

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, rejecting bentonite prospecting permit application (W-100501).

Affirmed.

1. Mineral Lands: Prospecting Permits

The filing of a bentonite prospecting permit application creates no vested rights in the applicant. If the land described in the application is determined to be within a known bentonite leasing area, it is subject to the competitive leasing provisions of 30 CFR Subpart 3564, and the application must be rejected. Rejection is required even if the application was filed prior to the ascertainment of the extent or workability of the underlying bentonite bed.

APPEARANCES: A. J. Maurer, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

A. J. Maurer, Jr., has appealed from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated October 31, 1986, rejecting his application for a bentonite prospecting permit (W-100501). Maurer filed an application for a bentonite prospecting permit with BLM on April 25, 1986, for the S\NW^ and the N\SW^, sec. 11, T. 47 N., R. 65 W., sixth principal meridian, Weston County, Wyoming, comprising 160 acres.

By memorandum dated May 29, 1986, the Chief of the Solid Minerals Branch, Wyoming State Office, BLM, requested reports and recommendations from the Manager, Casper District Office, BLM, concerning six bentonite prospecting permit applications filed by Maurer, including W-100501. On October 21, 1986, the Manager, Casper District Office, BLM, responded that all six of the applications should be rejected. With regard to application W-100501, he stated: "This land should be leased competitively. The SE^ NW^ is under a competitive lease application and is adjacent to active lease BLM A-039029. The land is underlain by a known commercial bentonite

bed." In addition, he stated that "[p]ractically all of the public lands surrounding or adjacent to the applications are encumbered by bentonite mining claims."

In its October 31, 1986, decision, BLM gave the following reasons for rejecting Maurer's application:

1. The SE[^] NW[^] is currently under two competitive bentonite lease applications.
2. The lands are adjacent to an active bentonite lease.
3. The lands are underlain by a known commercial bentonite bed.
4. Prospecting is not required to ascertain the existence of bentonite in this area.

In his statement of reasons for appeal, Maurer offers the following arguments in favor of his position that BLM's decision is erroneous:

1. To the best of my knowledge the U.S. Department of the Interior has not withdrawn the lands embraced by the captioned Decision from the filing of Prospecting Permit Application for Bentonite or a Permit subsequently issued to a qualified Permit Applicant. Therefore any application for a Bentonite Lease on said lands, which ignores the Prospecting Permit Application and Permit for Bentonite procedure, historically required by the Bureau of Land Management to establish the existence of a marketable deposit, as well as the basis for the said qualified Permittee to be awarded a "Preference Right Bentonite Lease," would be, it seems, automatically rejected by Bureau Officials. This conclusion is made with respect to Item 1. of the Decision.
2. It seems Item 2. of captioned Decision is merely a statement of fact, Item 3. of the Decision would seem to be in error as the Decision was not accompanied by any physical or documented evidence which would indicate that a commercial bentonite bed is "known" to exist thereon.
3. Item 4. of the above Decision can best be answered by admitting it may or may not be true but any prudent bentonite miner would probably choose exploration drilling in lieu of the Decision's Item 4. language, if he were making a determination of the minability of any bentonite so found.

By order dated September 19, 1988, this Board directed BLM to furnish the reports and data on which it relied in rejecting Maurer's application, inasmuch as the case file did not contain any documentation to support the determination that the land at issue is in fact underlain by a "known commercial bentonite bed." Appellant was directed to submit any desired response within 30 days of receipt thereof.

In response, on October 3, 1988, BLM filed with the Board a mineral report entitled "Known Bentonite Leasing Area--Upton, Wyoming" (Upton KBLA) which includes T. 47 N., R. 65 W., sixth principle meridian, where the lands subject to Maurer's application are located. A copy of this document was served on appellant who did not file a response. In this report, BLM discusses "only the Cretaceous formations where the bentonite occurs," including the "Lower Cretaceous Newcastle sandstone, Mowry shale, and the Upper Cretaceous Belle Fourche shale" (BLM Mineral Report dated Mar. 5, 1987 (Mineral Report)). BLM offers the following description of the geology of the Upton KBLA:

The Newcastle formation consists of approximately 50 feet of interbedded sandstones, siltstones, shales, lignites, and bentonite. The minable bentonite bed (A) varies in thickness from 0. to 3.5 feet.

The Mowry shale overlies the Newcastle sandstone and consists mostly of dark-grey to brownish-grey siliceous shale that weathers light silvery grey and forms thin brittle chips. Numerous bentonite beds 0.1 to 1.5 feet thick crop out in the Mowry. Two major bentonite beds, the Clay Spur at the top of the formation, and Bed B in the upper Mowry are persistent throughout the area. The Clay Spur ranges from 2.5 to 4.5 feet in thickness while the B Bed varies from 1.0 to 1.5 feet in thickness.

The Belle Fourche shale overlies the Mowry and is mostly greyish-black non-resistant shale interbedded with light colored bentonite. Four thick bentonite beds are contained within this formation. Bed E, near the base, ranges from 1.0 to 5.0 feet thick. Bed F, about 350 feet above the base of the formation, averages about 3.0 feet in thickness. Bed G, which is about 400 feet above the base, also is approximately 3.0 feet thick. An unnamed bed, about 50 feet above the G Bed, is 4.4 feet thick in Section 13, T. 47 N., R. 65 W.

(Mining Report at 3, 5).

Further, in this report, BLM states that this KBLA has "two operating processing plants," that "[s]everal beds of minable thickness exist and have been mapped by the USGS," that "[m]ining claims for bentonite cover most of the public lands with mapped bentonite," and that "[t]wo competitive lease applications are pending" (Mining Report at 8). In fact, BLM states in its decision that these two competitive lease applications cover the SE[^] NW[^], included in Maurer's application.

[1] In 1986, BLM significantly revised the regulations governing noncoal solid mineral leasing and prospecting. See 51 FR 15204 (Apr. 22, 1986). Under the revision, each of the solid minerals subject to leasing and prospecting is treated individually. The term "hardrock minerals" is defined at 43 CFR 3500.0-5(n) as including bentonite. Maurer's application for a bentonite prospecting permit must meet the terms of the following regulation:

A prospecting permit may be issued for any area of available public domain and acquired lands subject to hardrock mineral leasing where prospecting or exploratory work is necessary to determine the existence or workability of a particular hardrock mineral(s). Discovery of a valuable deposit of any such mineral(s) within the term of the permit entitles the permittee to a preference right lease.

43 CFR 3562.1.

A companion regulation provides as follows:

Lands where prospecting or exploratory work is unnecessary to determine the existence or workability of a valuable deposit of a particular hardrock mineral may be leased only through competitive sale to the qualified bidder who offers the highest acceptable bonus bid. A competitive lease sale may be initiated either through an expression of interest or on Bureau motion.

43 CFR 3564.1.

BLM's determination that Maurer's bentonite prospecting permit application covers lands within the Upton KBLA means that in BLM's view prospecting or exploratory work is unnecessary to determine the existence or workability of bentonite in the area. If BLM's determination is correct, the lands within the Upton KBLA may be leased only through competitive sale under 43 CFR 3564.1. ^{1/}

In the oil and gas lease context, the Board has ruled that "[o]ne who challenges BLM's determination that lands are within a KGS [known geological structure] must establish by a preponderance of the evidence that the determination is erroneous." *E.g., Carolyn J. McCutchin*, 103 IBLA 1, 3 (1988). We will apply that standard in evaluating BLM's determination that the lands subject to Maurer's bentonite prospecting application are within a KBLA. In doing so, we find that BLM's determination, set forth in the Mineral Report discussed *supra*, is supported by the record, and that Maurer

^{1/} In the analogous context of phosphate leasing, this Board has defined a known phosphate leasing area as "an area where prospecting or exploratory work is unnecessary to determine the existence or workability of phosphate deposits." *See, e.g., Earth Sciences, Inc.*, 80 IBLA 28, 29 (1984); *Christian F. Murer*, 57 IBLA 333 (1981). In *Earth Sciences, Inc.*, the Board affirmed BLM's rejection of appellant's phosphate lease prospecting application on the basis that the lands were within a known phosphate leasing area (KPLA), stating that "[i]n the absence of any showing that [the Geological Survey's] determination is incorrect, lands within a KPLA must be leased competitively and appellant's applications for prospecting permits were properly rejected to the extent they described lands within KPLA's. 43 CFR 3521.2-2(c)(1); *J. R. Simplot Co.*, 58 IBLA 305 (1981); *Christian F. Murer, supra.*" *Id.*

has presented no evidence to demonstrate that such determination is in error. On that basis, we must affirm BLM's rejection of Maurer's bentonite prospecting permit application.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision is affirmed.

Gail M. Frazier
Administrative Judge

I concur:

Anita Vogt
Administrative Judge
Alternate Member