

Appeal from decision of the Idaho State Office, Bureau of Land Management, rejecting phosphate prospecting permit application and denying approval of assignments. I-2544

Affirmed.

1. Applications and Entries: Vested Rights--Mineral Lands:
Leases--Mineral Lands: Prospecting Permits--Mineral Leasing Act:
Generally--Phosphate Leases and Permits: Permits

The filing of a phosphate prospecting permit application creates no vested rights in the applicant and the application must be rejected if the land described therein is determined by Geological Survey to be within a known phosphate leasing area and to be subject to the competitive leasing provisions of the Mineral Leasing Act. Rejection is required even if the application was filed prior to the ascertainment of the extent or workability of the underlying phosphate bed, which finding requires competitive leasing of the land.

2. Administrative Procedure: Hearings--Constitutional Law: Due Process--Rules of Practice: Hearings

Due process does not require notice of a right to a prior hearing in every case where an individual may be deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the deprivation becomes final.

APPEARANCES: L. Charles Johnson, Esq., Pocatello, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

John D. Archer ^{1/} has appealed a decision dated January 10, 1983, by the Idaho State Office, Bureau of Land Management (BLM), which rejected phosphate prospecting permit application I-2544, denied approval of assignments thereof to National Steel Corporation, Earth Sciences, Inc., and Southwire Company, and denied assignment from the three aforementioned companies to Alumet, a partnership.

Application I-2544 was filed in the Idaho State Office on October 24, 1968. It embraced the following described lands located within the Caribou National Forest:

T. 9 S., R. 43 E., Boise meridian, Idaho
 Sec. 10, lots 3, 4, W 1/2 SE 1/4;
 Sec. 15 N 1/2 NE 1/4
 containing 240.01 acres.

On May 27, 1969, the application was rejected, and an appeal was filed with the Board. In John D. Archer, 4 IBLA 323 (1972), the Board affirmed the BLM decision to reject the permit for lands which had been determined by Geological Survey (Survey) ^{2/} to contain workable deposits of phosphate. However, the Board modified the BLM decision to allow issuance of a permit for lot 4, SW 1/4 SE 1/4 sec. 10, T. 9 S., R. 43 E., Boise meridian, because Survey had recommended that further prospecting was necessary to determine the presence of an economic phosphate deposit. The Regional Office, United States Forest Service (USFS), was notified of the decision and asked for recommendations regarding the advisability of leasing lot 4 and the SW 1/4 SE 1/4 sec. 10, T. 9 S., R. 43 E., Boise meridian. In response USFS advised BLM that it was developing an environmental statement with respect to the area and requested that processing of I-2544 and 14 other permit applications be withheld in order that USFS could comply with the National Environmental Policy Act. On June 27, 1973, BLM notified appellant that further action with respect to processing permit application I-2544 was suspended pending USFS recommendations subsequent to its completion of the land use plans for the area. It was anticipated that the delay would last 1 year. A draft of the USFS study for the area was made public in 1978 and the study had not been completed at the time of this appeal.

^{1/} The statements of reasons list Alumet, National Steel Corporation, Southwire Company, and Earth Sciences, Inc., as other appellants. These entities were the assignees of Archer's interest in I-2544, had the permit been issued.

^{2/} By Secretarial Order No. 3071, 47 FR 4751 (Feb. 2, 1982), the Secretary created the Minerals Management Service (MMS) to, inter alia, take over the function of the Conservation Division, Survey. Subsequently, Secretarial Order No. 3087, dated Dec. 3, 1982, consolidated the onshore mineral leasing functions of MMS within BLM. 48 FR 8982 (Mar. 2, 1983).

In 1974, Archer and Elizabeth B. Archer assigned all of their interest in six phosphate leases and 22 prospecting permit applications, including the application involved in this case, to three companies. Requests for approval of assignments were filed on behalf of each of the companies. In 1981 the three companies "assigned" their rights to Alumet, a partnership, and filed a request for approval of said assignments. Neither the 1974 assignments nor the 1981 assignment has been approved.

In October 1981 BLM requested an update to the Survey report filed in 1971 regarding the existence of a known phosphate deposit in the area subject to the application. On February 1982 the MMS ^{3/} responded noting that the report with respect to application I-2544 and two other applications was being delayed pending completion of field examinations which were then under way. On September 22, 1982, MMS reported that the lands under application had been classified as valuable for phosphate and were located within the Aspen Range Known Phosphate Leasing Area.

The decision appealed from recited these facts and rejected application I-2544 as to the remaining lands: lot 4, SW 1/4 SE 1/4 sec. 10, T. 9 S., R. 43 E. The decision also stated that assignments of partial interest in I-2544 to Earth Sciences, Inc., National Steel Corporation, and Southwire Company, and subsequent assignment to Alumet were being denied, since no prospecting permit would be issued.

Appellants contend that by filing the application they obtained a legitimate expectancy and right to prospect for phosphate on the subject lands. Appellants further contend that the permit was wrongfully and erroneously withheld. They request an evidentiary hearing and oral argument to examine the State Director and BLM personnel on the processing of the permit application.

The Mineral Leasing Act grants the Secretary of the Interior authority to lease phosphate deposits of the United States through such methods as he may by general regulation adopt. 30 U.S.C. § 211(a) (1976). The regulations adopted by the Secretary with respect to leasing of minerals other than oil and gas can be found at 43 CFR Part 3500.

On the other hand, if "prospecting or exploratory work is necessary to determine the existence or workability of phosphate in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue * * * a prospecting permit." 30 U.S.C. § 211(b) (1976). The issuance of prospecting permits for phosphate is governed by 43 CFR Part 3510. It is obvious from the Act provisions that if phosphate is known to exist on the lands in workable quality and quantity the provisions of 30 U.S.C. § 211(a) will apply and the provisions of 30 U.S.C. § 211(b) will not be applicable. The method used for the determination regarding the existence of a deposit of phosphate

^{3/} See note 2.

is similar to that used for oil and gas. When an area has been found to be within a "known phosphate leasing area," the lands are no longer subject to prospecting permit applications and are subject only to lease applications. Prospecting permits are to be issued only where the existence or workability of the phosphate bed underlying the land has not been determined. Christian F. Murer, 57 IBLA 333 (1981); William F. Martin, 24 IBLA 271, 273 (1976); Atlas Corp., 74 I.D. 76, 85 (1967). In the present case, we recognize that Survey had previously determined that the workability of the phosphate bed on the subject lands was unknown. However, in the absence of any evidence showing that MMS' subsequent determination was in error the lands must be leased pursuant to 30 U.S.C. § 211(a), and a prospecting permit is no longer issuable.

[1] We recognize that the lands under application I-2544 had not been found to be appropriate for competitive leasing prior to the filing of I-2544. We further recognize that at least a portion of the lands remained "open" for prospecting under a prospecting permit in 1972 and until designation of the known phosphate leasing area. However, filing a prospecting permit application creates no vested rights in the applicant, and the permit application is properly rejected if, prior to the issuance of a permit, under 30 U.S.C. § 211(b) (1976), the land applied for is determined to be subject solely to the leasing provisions of 30 U.S.C. § 211(a). J. R. Simplot Co., 58 IBLA 305 (1981); Christian F. Murer, *supra*; William F. Martin, *supra*; William J. Colman, 9 IBLA 15 (1973); J. D. Archer, 1 IBLA 26, 77 I.D. 124 (1970). This holds true even if the offer was filed prior to the ascertainment of the extent or workability of the phosphate bed underlying the requested lands. Christian F. Murer, *supra*; William F. Martin, *supra*; Frank J. Allen, A-30641 (May 17 1967); *see* Permian Mud Service Inc., 31 IBLA 150, 158, 84 I.D. 342, 346 (1977); William T. Alexander, 21 IBLA 56 (1975). ^{4/}

In light of the fact that no vested rights were created when appellant Archer filed the permit application, we find that, while Archer has maintained his appropriate priority as against all other prospecting permit applicants, this priority does not alter the fact that no prospecting permit may be issued in a known phosphate leasing area.

Appellants further argue that, while the prospecting permit in issue was being held in abeyance, appellants were issued prospecting permits on nearby lands and encouraged to explore these nearby lands, and that the information developed on the nearby lands was used by USFS, MMS, and BLM to make the determination that the lands in question were within a known phosphate leasing area to the detriment of appellants. We note that the work performed by appellants created preferential rights within lands subject to the valid prospecting permits. To extend these rights to lands not subject to prospecting permits would be contrary to the intent of the Mineral Leasing Act.

^{4/} For a parallel application with respect to oil and gas leasing *see* Hepburn T. Armstrong, 72 IBLA 329 (1983); P. M. Braun, 60 IBLA 246 (1981); Guy W. Franson, 30 IBLA 123 (1977).

After a review of the facts and the law as it applies to the facts in this case, we find that, while it is regrettable that there was a delay imposed by the USFS's protracted environmental study, the decision was proper, using valid standards, and was neither arbitrary nor unreasonable. It was consistent with the law and within the authority of the officers applying the law.

We further find that the actions were properly within the authority of the Department of the Interior as that authority was vested in said Department by the Mineral Leasing Act, and that the actions were not in violation of the Administrative Procedure Act or the Constitution of the United States.

[2] There is no necessity for a hearing or oral argument in this case. A hearing is not required in the absence of assertions of facts which, if proved true, would entitle appellants to the relief sought. Anita Robinson, 71 IBLA 380 (1983). Due process does not require notice and a right to a prior hearing in every case where a person is deprived of an asserted property right so long as the individual is given notice and an opportunity to be heard before the initial BLM decision, adverse to him, becomes final. Appeal to this Board satisfies the due process requirements. George H. Fennimore, 50 IBLA 280 (1980); Dorothy Smith, 44 IBLA 25 (1979); H. B. Webb, 34 IBLA 362 (1978).

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.

R. W. Mullen
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

