

EARTH SCIENCES, INC.

IBLA 87-464

Decided January 6, 1989

Appeal from a decision of the Arizona State Office, Bureau of Land Management, rejecting potassium preference right lease applications A-7464, A-7465, A-7586, and A-8047.

Referred for hearing.

1. Administrative Procedure: Hearings -- Potassium Leases and Permits: Leases

Pursuant to 43 CFR 3533.4(b), an applicant for a potassium preference right lease whose application is rejected by the Bureau of Land Management is entitled to a hearing before an Administrative Law Judge, if the applicant has alleged in the application facts the applicant believes to be sufficient to show entitlement to a lease.

APPEARANCES: Douglas N. Stevens, Executive Director, Earth Sciences, Inc., Golden, Colorado.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Earth Sciences, Inc. (ESI), has appealed from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated March 30, 1987, rejecting preference right lease applications (PRLA's) A-7464, A-7465, A-7586, and A-8047 for failure to prove a discovery of a valuable deposit of potassium.

BLM issued 2-year potassium prospecting permits A-7464, A-7465, A-7586, and A-8047 to ESI with effective dates between November 1, 1973, and June 1, 1974, for nearly 7,000 acres of land within the Coronado National Forest. On October 29, 1975, ESI filed PRLA's for 4,834.67 acres and relinquished the remainder of the acreage under permit. 1/

Effective May 7, 1976, the Department revised the regulations relating to preference right leasing. 41 FR 18845 (May 7, 1976). Those regulations were made applicable to all pending applications. On July 15, 1976, BLM issued a decision requiring ESI to make additional showings in conformance with those regulations. Thereafter, Kerr-McGee Corporation filed a protest against issuance of preference right leases to ESI. Kerr-McGee alleged that

1/ The PRLA's include parts of secs. 2, 3, 10, 11, 14-17, 19-22, 25, and 28-30, T. 22 S., R. 16 E., Gila and Salt River Meridian, Arizona.

the statutory standards governing issuance of potassium preference right leases (30 U.S.C. § 282 (1976)) had not been met in that ESI had failed to show the discovery of a valuable mineral deposit of potassium and that the land was chiefly valuable for potassium. 2/

On May 25, 1984, additional substantive changes in the preference right leasing regulations became effective. 49 FR 17892 (April 25, 1984). Pursuant to directions from BLM, ESI submitted, at various times during 1985, supplemental information to conform with those changes. In addition, during the pendency of the PRLA's, BLM requested and received reports and recommendations from the District Mining Supervisor of the Geological Survey and from the Forest Service (FS), U.S. Department of Agriculture.

An economic evaluation by BLM's Southwest Regional Evaluation Team concluded that the potential rate of return from appellant's proposed project was inadequate to justify investment by a prudent investor. Consequently, in a decision dated March 30, 1987, BLM denied appellant's application based on a failure to demonstrate that a valuable deposit of potassium had been discovered.

The final paragraph of BLM's decision informed ESI, "You have the right of appeal to the Board of Land Appeals, Office of the Secretary, in accordance with 43 CFR, Part 4 * * *" (BLM Decision at 5). 3/ Thereafter, ESI filed an appeal, and BLM forwarded the record to this Board for decision.

On appeal ESI claims that the proper regulations by which to judge its PRLA's are those in existence at the time it filed its applications in 1975. It further asserts that it has discovered a valuable deposit of potassium. Clearly, appellant's assertion regarding the proper regulations by which to judge its applications must be rejected. As the regulations were revised over the years, they were specifically made applicable to pending applications. Thus, BLM took its action rejecting the applications pursuant to 43 CFR 3533.4(a)(1), which provides that "[t]he authorized officer shall reject an application for a preference right lease if the authorized officer determines: (1) That the applicant did not discover a valuable deposit of potassium and/or the lands are not chiefly valuable therefor * * *."

Although BLM was required, in accordance with that regulation, to reject the applications when it determined that ESI had not discovered a valuable deposit of potassium, subsection (b) of that same regulation states: "On alleging in an application facts the applicant believes to be sufficient to show entitlement to a lease, a permittee shall have the right

2/ Kerr-McGee also alleged that prospecting permit A-8047 covered certain unpatented mining claims which were in existence on the effective date of that permit and for which Kerr-McGee had subsequently filed a patent application. BLM thereafter issued patents for certain of those mining claims.

3/ Under 43 CFR 3500.4, any party adversely affected by a decision of the authorized officer made pursuant to the regulations in 43 CFR Part 3500 has the right of appeal to this Board.

to a hearing before an Administrative Law Judge in the Office of Hearings and Appeals." 43 CFR 3533.4(b).

[1] In a recent decision affirming BLM's rejection of a hardrock preference right lease application, the Board commented on 43 CFR 3563.4(b) which contains the same language as 43 CFR 3533.4(b). James Peters, 105 IBLA 147, 149 (1988). As we noted in Peters, the applicable regulation, 43 CFR 3521.1-1(g)(1), provided in 1985 that "[o]n alleging in an application facts sufficient to show entitlement to a lease, a permittee shall have a right to a hearing." However, in 1986 the Department recodified that regulation as 43 CFR 3533.4(b) and changed it to provide that an applicant would have a right to a hearing if facts are alleged in the application which "the applicant believes to be sufficient to show entitlement to a lease" (emphasis supplied). ^{4/} Prior to that change, the applicant was required to allege facts which, if proven, would establish entitlement to a lease. Marine Minerals Corp., 76 IBLA 68, 71 (1983).

As we explained in Peters, supra at 150, the effect of the regulatory change is to require the Department to afford a preference right lease applicant the opportunity for a hearing in every case, since an applicant would not go to the trouble of submitting an application if it did not believe it was entitled to a lease. Thus, the right to a hearing is contingent on the applicant's subjective belief of entitlement, not upon an objective record determination by BLM.

The record contains a great deal of evidence that appellant has alleged facts which it believes to be sufficient to show entitlement to leases, including the filing of its original applications in 1975; the numerous supplements it has filed in response to requests from BLM; and its statement on appeal that it believes it has shown the discovery of a valuable deposit of potassium. Although appellant did not specifically request a hearing, the regulations state that it has a right to one.

Accordingly, we find that appellant has alleged facts in its application which it "believes to be sufficient to show entitlement to a lease," and it therefore has a right to a hearing before an Administrative Law Judge in order to make such a showing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, this matter is referred to the Hearings Division, Office of Hearings and Appeals, for assignment

^{4/} The 1986 rulemaking resulted in the language of 43 CFR 3521.1-1(g)(1) (1985) being modified as explained and the new language being inserted in the regulations in six separate locations relating to preference right leasing of various minerals -- 43 CFR 3513.4(b) for phosphate; 43 CFR 3523.4(b) for sodium; 43 CFR 3533.4(b) for potassium; 43 CFR 3543.4(b) for sulphur; 43 CFR 3553.4(b) for gilsonite; and 43 CFR 3563.4(b) for hardrock.

of an Administrative Law Judge in accordance with 43 CFR 3533.4(b). 5/ ESI shall have the burden of proof at the hearing as explained in 43 CFR 3533.4(c). In addition, Kerr-McGee, as protestant to the issuance of leases, is entitled to notice of any proceedings. The Administrative Law Judge's decision shall be final for the Department absent an appeal to this Board.

Bruce R. Harris
Administrative Judge

I concur:

David L. Hughes
Administrative Judge.

5/ We note that as long as a potassium preference right lease applicant whose application has been rejected has a right of appeal to this Board pursuant to 43 CFR 3500.4 and also has a right to a hearing pursuant to 43 CFR 3533.4(b), this Board has little choice under the regulations, in the absence of an express waiver of that right to a hearing, but to refer the case to the Hearings Division.

