

ELIZABETH B. ARCHER ET AL.

IBLA 81-319; IBLA 81-320

Decided July 5, 1984

Appeals from decisions of the Idaho State Office, Bureau of Land Management, rejecting phosphate prospecting permit applications and denying approval of assignments in whole or in part. I-3715, et al.

Affirmed in part; set aside and remanded in part; referred for hearing in part.

1. Mineral Lands: Determination of Character of -- Phosphate Leases and Permits: Permits

BLM must reject a phosphate prospecting permit application filed pursuant to sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982), where the land is determined to be within a known phosphate leasing area.

2. Applications and Entries: Vested Rights -- Mineral Lands: Determination of Character of -- Phosphate Leases and Permits: Permits

An applicant for a phosphate prospecting permit under sec. 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982), acquires no vested right to a permit by virtue of an inordinate delay in adjudication of the application, even where a permit might have issued when the application was originally filed.

3. Mineral Lands: Determination of Character of -- Phosphate Leases and Permits: Permits

In rejecting a phosphate prospecting permit application because the land is within a known phosphate leasing area, and thus no longer subject to issuance of a permit, BLM may rely on proof of the existence or workability of minerals in adjacent lands and geological and other surrounding external conditions, and need not engage in drilling or other exploratory work on the ground.

4. Mineral Lands: Determination of Character of -- Phosphate Leases and Permits: Permits

In rejecting a phosphate prospecting permit application, BLM may properly consider a recommendation of the Forest Service that issuance of a permit would not be in the public interest. However, ultimate rejection must be supported by facts of record and a reasoned explanation.

APPEARANCES: Elizabeth B. Archer, pro se; J. D. Archer, pro se; L. Charles Johnson, Esq., Pocatello, Idaho, for Earth Sciences, Inc., National Steel corporation, and Southwire Company.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Elizabeth B. Archer, J. D. Archer, Earth Sciences, Inc., National Steel Corporation, and Southwire Company have appealed from decisions of the Idaho State Office, Bureau of Land Management (BLM), dated January 5, 6, and 13, 1981, rejecting various phosphate prospecting permit applications and denying approval of assignments in whole or in part. 1/

In its January 1981 decisions, BLM rejected the permit applications and denied approval of the assignments in whole or in part because certain of the

1/ The case involves the following phosphate prospecting permit applications:

<u>Rejected</u>	<u>Filing App.</u>	<u>Acreage Decision</u>	<u>Acreage IBLA 81-319</u>	<u>Date of M</u>	<u>Date of App. No.</u>	<u>Applicant</u>	<u>Applied For</u>
I-3777	Elizabeth B.	320.00	320.00	10/22/70	1/6/81	Archer	
I-4975	Elizabeth B.	320.00	280.00	4/12/72	1/5/81	Archer	
I-5086	Elizabeth B.	91.69	91.69	5/12/72	1/6/81	Archer	
I-6274	Elizabeth B.	360.00	280.00	11/3/72	1/5/81	Archer	
I-6295	Elizabeth B.	440.00	360.00	11/16/72	1/5/81	Archer	
<u>IBLA 81-320</u>							
I-3715	J. D. Archer	353.29	353.29	9/11/70	1/13/81	I-3725	Elizabeth B. 200.00
200.00	9/17/70	1/13/81	Archer				
I-4294	Elizabeth B.	200.00	200.00	5/11/71	1/13/81	Archer	
I-4393	Elizabeth B.	320.00	320.00	6/25/71	1/13/81	Archer	

On June 3, 1984, Earth Sciences, Inc., National Steel Corporation, and Southwire company filed requests for approval of assignments of the permit applications from Elizabeth B. Archer and J. D. Archer. The assignments are dated Mar. 21, 1974.

lands had been determined by the Director, Geological Survey (Survey), <sup>2/</sup> to be within known phosphate leasing areas (KPLA's), and, therefore, could only be leased under the competitive provisions of section 9(a) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(a) (1982). <sup>3/</sup> In addition, BLM rejected permit applications I-3715, I-3725, I-4393, and I-4294 (IBLA 81-320) based on a recommendation by the Forest Service, U.S. Department of Agriculture. <sup>4/</sup> the lands within those permit applications lie within the Caribou National Forest. In a letter to the State Director, Idaho State Office, BLM, dated September 25, 1980, the Deputy Regional Forester, Forest Service, stated that:

The lands involved in these applications are covered by the Diamond Creek Environmental Statement and Land Management Plan (August 21, 1978). The coordinating Requirements of the referenced environmental statement direct:

"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."

Portions of I-3715 and I-4294 lie within the Webster Ridge Management Unit which contains important elk winter range. The management decisions for this unit state:

"Recommend denial of additional prospecting and mineral leasing on critical big game winter range and elk calving area."

Based on the direction cited above, we recommend rejection of the prospecting permits.

---

<sup>2/</sup> By Secretarial Order No. 3071 (47 FR 4751 (Feb. 2, 1982)), the Secretary created the Minerals Management Service to, inter alia, take over the functions of the Conservation Division, Survey. Secretarial Order No. 3087, dated Dec. 3, 1982, consolidated the onshore mineral leasing functions of the Minerals Management Service and the Bureau of Land Management within BLM. 48 FR 8983 (Mar. 2, 1983). Further reference in the decision will be to Survey, since the Conservation Division, Survey, was in existence during the relevant determinations.

<sup>3/</sup> The following permit applications are located partially or wholly within the Schmid Ridge KPLA: I-3777, I-4975, I-6274, I-6295 (IBLA 81-319). The following permit applications are located partially or wholly within the Webster Range-Dry Ridge KPLA: I-3715, I-4294 (IBLA 81-320), I-5086 (IBLA 81-319). The following permit application is located partially within the Aspen Range KPLA: I-3725 (IBLA 81-320).

<sup>4/</sup> Permit applications I-3715, I-3725, and I-4294 were rejected in their entirety because a portion of the land in each application is included in a KPLA and pursuant to the Forest Service recommendation. Permit application I-4393 was rejected in its entirety pursuant only to the Forest Service recommendation.

In their statements of reasons (SOR) for appeal, appellants contend that BLM exceeded its statutory authority in rejecting the permit applications. They state that they have satisfied the statutory criteria for issuance of a prospecting permit since they had shown in their applications that "prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area." 30 U.S.C. § 211(b) (1982). Appellants argue that BLM acted without a proper factual basis with regard either to designation by Survey of the land as KPLA's or the Forest Service's recommendations. Appellants also argue that it is improper for BLM to reject the permit applications based on the Survey designations and Forest Service recommendations made after the filing of their applications. Appellants characterize their applications as a "legitimate expectancy." Finally, appellants contend that they have not been afforded notice and an opportunity for a hearing prior to any adverse action with respect to their pending permit applications, contrary to the provisions of the Administrative Procedure Act, 5 U.S.C. § 551 (1982). Appellants request a hearing, pursuant to 43 CFR 4.415.

By orders dated April 19, 1982, and February 8, 1983, the Board directed BLM to submit additional evidence in support of the determination to include the land involved herein in KPLA's. On March 7, 1983, the Board received from BLM minutes of the mineral land evaluation committee, entitled Idaho Phosphate Land Leasing Minutes (Minutes) Nos. 6 through 8, approved by the Acting Chief, Conservation Division, Survey.

The Schmid Ridge KPLA was based on Minutes No. 6, dated September 22, 1978, prepared by a committee composed of a geologist, the area geologist, the acting area mining supervisor, and the acting conservation manager. The committee recommended that the KPLA be designated effective March 3, 1978, "the date that this study was completed" (Minutes No. 6 at 11). The Minutes were approved by the Acting Chief, Conservation Division, Survey, on February 13, 1979, and the Schmid Ridge KPLA was designated effective March 3, 1978. Designation of the land as a KPLA was based on the presence of the Meade Peak phosphatic shale member of the Phosphoria Formation, which "contains large amounts of phosphorous occurring as carbonate-fluorapatite" (Minutes No. 6 at 3). The thickness, grade, and extent of the phosphate rock were estimated, based, in part, on sampling by Survey "at several localities within the KPLA (lots 1208, 1211, 1212, 1259, 1260, 1277, and 1278)." Id. This sampling revealed two phosphate zones in the Meade Peak phosphatic shale member, a lower zone averaging 18 feet in thickness at 24 percent P<sub>2</sub>O<sub>5</sub> (phosphoric pentoxide) and an upper zone averaging 33 feet in thickness at 24 percent P<sub>2</sub>O<sub>5</sub>. In determining the boundary of the KPLA, Survey relied on the following criteria:

(1) The minimum thickness of the phosphate rock is 20 ft with a weighted average of 24 percent P<sub>2</sub>O<sub>5</sub>.

(2) The dip and other structural data were utilized to determine the depth to which the outcrop data should be extended in order to define the Known Phosphate Leasing Area. Where the phosphate rocks are steeply dipping and the structure uncomplicated, those 40-acre tracts cut by the Meade Peak were included in the KPLA. Where the section is shallow dipping, the 40-acre

tracts cut by the Meade Peak, and the nearest 40-acre tract down dip (where the Meade Peak is under less than 600 feet of overburden) were included in the KPLA. The remaining areas that have complex geologic structure were outlined to include mainly the outcrops of Meade Peak.

(3) The phosphate beds are capable of being worked for the extraction of phosphatic materials by conventional surface and (or) underground mining methods.

Id. at 8.

The Webster Range-Dry Ridge KPLA was based on Minutes No. 7, dated May 25, 1979, prepared by a committee composed of a geologist, the acting area geologist, the area mining supervisor, and the regional manager. The committee recommended that the KPLA be designated effective March 1, 1978, "the date that this study was completed" (Minutes No. 7 at 14). The Minutes were approved by the Acting Chief, Conservation Division, Survey, on October 23, 1979, and the Webster Range-Dry Ridge KPLA was designated effective March 1, 1978. Designation of the land as a KPLA was based on the presence of the Meade Peak phosphatic shale member of the Phosphoria Formation. The determination of the thickness, grade, and extent of the phosphate rock was based, in part, on sampling consisting of "eleven complete USGS trenches that cut across representative sections of the Meade Peak Member." Id. at 4. This sampling revealed two phosphate zones in the Meade Peak phosphatic shale member, a lower zone averaging 35 feet in thickness at 23 percent P<sub>2</sub>O<sub>5</sub> and an upper zone averaging 25 feet in thickness at 25 percent P<sub>2</sub>O<sub>5</sub>. In determining the boundary of the KPLA, Survey relied on the same criteria used in Minutes No. 6.

The Aspen Range KPLA was based on Minutes No. 8, dated October 16, 1978, prepared by a committee composed of a geologist, the acting deputy conservation manager (resource evaluation), the acting deputy conservation manager (mining), and the acting conservation manager. The committee recommended that the KPLA be designated effective October 16, 1978, "the date that this study was completed" (Minutes No. 8 at 17). The Minutes were approved by the Acting Chief, Conservation Division, Survey, on September 9, 1980, and the Aspen Range KPLA was designated effective October 16, 1978. Designation of the land as a KPLA was based on the presence of the Meade Peak phosphatic shale member of the Phosphoria Formation. The determination of the thickness, grade, and extent of the phosphate rock was based, in part, on sampling by Survey "in six trenches, three drill holes, and in one underground mine." Id. at 5. This sampling revealed two phosphate zones in the Meade Peak phosphatic shale member, a lower zone averaging 30.4 feet in thickness at 25.61 percent P<sub>2</sub>O<sub>5</sub> and an upper zone averaging 13.9 feet in thickness at 22.13 percent P<sub>2</sub>O<sub>5</sub>. In determining the boundary of the KPLA, Survey relied on the same criteria used in Minutes No. 6.

On June 24, 1983, appellants filed a supplemental SOR in which they make a number of arguments. First, appellants argue that BLM has effectively withdrawn the land involved herein from prospecting without complying with the withdrawal provisions of section 204 of the Federal Land Policy and Management

Act of 1976 (FLPMA), 43 U.S.C. § 1714 (1982), and that rejection of their permit applications is inconsistent with congressional intent to promote mineral exploration and development, expressed in a number of statutory provisions, including section 2 of the Mining and Minerals Policy Act of 1970, 30 U.S.C. § 21a (1982). Appellants also argue that the inordinate delay in adjudicating their permit applications, originally filed between September 1970 and November 1972, was arbitrary and capricious and constituted a denial of due process of law of "constitutional proportion" (Supplemental SOR at 36). Appellants contend that BLM was thereby precluded from rejecting their permit applications. Appellants further state that BLM was required to adjudicate their permit applications within a "reasonable time" under section 555(b) of the Administrative Procedure Act (APA), 5 U.S.C. § 555(b) (1982). Additionally, appellants argue that BLM is equitably estopped to reject their permit applications based on detrimental reliance by appellants and their assignees on established Departmental "policy and practice" to routinely issue phosphate prospecting permits (Supplemental SOR at 39).

With respect to the factual basis for the KPLA designations, appellants also make a number of arguments. they state that there is no evidence that there have been any site examinations or sampling with respect to the land involved herein, or that such land contains "demonstrated phosphate reserves" (Supplemental SOR at 3). Appellants in particular state that Survey had no "physical knowledge" whether the thickness and grade of phosphate rock, in sections of land where the rock does not outcrop, meets the established criteria, or whether the land is cut by or downdip from the Meade Peak phosphatic shale member. Appellants also question the authority of the mineral land evaluation committee to designate the KPLA's, and the manner of preparation of the Minutes. Further, appellants argue that the Minutes do not include an explanation of the basis for changing the conclusion of "previous on-site examinations disclosing no discovery of phosphate deposits" (Supplemental SOR at 6).

Finally, appellants contend that BLM had no authority to consult with the Forest Service regarding issuance of phosphate prospecting permits in the Caribou National Forest and that the Forest Service recommendations are not supported by a proper factual basis.

[1] Section 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1982), provides that the Secretary is "authorized" to issue a 2-year phosphate prospecting permit to any qualified applicant only "[w]here prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area." Thus, the statute requires BLM to reject a phosphate prospecting permit application which does not meet the express statutory criteria. William F. Martin, 24 IBLA 271 (1976).

In the present case, Survey has determined that appellants' permit applications encompass lands within KPLA's. As we said in Christian F. Murer, 57 IBLA 333, 334 (1981): "for our purposes, a known phosphate leasing area is an area where prospecting or exploratory work is unnecessary to determine the existence of workability of phosphate deposits. See, e.g., Frank J. Allen, A-30641 (May 17, 1967), and J. D. Archer, A-30886 (Mar. 21, 1968)." (Emphasis added.) Accordingly, we have consistently held that BLM must

reject a phosphate prospecting permit application for land within a KPLA, because it does not meet the statutory criteria. See, e.g., Christian F. Murer, *supra*. Moreover, because the mere filing of a permit application creates no vested rights in an applicant, such an application must be rejected if, at any time subsequent to filing of the application but "prior to issuance of a permit," the land is determined to be within a KPLA. Christian F. Murer, *supra* at 335.

Appellants contend that BLM's failure to issue the permits prior to 1978 amounts to a withdrawal of the land, not in compliance with section 204 of FLPMA, *supra*. A "withdrawal" as defined by section 103 of FLPMA, 43 U.S.C. § 1702 (1982), means, in part, "withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws." Section 204(a) of FLPMA, *supra*, authorizes the Secretary to make withdrawals "but only in accordance with the provisions and limitations of this section." Here, consideration of the applications was pending and we find no merit to appellants' argument that BLM's failure to issue permits prior to designation of the land as KPLA's constituted a "withdrawal" of the land from the operation of the Mineral Leasing Act. 5/ Designation of the land as KPLA's precluded the issuance of phosphate prospecting permits and, thus, the possibility of issuance of preference right leases pursuant to 43 CFR 3520.1-1(a).

[2] Appellants further argue that BLM failed to adjudicate their permit applications within a "reasonable time" as required by section 555(b) of the APA, *supra*. Section 555(b) provides, in relevant part, that: "With due regard to the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it." 5 U.S.C. § 555(b) (1982). The record indicates that appellants' permit applications were filed between September 1970 and November 1972 and that BLM rejected the applications in January 1981. The record indicates that the delay in adjudication was due to the failure of either Survey or the Forest Service to respond timely to BLM requests for its recommendations with respect to the permit applications. However, even assuming BLM failed to act within a reasonable time to adjudicate appellants' permit applications, the remedy for such delay is not issuance of the permits.

As we noted in Harry S. Hills, 71 IBLA 302, 304-05 (1983), in connection with partial rejection of a noncompetitive oil and gas lease offer because the land had been determined to be within a known geologic structure (KGS), which may only be leased after competitive bidding:

The delay in obtaining a structure report or in the processing of appellant's offer cannot prevail against the governing legal

---

5/ In any event, rejection of a mineral lease application on the basis of site-specific considerations does not rise to the level of a "withdrawal" of land under section 204 of FLPMA, even where rejection is based on the incompatibility of mineral leasing with other land values. See Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383, 392 (D. Wyo. 1980). Rejection in such circumstances is simply an exercise of the Secretary's statutory discretion to lease or not to lease in any given instance. See Udall v. Tallman, 380 U.S. 1 (1965)

principles, or aid appellant in his quest for a noncompetitive lease where issuance of a noncompetitive lease is not authorized. The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by its officers' failure to act or delay in the performance of their duties. 43 CFR 1810.3(a); Kenneth L. Hanlin, 70 IBLA 115 (1983). See also Robert A. Lyon, 66 IBLA 141 (1983); George Reddy & Associates, 59 IBLA 359 (1981); Donnie R. Clouse, 51 IBLA 221 (1980).

In the present case, appellants' arguments concerning delay do not answer the controlling question of whether the permit applications comply with the statutory criteria enunciated in 30 U.S.C. § 211(b) (1982), which are a condition precedent to issuance of a phosphate prospecting permit. Since appellants did not have a vested right to a prospecting permit, we cannot find that any procedural shortcoming has resulted in any injury to them which is justiciable.

Appellants also argue that BLM is equitably estopped to reject their permit applications based on the fact that they and their assignees "detrimentally relied upon the then existent policy and practice of the Department of issuing phosphate prospecting permits" (Supplemental SOR at 39).

The court in United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970), outlined four elements necessary for imposition of estoppel:

- (1) The party to be estopped must know the facts;
- (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
- (3) the latter must be ignorant of the true facts; and
- (4) he must rely on the former's conduct to his injury.

Several factors preclude imposition of estoppel in the present case. Appellants have not established that there was a Departmental policy or practice of issuing phosphate prospecting permits routinely or, in other words, without regard to compliance with the statutory criteria enunciated in 30 U.S.C. § 211(b) (1982). Moreover, even if such a policy or practice could be established, we cannot say that an applicant would have a "reasonable right to act in reliance thereon." United States v. Georgia-Pacific Co., *supra* at 98. Rather, the "true facts" are that the Department has consistently rejected phosphate prospecting permit applications not meeting the statutory criteria.

It is asserted that but for the delay in adjudication, the permits would have issued. This may be the case. With respect to a number of the permit applications, Survey had originally recommended issuance of a permit. However, as noted above, delay in adjudication does not translate into a vested right. The court held in Utah International, Inc. v. Andrus, 488 F. Supp. 962, 967 (D. Utah 1979), in connection with issuance of a preference right coal lease where Survey had originally determined that coal was available in "commercial quantities," a condition precedent to issuance of a lease, that the Department still had the authority to reconsider prior decisions with respect to disposition of the public lands, until such time as it had actually acted. Similarly, in the present case, the Department was not bound by the previous Survey recommendations.

Finally, we can find neither an "affirmative misrepresentation" nor an "affirmative concealment of a material fact" required to impose estoppel. United States v. Ruby Co., 588 F.2d 697, 703-04 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979); see Schweiker v. Hansen, 450 U.S. 785 (1981).

[3] Appellants have also made a number of arguments with respect to designation of the land involved herein as KPLA's. Appellants question the authority of the mineral land evaluation committee to designate KPLA's. As we have said on numerous occasions, Survey is the Secretary's technical expert in matters concerning geologic evaluation of tracts of land and the Secretary is entitled to rely on Survey's reasoned analysis. See, e.g., Harold R. Leeds, 60 IBLA 383 (1981). The mineral land evaluation committee in each case was composed of designated members of Survey and the final recommendation was subject to approval by the Acting Chief, Conservation Division, Survey. Moreover, appellants have not presented any evidence that preparation of the Minutes was improper. They are signed by each of the members of the committee and, presumably, reflect a consensus of opinion.

Appellants contend that Survey did not have an adequate factual basis for KPLA designation of the land involved herein because there was no evidence of any site examination or sampling, and they have requested a hearing on issues of fact concerning the KPLA designation. We note that the record reveals that no samples were taken from land involved. Rather, it appears that Survey projected the existence and workability of the phosphate deposits into that land based on "dip and other structural data." This use of geological inference was not improper. As we said in Christian F. Murer, supra at 335:

Assistant Secretary Anderson stated in Atlas Corp., 74 I.D. 76 (1967), that it is unnecessary to demonstrate the workability of a mineral deposit by an actual physical examination of the deposit in the land sought by means of drilling or actual exploratory work on the grounds. Competent evidence to establish the fact that exploration is unnecessary to determine the existence or workability of a phosphate deposit may consist of proof of the existence of minerals in adjacent lands and of geological and other surrounding external conditions. Id. at 84-5.

However, appellants also contend that Survey failed to explain the basis for changing the conclusions of "previous on-site examinations." Appellants refer to Survey's 1971 memoranda which recommended issuance of certain phosphate prospecting permits, viz., I-3777 (IBLA 81-319) and I-3715, I-4294, and I-4393 (IBLA 81-320). Appellants also refer to drilling under prior phosphate prospecting permits by Elizabeth B. Archer and J. D. Archer. In particular, appellants refer to exploratory holes drilled on land included in I-3777, I-3715, and I-3725.

The 1971 Survey memoranda stated that its records indicated that prospecting would be necessary to determine the existence of phosphate deposits in workable quality and quantity in the lands. Minutes Nos. 6 through 8 do not refer to these early recommendations, although they do reference the land described in the applications, and recommend KPLA designation. The January 1981 BLM decisions were based, in part, on Survey's 1980 memoranda which

advised BLM that portions of the lands were located in a KPLA. With respect to the Archers' earlier exploratory work, appellants have presented no evidence that the drilling tested the Meade Peak phosphatic shale member of the Phosphoria Formation upon which Survey relied. 6/

Nevertheless, appellants have also referred to the case of William J. Coleman, A-30516 (Sept. 16, 1968), which involved phosphate prospecting permit application I-015418 for 2,080 acres of land, including land rejected by BLM in I-4975 and I-6274. That land is situated in secs. 28, 32, and 33, T. 9 S., R. 44 E., Boise meridian, Idaho. In Coleman, the Assistant Secretary vacated an earlier decision affirming rejection in part of permit application I-015418. The Assistant Secretary relied on an August 5, 1968, Survey report. With respect to secs. 28, 32, and 33, the report stated that they are "strongly faulted or largely overlain by unfavorable rocks." William J. Coleman, supra at 4. There is no reference to this early report in Minutes No. 6, dealing with the Schmid Ridge KPLA, which includes I-4975 and I-6274.

We believe that the information supplied by Survey provides strong support for the KPLA designations challenged by appellants. However, we believe that some explanation should be provided about the disagreement between the recent studies supporting the KPLA designation and the earlier studies which appear to have been overlooked. Moreover, we note that appellants had prospecting permits on some of the lands, drilled, discovered no phosphate, and as a result acquired no preference right to lease. Under the circumstances, we believe appellants should be given an opportunity to offer evidence in support of their contention that the KPLA designations were improper. We consider an evidentiary hearing held pursuant to 43 CFR 4.415 to be an appropriate means for resolving those factual issues. BLM will be assigned the burden of making an initial showing in support of its KPLA designations. Appellants will then have the burden of rebutting the Government's case. The KPLA designations will be sustained unless appellants make a clear and definite showing of error.

[4] Finally, appellants challenge the authority of BLM to consult with the Forest Service with respect to issuance of phosphate prospecting permits in the Caribou National Forest. Appellants state that the "regulation issued under 30 U.S.C. § 211 (1982), 43 CFR 3521.2-2(c) envisions only consultation with the USGS" (Supplemental SOR at 32). The cited regulation provides for consultation with Survey prior to offering land "not under an outstanding permit or application for preference right lease" for competitive bidding. 43 CFR 3521.2-2(c)(1).

The ultimate authority to issue phosphate prospecting permits is clearly conferred upon the Secretary of the Interior under section 9(b) of the Mineral

---

6/ Appellants stated, in connection with land included in I-3777, that Elizabeth B. Archer drilled to depths of 130 feet and 150 feet, bottoming in chert, and "did not penetrate or find workable phosphate deposits" (SOR, I-5086 and I-3777 at 7). The record indicates that in the Schmid Ridge KPLA which encompasses I-3777, the Meade Peak member is at least overlain by the Rex Chert member of the Phosphoria Formation, consisting of "about 300 feet of bedded dark gray and black chert and cherty mudstone" (Minutes No. 6 at 2).

Leasing Act, supra, even where the surface of the land is under the administrative jurisdiction of another agency. Issuance of a permit is qualified by whether "the public interest will be best served thereby." 30 U.S.C. § 211(a) (1982). However, as the Assistant Secretary stated in Agricultural Research Service, A-31033 (Jan. 17, 1969), at page 7, with respect to land under the administrative jurisdiction of the U.S. Department of Agriculture: "Of course, as a matter of comity, in determining whether or not the issuance of a mineral lease or prospecting permit on withdrawn land is in the public interest, the Secretary of the Interior consults with the administering agency and usually honors its views." See also Natural Gas Corp. of California, 59 IBLA 348 (1981); Earl R. Wilson, 21 IBLA 392 (1975). Accordingly, it was perfectly proper for BLM to consult with the Forest Service in connection with its consideration of appellants' permit applications.

The question then arises whether the Forest Service provided a proper factual basis for rejection of certain of appellants' permit applications. We conclude that, in certain cases, it did not. The Forest Service recommendation was based in large part on the coordinating requirement in the Diamond Creek Land Management Plan (LMP) that further prospecting permits be withheld "until mining is within 25 years of exhausting phosphate reserves." While that statement may appear arbitrary, on its face, it must be viewed in context. As stated at page 255 of the Diamond Creek LMP: "Accommodate valid mineral, gas, and oil exploration while meeting other management objectives." The Diamond Creek LMP outlines a number of general management objectives. However, there is no explanation as to what other management objectives would conflict with issuance of a phosphate prospecting permit for the land involved herein. Accordingly, we cannot conclude that the record as presently developed affords "a sound basis for the Bureau's determination." Agricultural Research Service, supra at 8. The case will be remanded to BLM to reassess the desirability of issuing phosphate prospecting permits I-3715, I-3725, I-4294, and I-4393 for that land not included in a KPLA, which were rejected solely on the basis of the Diamond Creek LMP's general 25-year supply provision.

Appellants have also objected to rejection of portions of permit applications I-3715 and I-4294 because the land is within "critical big game winter range and elk calving areas" in the Webster Ridge Management Unit (Diamond Creek LMP at 280). The Diamond Creek LMP states at 279:

Important elk winter range exists in the Timothy-Bacon Creek area. The winter range has been over-utilized in the past, and concentration is occurring in a few areas along this front. Aspen stands are gradually being replaced by the more competitive conifer species. Available feed for elk has been reduced. Elk that inhabit and enhance the quality of the Stump Creek Roadless Area are dependent upon the winter range in this unit. If elk are maintained in this area, management practices, such as prescribed burning, will have to be done to provide suitable forage and habitat for them.

An important elk-calving area also exists from Chicken Spring south along the foothill range to the Johnson Guard Station.

We believe that this provides ample support for rejection of portions of permit applications I-3715 and I-4294. Prospecting permits would not merely interfere with the elk but would unavoidably alter the habitat in a critical area. See, e.g., James M. Chudnow, 68 IBLA 128 (1982). Appellants have provided no evidence to the contrary.

Accordingly, we conclude that BLM properly rejected appellants' phosphate prospecting permit applications to the extent they included land in big game winter range and elk calving grounds. We further conclude that BLM did not properly reject appellants' permit applications for the remaining land based on the recommendations of the Forest Service to withhold prospecting permits "until mining is within 25 years of exhausting phosphate reserves." As to those lands, the BLM decisions must be set aside and the cases remanded. Finally, we refer the cases to the Hearings Division on the issue of the correctness of the KPLA designations. 7/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed in part; set aside and remanded in part for further action consistent herewith; and referred in part to the Hearings Division.

Gail M. Frazier

Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Bruce R. Harris  
Administrative Judge

---

7/ Accordingly, the BLM decisions in IBLA 81-319, are set aside in whole or in part, and the cases referred to the Hearings Division. With respect to IBLA 81-320, that part of the BLM decision which rejects all of the applications based on the Forest Service recommendations is set aside and remanded. That part of the decision which holds for rejection parts of permit applications I-3715, I-3725, and I-4294 because they include land in a KPLA is set aside, and the cases referred in part to the Hearings Division. We affirm that part of the decision which holds parts of applications I-3715 and I-4294 for rejection to the extent that they include land in big game winter range and elk calving grounds.

