

Editor's note: appeal filed, Civ. No. 98-145-E-BLW (D. Id. April 10, 1998), Affirmed March 2, 1999; Appeal filed with 9th Cir., No. 99-35365, dismissed (per agreement, Rule 42(b) of Federal Rules of Appellate Procedure) (9th Cir. Jan. 13, 2000)

EARTH SCIENCES, INC.

IBLA 95-392 and 96-397

Decided March 12, 1998

Appeals from Decisions of the Idaho State Office, Bureau of Land Management, rejecting a preference right phosphate lease application and an application to modify an existing phosphate lease. I-3557-01 and I-012982.

Affirmed.

1. Phosphate Leases and Permits: Leases

The BLM properly rejects an application for a preference right phosphate lease where the applicant fails to establish, by a preponderance of the evidence, that BLM erred in finding that it had failed to demonstrate that it had discovered a valuable deposit of phosphate and associated vanadium underlying all or part of the land sought to be leased.

2. Phosphate Leases and Permits: Leases

The BLM properly rejects an application to modify an existing phosphate lease to encompass adjacent land where the applicant/lessee fails to establish, by a preponderance of the evidence, that BLM erred in finding that it had failed to demonstrate that a deposit of phosphate extends from its existing lease to the adjacent land.

APPEARANCES: Charles Johnson, Esq., Pocatello, Idaho, for Earth Sciences, Inc.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Earth Sciences, Inc. (ESI), has appealed from two Decisions of the Idaho State Office, Bureau of Land Management (BLM), dated March 21, 1995, and May 3, 1996, rejecting its preference right lease application (PRLA) I-3557-01, which sought a new phosphate lease, and an application to modify its existing phosphate lease I-012982 to include additional acreage. The appeals were docketed as IBLA 95-392 and IBLA 96-397, respectively, and were consolidated by our Order of October 15, 1997.

Lease Application I-3557-01

The ESI and its predecessor-in-interest (Elden Young) had, from October 1, 1971, to September 30, 1975, held prospecting permit I-3557, with respect to 474.96 acres of land in secs. 8, 17, and 21, T. 14 S., R. 43 E., Boise Meridian, Bear Lake County, Idaho. On September 26, 1975, prior to the expiration of the permit, ESI, which had acquired the permit from Young on December 1, 1972, filed application I-3557-01 seeking to lease all of that land.

The ESI originally proposed to extract phosphate ore, along with associated vanadium ore, from the application area by underground means and to process the ore at its own plant and sell the processed ore. That effort was intended to be part of an extensive mining operation since ESI also holds the right to mine on surrounding lands under Federal (I-012982) and state leases and by virtue of ownership of the lands in fee. Its total holding is a continuous block of land, 4,100 acres in size, stretching from Bloomington Canyon northward to Sleight Canyon. While the area encompassed by the application is only 11-1/2 percent of the total project area, ESI considers acquisition of the area "critical to the viability of the overall project" because, without the lease, "the continuity of the orebody would be interrupted to the extent that it would be impossible, or nearly so, to carry out a development program." (Letter to BLM, dated May 1, 1991, at 1-2.)

The ESI asserted in its application that it had, during the permit period, by virtue of drilling four exploration test holes (Nos. 8, 22, 24, and 28) in the NE¹/₄ sec. 21, discovered a valuable phosphate deposit in the Meade Peak Member of the Phosphoria Formation, which underlies all of the permitted land. On September 29, 1975, and June 20, 1977, it submitted sundry reports for the four drill holes, data obtained therefrom (viz., lithologic logs and phosphate assays), and structural contour (upper phosphate zone) and isopach (upper and lower phosphate zones) maps for the NE¹/₄ sec. 21. The ESI also provided an estimate of measured and indicated (demonstrated) phosphate ore reserves in the PRLA area.

Robert Mallis, a BLM geologist, initially evaluated the information submitted by ESI in support of its application, and prepared a geologic report which described the general geology of the application area and ESI's efforts to explore it. In that report, Mallis concluded that ESI had shown the existence, but not the full extent and character, of a phosphate deposit in the NE¹/₄ sec. 21 and had made no showing at all for the remainder of the PRLA area. Therefore, Mallis recommended to the Chief, Branch of Solid and Fluid Minerals, by memorandum dated November 1, 1988, that BLM should find that ESI was not entitled to a preference right lease since the information submitted was "not sufficient to show the existence of a valuable phosphate deposit."

The BLM accepted Mallis' recommendation and rejected ESI's application by Decision dated September 14, 1989, which ESI appealed. The BLM later notified the Board that it desired to consider any new information that ESI

might wish to submit in support of its PRLA. By Order dated February 28, 1990, we vacated the September 1989 Decision and remanded the case back to BLM for further deliberations.

Subsequently, BLM notified ESI by letter of September 6, 1990, that the information it had already submitted was insufficient for BLM to determine whether a valuable phosphate deposit had been discovered and afforded ESI an opportunity to provide certain specified information in support of its application. This information included a detailed explanation of how it arrived at its ore reserve estimates, geologic and exploration data, a detailed market and cost analysis, and an economic analysis for its proposed mining operations.

The ESI provided additional information in March 1991. The Chief, Branch of Solid and Fluid Minerals, concluded that based on ESI's limited exploration of the application area and its projection of the phosphate/ vanadium deposit from surrounding lands, ESI had demonstrated that the application area contained a "potentially valuable deposit," at least in the NE¹/₄ sec. 21, and referred the matter to the Chief, Northwest Regional Evaluation Team (NRET) for a final determination. (Memorandum of Aug. 24, 1992, to Chief, NRET, at 3.)

The NRET evaluated the economic feasibility of mining the phosphate/ vanadium deposit underlying the application area, and concluded in its February 28, 1995, final report that, during the 4-year term of its prospecting permit, ESI had not discovered a valuable phosphate/vanadium deposit underlying any of the land sought to be leased. It found that, while a deposit had been discovered underlying, at least, the NE¹/₄ sec. 21, it was not "valuable" either at the time the application was filed or the evaluation was performed. (Final report at 63.)

In its March 1995 Decision, BLM rejected ESI's application, pursuant to 43 C.F.R. § 3513.4(a), based on the determination in the NRET final report. The ESI appealed from that Decision, and petitioned the Board to stay its effect pending our final decision on the merits of its appeal. By Order dated June 6, 1995, we denied ESI's petition.

In its Preliminary and Supplemental Statements of Reasons for Appeal (SOR), ESI contends that it, in fact, discovered a valuable phosphate deposit within the 4-year term of its prospecting permit, and thus is entitled to a preference right lease. It states that there is agreement between ESI and BLM regarding the presence of a deposit of valuable minerals (phosphate and associated vanadium) within the PRLA area. Thus, ESI argues that the sole issue is whether that deposit is itself "valuable," within the meaning of section 9(b) of the Mineral Leasing Act, as amended, 30 U.S.C. § 211(b) (1994), because it contains ore in sufficient quality and quantity to justify the expenditure of time and money in its extraction, removal, and marketing, with a reasonable prospect of success in developing a valuable mine. The ESI contends that the phosphate/vanadium deposit meets this criteria. The BLM filed no response to either of ESI's SOR's.

The ESI argues that BLM's failure to respond to its SOR's should be deemed to constitute its consent to the granting of its application. This argument is rejected. There is no requirement that BLM respond to an SOR. See 43 C.F.R. §§ 4.413 and 4.414. Nor, in any particular case, will the failure to respond be construed as BLM's concession of any argument made on appeal or to the ultimate disposition of the case in the appellant's favor. 43 C.F.R. § 4.414.

[1] Section 9(b) of the Mineral Leasing Act provides that, when the holder of a prospecting permit "shows to the Secretary [of the Interior] that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit." 30 U.S.C. § 211(b) (1994); see Elizabeth B. Archer, 102 IBLA 308, 311 (1988).

The BLM is entrusted, by Departmental regulation, with the duty of determining whether the permittee discovered a valuable phosphate deposit and thus whether he is entitled to a preference right lease. 43 C.F.R. § 3513.2-1. In addition, 43 C.F.R. § 3513.4(a) provides that BLM "shall reject an application for a preference right lease if the authorized officer determines * * * [t]hat the applicant did not discover a valuable deposit of phosphate."

It is well established that, in order to establish that a valuable phosphate deposit has been discovered and justify issuance of a preference right lease, a permittee must demonstrate the existence of a "mineral occurrence where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his/her labor and means, with a reasonable prospect of success, in developing a valuable mine." 43 C.F.R. § 3500.0-5(i).

Contrary to its assertion, the fact that ESI has already invested considerable time and money and is interested in investing even more time and money in the extraction, removal, and marketing of the ore reserves does not demonstrate the existence of a valuable deposit in the application area, within the meaning of section 9(b) of the Mineral Leasing Act. See Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 131 n.15 (1990).

The ESI contends that BLM is not permitted to conduct its own in-depth valuable deposit determination because 43 C.F.R. § 3513.2-1 and BLM's Instruction Memorandum (IM) No. 93-101 establish that the determination of whether the application area contains a valuable phosphate deposit hinges solely on information provided by the permittee.

Regulation 43 C.F.R. § 3513.2-1 states that the determination "shall be based on the data furnished to [BLM] by the permittee * * * during the life of the permit and supplemental data submitted at the request of [BLM]." Such data is described in IM No. 93-101, which provides general guidance to BLM State Offices regarding valuable deposit determinations,

as that which is necessary for BLM to make such a determination. (Attachment to IM No. 93-101, at 1-1 to 1-2.) Further, BLM is, in fact, required to assess the reasonableness and accuracy of the data provided by the permittee. Id. at 1-4, 1-5.

Nothing in 43 C.F.R. § 3513.2-1 or IM No. 93-101 (or its attachment) undermines the fact that BLM, as the Secretary's delegate, is entrusted by statute and regulation with the ultimate responsibility to decide whether there is a valuable phosphate deposit, and thus whether a preference right lease should be issued. 30 U.S.C. § 211(b) (1994); 43 C.F.R. §§ 3513.2-1 and 3513.4(a). In doing so, BLM may consider any and all pertinent information, since only in that way can BLM properly assess the reasonableness and accuracy of the data provided by the permittee. The Hanna Mining Co., 20 IBLA 149, 151-52 (1975). That is what BLM did here.

The ESI refers on appeal to all of the evidence it has previously submitted in support of its application, disputing the accuracy of certain contrary factors relied upon by NRET in its economic analysis. It objects to NRET's assessment of the tonnage and grade of phosphate and vanadium ore reserves, adoption of recovery rates for the lower phosphate- and vanadium-bearing zones, and failure to consider uranium and selenium reserves. All of ESI's evidence was duly considered by NRET, and, on the basis of that assessment, NRET concluded that ESI had not demonstrated the presence of a valuable phosphate/vanadium deposit within the area applied for. All that, including the basis for NRET's decision on the particular disputed factors, was set forth at some length in its final report. The ESI has failed to show that NRET misinterpreted the facts, employed an improper methodology, or otherwise erred in its analysis.

The NRET is the Department's technical expert for valuable deposit determinations. Thus, its reasoned opinion is entitled to considerable deference and will not be overturned except by a showing that it acted arbitrarily and capriciously or contrary to law or that, by a preponderance of the evidence, it erred as a matter of fact because its methodology was erroneous or it relied on inappropriate or insufficient data or made erroneous computations or determinations. See Western American Exploration Co., 112 IBLA 317, 318-19 (1990), and cases cited. The ESI makes no such showing. The fact that it holds an opinion contrary to NRET's is not sufficient, by itself, to demonstrate error or justify modification or reversal of any of the conclusions reached by NRET. See American Gilsonite Co., 111 IBLA 1, 32 (1989).

Therefore, we conclude that BLM properly rejected ESI's application I-3557-01 because ESI failed to demonstrate that it had discovered a valuable phosphate/vanadium deposit underlying all or part of the land sought to be leased. See John D. Archer, 47 IBLA 268, 271 (1980).

Application to Modify Lease I-012982

The ESI filed its application on December 5, 1977, seeking to modify its lease to encompass the 4.63-acre triangular-shaped parcel of land

in lot 5, sec. 21, T. 14 S., R. 43 E., Boise Meridian, Bear Lake County, Idaho. The parcel is immediately adjacent to the 25.74-acre parcel of land in lot 4, sec. 21, already leased to ESI as part of lease I-012982.

By letter dated June 14, 1990, BLM notified Conda Partnership (Conda), which held the lease from November 1, 1984, to April 1, 1993, that, in order to determine whether a phosphate deposit extended from its leased lands under lot 5, Conda was requested to submit drill logs, trench data, geologic cross-sections, and any other pertinent information. No response was received from Conda.

By letter dated December 8, 1992, BLM informed ESI that, once the lease was assigned back to ESI, if it desired to pursue lease modification, it would be responsible for submitting the information previously requested by BLM in its June 14, 1990, letter. The assignment was approved by BLM on March 29, 1993, effective April 1, 1993. However, ESI did not respond to BLM's December 8, 1992, letter.

Finally, by letter dated September 6, 1995, BLM requested ESI to submit, within 30 days of receipt of the letter, the information previously requested in its June 14, 1990, letter. The BLM stated that "[f]ailure to comply will result in the rejection of the lease modification application." The September 6, 1995, letter was received by ESI on September 11, 1995.

The ESI responded on September 21, 1995, stating that it had previously filed the requested information. However, it stated that, if the information was still required, it needed a 6-month extension of time to provide it. The BLM reiterated its request for the information in a September 29, 1995, letter, and afforded ESI an additional 90 days from receipt of that letter to comply. The BLM stated that "[f]ailure to provide the requested information within the time allowed may result in rejection of the lease modification application." The September 29, 1995, letter was received by ESI on October 2, 1995. The ESI submitted a response on December 21, 1995, which was received January 8, 1996. It again referred to information already in BLM's files.

In its May 1996 Decision, BLM rejected ESI's lease modification application because ESI had failed, despite numerous requests, to submit evidence demonstrating that a phosphate deposit extends under lot 5: "For failure to submit information which includes a showing that a phosphate deposit extends from [ESI's] adjoining lease or from private lands owned or controlled by ESI, as required by regulation 43 CFR 3516.3(c)(3), your application is hereby rejected." The ESI appealed from BLM's May 1996 Decision.

In its SOR, ESI contends that BLM already has information in its files sufficient to demonstrate that the parcel of land sought to be leased as a part of lease I-012982 contains phosphate reserves which extend from the deposit already known to underlie that lease. In support thereof,

ESI incorporates by reference all of the documents submitted by the Ruby Company (Ruby) in support of its original application for lease I-012982, as well as the entire file relating to that lease and ESI's PRLA I-3557-01.

[2] Regulation 43 C.F.R. § 3516.1 provides that, when lands available for leasing "are known to contain a phosphate deposit that extends from an adjoining Federal lease or from privately held lands," BLM may lease that area noncompetitively, either by issuing a new lease or by adding the area to an existing lease. The person who seeks to lease such an area is required to file an application, which "shall * * * [i]nclude a showing that a phosphate deposit extends from the applicant's adjoining lease or from private lands owned or controlled by the applicant." 43 C.F.R. § 3516.3(c)(3).

The ESI's SOR is essentially a resubmission of its December 21, 1995, response to BLM, which likewise asserted that various documents already in BLM's files demonstrate that lot 5 contains a phosphate deposit. The ESI first refers to certain documents involving Ruby's original lease application and resulting lease I-012982. That application was filed on November 14, 1961, and resulted in the issuance, effective July 1, 1962, of a lease, which covered 65.74 acres of land in lot 4 and the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 21. We can find no document, nor has ESI identified any, which states or even indicates that any of the land adjacent to lease I-012982 in lot 5 contains a phosphate deposit. Furthermore, the mere fact that lot 5 is situated in close proximity to an existing phosphate lease does not show that it contains such a deposit.

The ESI points to a March 9, 1962, memorandum from the Director, United States Geological Survey (USGS), informing the Manager, Land Office, Boise, Idaho, BLM, in response to a request for a report regarding Ruby's lease application, that, according to USGS's records, "the phosphatic shale member of the Phosphoria formation crops out and underlies part of the lands applied for [lot 4, SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 21]." (Ex. B attached to SOR at 1.) However, the Director did not state that the phosphate-bearing portion of the formation continues under lot 5. Nor can we make such a finding.

Moreover, the record includes an August 28, 1995, memorandum from Mallis to Judy Phelps, a BLM solid mineral adjudicator, stating that

[m]y preliminary evaluation of the lands applied for [lot 5], based on available published geologic information, is inconclusive as to whether or not the area is underlain by a phosphate deposit. If a phosphate deposit does exist within the area, it is probably small in size and at a depth in excess of 500 feet; however, without the * * * information [requested from ESI], I cannot make a positive determination.

The BLM requested in 1992 and again in 1995, that ESI make the showing required by 43 C.F.R. § 3516.3(c). It failed to do so.

Thus, the record demonstrates that, at no time after filing its application to modify its existing phosphate lease, I-012982, did ESI make a showing that a phosphate deposit extends from its leased lands or any of its privately held lands under the land sought to be included in its lease. Accordingly, we conclude that BLM properly rejected ESI's application to modify its existing lease I-012982.

To the extent ESI has raised other arguments we have not specifically addressed herein, they have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

John H. Kelly
Administrative Judge

I concur.

James P. Terry
Administrative Judge

