mining Association] people complained that generally the stipulations were excessively oriented toward stating how to reach a desired result, rather than stating clearly what the result must be and leaving its attainment to the lessee. Without going into details, we tended to agree with the IMA criticisms; especially after the poor quality of the above numbered stipulations put the quality of the others into question. Several of the other stipulations (Nos. 2, 7, and 8; perhaps others) seem to dictate processes rather than results. This is a potentially dangerous practice because it can produce surface resource consequences quite at odds with those intended. It is better to leave room for innovation and the application of technology by deferring the process questions to the time when a mining and reclamation plan is proposed. At that time, the successful bidder will have assessed the various ways which might be used to meet your standards (desired results) based on the geology of the ore deposit, the economics involved, and the technology then available.

"While we reluctantly agreed with your recommendation that the July 8 sale not be postponed until the deficiencies in the stipulations were corrected, we nevertheless want to impress on you our determination that those

stipulations are directed toward environmental protection, not unfair competitive advantage.

Archer also alleged that the lease sale should not have gone forward until MMS had completed negotiating a new lease form with the phosphate industry. It is clear that the site-specific stipulation in this case caused some controversy within the phosphate mining industry and within the Forest Service (see note 8 *supra*). That fact, however, does not mean that the sale was improper or that the lease terms improperly favored Conda.

It is further alleged by appellant that the estimated phosphate tonnage on I-8289 was improperly reduced by MMS, and that the reduction affects the fair market value of the lease and thereby reduces the minimum competitive bid.

Two different estimates of recoverable phosphate ore on lease I-8289 were made. The earlier resource estimate of phosphate in I-8289, made in 1974, indicated that total phosphate resources constituted 19 million tons, under less than 400 feet of overburden. Counsel for BLM contends that that estimate did not consider the practicality of mining the deposit, or environmental restrictions peculiar to I-8289. The later resource estimate of phosphate in I-8289, made in October 1980, concluded that because of restrictions on the pit design due to environmental considerations and the resulting physical limitations of mining, the recoverable phosphate reserves would be only 8.7 million tons. According to counsel for BLM the later estimate used a commonly accepted stripping ratio method for determining minable phosphate reserves which previously had been used for similar studies. Counsel for BLM contends that the later recoverable ore estimate is more realistic since it considers site-specific limitations dictated by topographic and environmental factors and that the later estimate approximates the total estimated recoverable resource that can actually be mined from I-8289 while simultaneously protecting the surface resources. Counsel for BLM emphasizes that the October 1980 estimate was done solely by MMS with no participation by any private party (BLM's brief at 15-16).

fn. 8 (continued)

stipulations are not satisfactory. We fully understand why IMA and the holders of leases whose terms are about to be readjusted are apprehensive. The stipulations in lease I-8289 are not to be construed as precedent-setting for future leases and lease readjustments. We expect that future stipulations you impose will be thoughtfully drafted, confined to operations and conditions within the lease boundaries, and oriented toward standards to be met, rather than how to meet them."

While this memorandum expresses dissatisfaction with certain stipulations, there is no specific mention of the stipulations (4 and 10) challenged by appellant. In addition, the tenor of the memorandum is that stipulations should be designed to identify a desired result, allowing the lessee to determine the best way to achieve that result, rather than adopting the "cookbook" approach. In any event, the memorandum does not support appellant's charge that the stipulations unfairly favored Conda.

[3] With regard to Archer's argument concerning fair market value, counsel for BLM asserts that economic evaluations of the lease tract were made by MMS based upon both the discounted cash flow method and comparable sales method; that competitive bid sales on a per acre basis between 1960 and 1966 varied between \$10.04 and \$774.28; and that five earlier lease tract sales were utilized in the evaluation of fair market value, including sales most similar in respect to location, access, and geology. Counsel for BLM notes, however, that in the evaluation of phosphate deposits, a dollar per acre evaluation between one lease and another can be misleading since it is the recoverable resource (tonnage) and mining costs unique to an individual lease tract which govern the tract's potential value, and the deposits vary greatly from one location to another in southeastern Idaho. Counsel for BLM characterizes Archer's argument as an attempt to show that this lease tract was offered for less money than should have been expected since prior to this sale no Federal phosphate lease had been sold in Idaho at the preannounced minimum bid. Counsel for BLM refutes Archer's argument by stating that before this sale, the minimum acceptable bid for Federal phosphate leases in Idaho was not set at a realistic final sale value but that early lease tracts were offered for \$1 to \$3 per acre. Counsel for BLM states that lease tract I-8289 was offered at a realistic minimum acceptable bid value of \$385 per acre, more than one hundred times higher than actual lease sales held during the 1960's; however, these early lease sales called for a single bid without a provision to bid higher, thus, industry's bids were many times higher than the minimum.

As such, counsel for BLM concludes that the minimum acceptable bid for I-8289 is in the range of actual accepted bid offers from the 1960's; is entirely reasonable; and that the MMS's fair market value, and the minimum acceptable bid value, did provide for a fair return to the Government, *i.e.*, nearly one-quarter of a million dollars for the right to mine I-8289.

MMS advises BLM of the mineral classification of the lands applied for, the acceptability of the leasing unit, the estimated fair market value of the lease tract, and the economic terms for the lease offer which includes rentals, royalty, minimum royalty, and bonding. MMS was the Secretary's technical expert in matters concerning geologic evaluation of tracts of land, and the Secretary is entitled to rely on MMS' reasoned analysis. L. B. Blake, 67 IBLA 103 (1982).

While Archer challenges in general terms the basis for MMS's determination as to the second estimate of the recoverable phosphate ore existing on lease I-8289, and the method used in determining the fair market valuation for the lease, I-8289, Archer has not provided any specific evidence that establishes error in the determination made by MMS. Both estimates of the recoverable phosphate ore were made by MMS or its predecessor, Geological Survey. A reasonable explanation has been provided why the second estimate is different from the first. Archer has not presented specific information to rebut that presentation. Similarly, Archer has not presented evidence sufficient to establish that MMS's fair market valuation for the tract is in error.

Archer alleges that bidding procedures used for lease I-8289 were not authorized by the regulations. He charges that the regulations at 43 CFR 3521.2-2(c) allow either public auction or sealed bids, not both as announced in this case. Archer has failed to read the regulations thoroughly. Although the cited regulation does mention either method, subsequent regulations explain the notice of lease offer, qualifications of the successful bidder, and awarding of the lease as follows:

§ 3521.2-3 Notice of lease offer.

(a) Contents. (1) The notice will show the time and place of sale, whether the sale will be at public auction or by sealed bids * * *.

* * * * *

(5) * * * If the sale is by public auction, the statement of terms and conditions of the sale will also specify that sealed bids may be submitted. * * *

§ 43 CFR 3521.2-4 Qualifications of successful bidder.

* * * * *

(1) When the sale is by public auction, before bidding is commenced by those persons present, the authorized officer conducting the sale will open and read to those persons the sealed bids received on or before the time set in the notice of lease offer. * * *

§ 43 CFR 3521.2-5 Award of lease (competitive).

(a) Notification of Award. * * * The authorized officer will read all sealed bids. If the procedure calls for sealed bids * * * followed by oral bids, the oral bidding will begin at the level of the highest sealed bid received which must at least equal the fair market value determination of the U.S. Geological Survey. After the oral bidding has ceased, the highest bid will be announced. [Emphasis added.]

We find that the regulations provide for and justify the bidding procedures utilized by BLM.

Archer also contends that available information indicates that Conda trespassed onto the lands covered by lease I-8289 to deposit dump material and constructed a road on the land which makes a complete cut through the phosphate formation at the southern end of the land covered by the lease, thus, giving Conda information not available to other bidding parties (Statement of Reasons at 8). With his statement of reasons for appeal Archer submits his affidavit wherein he states that prior to August 31, 1982, Conda had

trespassed on I-8289, had made a road cut and possibly had done some exploratory sampling or mining and that these activities had been in place "for some time." He states in the affidavit that his information was based upon a conversation with a mining engineer for the Caribou National Forest. In addition to the affidavit Archer submitted photographs taken July 25 and 26, 1982, which Archer contends demonstrates that the road in question would constitute a trespass onto the land covered by lease I-8289 if a special use permit for it was not acquired from Forest Service.

In a request for hearing, filed November 2, 1982, Archer states that there are two questions of fact concerning the allegations of trespass by Conda on lease I-8289; the first concerns the road cut which he alleges is on I-8289 and which exposed the phosphate formation on the lease; the second concerns actual trespass by mining operations on the lease of approximately 60 feet in the Mill Canyon area.

In response to the request for hearing, counsel for BLM submitted a survey of lease I-04, completed by C. A. Schwartz and Associates, who are consulting engineers and land surveyors from Soda Springs, Idaho. Counsel states that based on the survey the MMS District Mining Supervisor in Pocatello determined that the road does not invade lease offer I-8289, and that the mining operation which does invade the lease was undertaken after the lease sale. Accordingly, counsel for BLM objected to any hearing since he contends that there are no disputed questions of fact.

BLM's investigation discloses that the road cut is on lease I-04 and that any trespass on I-8289 occurred after the bidding date. Although Archer alleges in the request for a hearing that available information indicates the road cut was made prior to the lease sale, BLM states that the road cut is on I-04, not I-8289, as alleged by appellant.

While it appears that Conda's mining operation trespassed onto the lands covered by lease offer, I-8289, Archer has presented no evidence that such trespass occurred prior to July 8, 1982, the date set for the competitive lease bidding on I-8289.

It is within the discretion of the Board to grant a request for a hearing on a question of fact. 43 CFR 4.415. Since appellant has not presented sufficient evidence to show that a relevant question of fact exists, the request for a hearing is denied.

Finally, Archer alleges improper influence by Conda on the Federal agencies involved in offering I-8289, especially MMS (Statement of Reasons at 28). Appellant admits that no one specific document or incident indicates such influence over MMS, but that when the record is examined, as a whole, it demonstrates "the pattern of influence which has been exercised on the MMS in this case." *Id.* We find this allegation to be totally lacking in substance.

Examination of the record fails to reveal any indication that any of the Federal agencies involved, acting individually or in concert, treated Conda more favorably than others with respect to the offering of I-8289.

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.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge