

ARK LAND COMPANY, ET AL.

IBLA 2003-305

Decided March 23, 2006

Appeal from a decision of the State Director, New Mexico State Office, Bureau of Land Management (BLM) rejecting coal preference right lease applications NMNM 3752, NMNM 3753, NMNM 3754, NMNM 3755, NMNM 3835, NMNM 3837, NMNM 3918, NMNM 3919, NMNM 6802, NMNM 7235, NMNM 8745.

Case referred to the Hearings Division, Office of Hearings and Appeals, for an evidentiary hearing and a recommended decision.

1. Coal Leases and Permits: Applications--Coal Leases and Permits: Permits: Generally--Mineral Leasing Act: Generally

A deficiency in a coal prospecting permit application related to evidence of qualifications of the applicant under the Mineral Leasing Act is a curable defect. When a party challenges the response to a request for additional information made by BLM 35 years ago in adjudicating the prospecting permit application, a presumption of regularity pertaining to the actions of BLM officials supports a finding that the information was provided to the satisfaction of BLM and a challenge to the validity of the prospecting permit is properly denied.

2. Coal Leases and Permits: Applications--Coal Leases and Permits: Permits: Generally--Mineral Leasing Act: Generally

The limitation on issuance of coal prospecting permits under the Mineral Leasing Act to “unclaimed, undeveloped” lands was intended to protect the rights of entrymen with a vested adverse claim to purchase the lands which predated the filing of the prospecting permit application.

3. Coal Leases and Permits: Applications--Coal Leases and Permits:
Permits: Generally--Mineral Leasing Act: Generally

Under the former preference right coal leasing provisions of the Mineral Leasing Act, 30 U.S.C. § 201(b) (1970), governing public lands for which prospecting or exploratory work is necessary to determine the existence or workability of coal deposits, the holder of a prospecting permit is entitled to a preference coal lease if he shows within the term of the prospecting permit that the land contains coal in commercial quantities. This requires a showing that the mineral deposit is of such quality and quantity that a prudent person would be justified in the further expenditure of his labor and capital with a reasonable prospect of success in developing a mine. The permittee must show a reasonable expectation that revenue from the sale of coal will exceed the costs of developing the mine, including costs of environmental protection and reclamation, and extracting, removing, and marketing the coal.

4. Coal Leases and Permits: Applications--Coal Leases and Permits:
Permits: Generally--Mineral Leasing Act: Generally

In determining commercial quantities when adjudicating a coal preference right lease application, prices and costs are not considered to be frozen at the time the application is filed, and the Department may consider changes in the prices of coal and costs occurring before a final Departmental decision is made, as well as expected prices and costs over the life of the deposit.

APPEARANCES: William B. Prince, Esq., Salt Lake City, Utah, for Ark Land Company and Rogers Badgett; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management; Paul E. Frye, Esq., Albuquerque, New Mexico, for the intervenor.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Ark Land Company and Rogers Badgett (collectively referred to as Ark or appellants) have appealed a June 16, 2003, Record of Decision (Decision) of the State Director, New Mexico State Office, Bureau of Land Management (BLM), rejecting certain coal preference right lease applications (PRLA's). ^{1/} The PRLA's are

^{1/} The preference right lease applications bear the following serial numbers:

(continued...)

located in the Bisti Region of the San Juan basin. BLM rejected the PRLA's because it determined "in accordance with 43 CFR 3430.1-2, that coal had not been discovered in commercial quantities." (June 16, 2003, Decision Transmittal Letter at 1.) The Decision is based on a May 16, 2003, "Commercial Quantities Report" (CQ Report) prepared by Powell F. King, BLM Mining Engineer.

The Navajo Nation has intervened in this appeal. Intervenor has filed an Answer to Ark's Statement of Reasons (SOR) and a Reply.

The prospecting permits were issued pursuant to section 2(b) of the Mineral Leasing Act of 1920 (MLA), as amended, 30 U.S.C. § 201(b) (1970),^{2/} which provided in part that:

Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this chapter, prospecting permits for a term of two years, for not exceeding five thousand one hundred and twenty acres; and if within said periods of two years thereafter the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this chapter for all or part of the land in his permit.

A noncompetitive coal lease is properly granted pursuant to a PRLA "if the applicant can demonstrate that he discovered commercial quantities of coal on the prospecting permit lands within the term of the prospecting permit." 43 CFR 3430.1-1.

These PRLA's have been the subject of a series of prior adjudications and administrative appeals resulting in remands to BLM. Adjudication of PRLA's is governed by the regulations at 43 CFR Subpart 3430. After completion of the environmental analysis (environmental assessment (EA) and/or environmental impact statement (EIS)) and prior to adjudication of a PRLA, BLM provides the

^{1/} (...continued)

NMNM 3752, NMNM 3753, NMNM 3754, NMNM 3755, NMNM 3835, NMNM 3837, NMNM 3918, NMNM 3919, NMNM 6802, NMNM 7235, and NMNM 8745.

Appellants either hold title to the PRLA's on the BLM records or hold pending (unapproved) assignment of record title. (Statement of Reason (SOR) at 1 n.1.)

^{2/} Repealed by section 4 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), P.L. No. 94-377, 90 Stat. 1083. Under FCLAA, coal leases are issued on the basis of competitive bidding or negotiated sale at fair market value. 30 U.S.C. § 201(a)(1) (2000).

applicant a copy of the proposed lease including any stipulations and a copy of the relevant EA or EIS. 43 CFR 3430.4-1(b). Regulations governing PRLA's require the applicant to submit a "final showing" regarding details of the proposed operation including estimated revenues and the

proposed means of meeting the proposed lease terms and special conditions and the estimated costs that a prudent person would consider before deciding to operate the proposed mine, including but not limited to, the cost of developing the mine, removing the coal, processing the coal to make it salable, transporting the coal, paying applicable royalties and taxes, and complying with applicable laws and regulations, the proposed lease terms, and special stipulations * * *.

43 CFR 3430.4-1(d)(2).^{3/} In a May 13, 1994, decision, BLM initially rejected these PRLA's on the ground that the applicants' amended Final Showing, the Bisti PRLA Final Showing for the CMV submitted in September 1993 (1993 Final Showing), was inadequate for failure to address the economics of mining certain portions of the coal on the prospecting permits which applicants considered to not be economically recoverable. On appeal, the Board set aside the BLM decision and remanded the case on the ground that there had been no BLM adjudication of Ark's projected costs for operating a mine on the lands and no finding of whether a reasonably prudent person would undertake a mining operation. Ark Land Co., 139 IBLA 196, 205 (1997).^{4/}

On remand, BLM reviewed Ark's 1993 Final Showing and an updated (1997) cost projection. It also prepared an environmental protection cost estimate document (CED) to estimate the cost of compliance with all laws, regulations, lease terms, and stipulations intended to protect the environment as required by regulation. 43 CFR 3430.4-3.^{5/} In its decision, BLM stated that the "profitability of the proposed mining operation was evaluated based on the information provided by Ark and on studies and analysis performed by the BLM." (BLM Decision dated Dec. 19, 1997, at 4.)

^{3/} If the lands in the PRLA are to be mined as part of a logical mining unit involving other lands, the final showing "shall include the estimated costs and revenue of the combined mining venture [(CMV)]." 43 CFR 3430.4-1(d)(3).

^{4/} The Navajo Nation was granted intervenor status by the Board in this case. 139 IBLA at 203. Among the issues raised by intervenor was the validity of the prospecting permits and the propriety of issuance of the prospecting permits in view of Indian occupancy of and claims to portions of the lands. In remanding the case to BLM, we noted that it should make the initial adjudication on the question of the validity of the prospecting permits. 139 IBLA at 203.

^{5/} Notice of the availability of the draft CED for public comment was published in the Federal Register. 62 FR 52351 (Oct. 7, 1997).

Accordingly, BLM approved the PRLA's. This decision was appealed to the Board by the Navajo Nation. The Board once again set aside the BLM decision and remanded the case for further adjudication because the decision was conclusory in nature and failed to provide an analysis of the facts relied upon by BLM to support its findings as required to establish a rational basis for the decision. The Navajo Nation, 150 IBLA 83, 88, 90 (1999). In reaching this result, we did not address the issue raised by the Navajo Nation regarding the propriety of the prospecting permits. 150 IBLA at 85.

On the second remand, BLM issued the decision which is the subject of this appeal. It "was based upon an analysis of the 1993 Final Showing and additional information submitted by Ark Land in 2002, which is referred to as the 2002 Update." (Decision at 1). BLM determined that Ark had "reasonably estimated the quantity and quality of the coal" in the 1993 Final Showing. Id. at 9-10. Addressing the proposed mining operations, BLM noted that an EA and an EIS had been prepared analyzing the impacts of mining and measures to mitigate environmental effects, and that details of measures to mitigate environmental impacts were provided in the environmental chapter of the 1993 Final Showing. Id. at 10-11. Further, BLM found that Ark's "proposed method of operation and reclamation is in conformity with all applicable laws, regulations, and lease conditions and stipulations." Id. at 11. Focusing on the proposal to construct a rail spur from the mine to facilitate sales to power plants served by rail, BLM also found the "transportation cost assumptions used by Ark are reasonable and adequate." Id. at 11-12. Thus, BLM found that Ark's "estimated costs of developing the mine, removing the coal, and processing the coal are reasonable and adequate," and these costs were used in the analysis of commercial quantities. Id. at 13.

In rejecting Ark's analysis of the existence of commercial quantities of coal on the PRLA's, BLM has focused on two components, environmental costs and the price at which mined coal could be sold. With respect to the costs of mitigating environmental effects, BLM was unable to verify Ark's environmental cost data and duplicate its calculations. Consequently, BLM used the costs it estimated in the CED, as adjusted ^{6/} to the time of the 2002 Update. Id. at 15. Calculating the net difference in environmental costs at \$22 million, BLM allocated the additional environmental expense equally over the anticipated 26 years of production in calculating the economic return. Id. at 14; CQ Report at 19, 52 (Table 10).

Ark's projected sale price of mined coal, on which revenue estimates are based, was also dismissed by BLM. After quoting coal market discussions from a periodical publication, BLM concluded that Ark's coal price projection "is not reasonable" and

^{6/} The adjustment of 6 percent was based on the rate of growth of Ark's cost of contract services from the time of the 1993 Final Showing to the date of the 2002 Update. (BLM Decision at 14.)

rejected Ark's projected sale price (2002 Update) of \$18.00 per ton for coal free on board (FOB) the mine. Consequently, BLM made its own analysis of coal prices. *Id.* at 15-17. Two approaches were used by BLM to project coal prices for the mine. Based on the periodical discussions regarding price forecasts for coal in the Four Corners region, BLM estimated the price for coal in the PRLA's, when adjusted for the quality of the coal, at between \$10.65 and \$13.80 per ton. *Id.* at 19; CQ Report at 27. Calculations were made to determine the price at which the cash flow would generate a 10 percent return on operations. This was found to be a price of \$14.97 per ton FOB the mine, a price in excess of projected market prices. (Decision at 19; CQ Report at 27.) BLM acknowledged that a profit would be realized on operations at a market price as low as \$10.31 per ton, although the rate of return generated would be less than 10 percent. (Decision at 20; CQ Report at 28.)

In an alternative analysis, BLM projected the FOB mine price on the basis of an incremental pricing analysis, stating that the "incremental price represents transactions where coal companies price coal to move incremental tonnage at prices above cash costs [^{7/}] but below their total or break-even cost [^{8/}]." *Id.* Stating that the coal producing regions serving the area's power plants have excess production capacity, BLM indicates that a new mine will have to compete with existing mines in the incremental pricing market. *Id.* Taking Federal Energy Regulatory Commission (FERC) data regarding the price of coal delivered to regional power plant customers (CQ Report, T. 5), BLM calculated the delivered spot market coal prices. (CQ Report at 24 and T. 6.) Then, BLM applied a net-back analysis in which it subtracted the cost of transportation from the Bisti Mine to the power plant from the delivered price in order to project the potential price FOB the mine. (CQ Report at 25.) These prices were in turn entered into a profitability analysis to calculate the rate of return from potential sales to the power plants. *Id.* at 28. A positive rate of return was determined for only three of the nine potential customers and only one of the plants would allow a return above the 10 percent rate which BLM held would be required by a prudent investor. *Id.* at 28-29. Accordingly, BLM concluded that a "reasonable prospect of success in developing a valuable mine does not exist and a prudent person would not be justified in further expenditure of labor and means due to the limited markets available, and the projected low rates of return." *Id.* at 31.

In the SOR, appellants argue that BLM erred in undertaking an entirely new analysis of commercial quantities of coal on remand of the 1997 decision approving the applications based on the 1993 Final Showing. (SOR at 14.) Appellants contend

^{7/} Defined to include "labor, materials and supplies, mine overhead, taxes, royalties and transportation to place coal in a railcar." (Decision at 20.)

^{8/} Defined to include cash costs plus corporate overhead with no return on capital investment. *Id.*

that the decision must be based on information before BLM at the time of its 1997 decision. Id. at 17. In view of BLM's failure to prepare an analysis of the data in the 1993 Final Showing to support its 1997 finding of commercial quantities of coal as required by the Board, appellants' consultant, Pincock Allen & Holt (PAH), prepared a commercial quantities analysis based on the 1993 Final Showing focusing on market and coal prices. (SOR at 21, PAH CQ Analysis (July 21, 2004), Ex. 14 to SOR.) Appellants contend, among other things, that BLM arbitrarily picked the date to be used in its study of coal prices (asserting that prices were trending higher), neglected to consider the increased demand from power plant expansion, and used stale market and transportation data. (SOR at 24-27.) Failure to consider the cyclical nature of the coal market and the range of historic price and cost factors improperly distorts BLM's application of the prudent man test and the marketability test, appellants argue. Id. at 31. Finally, appellants assert a right to a hearing before an administrative law judge under 43 CFR 3430.5-2(b).

In its Answer, BLM contends that it is not precluded from obtaining additional relevant information postdating its 1997 decision which was set aside and remanded. (Answer at 1-2, 4-5.) Recognizing that the economics of a commercial quantity determination depend heavily upon the price of coal and costs association with mining and transporting the coal to market, id. at 11, BLM concedes that a hearing may be required in this case. Id. at 14.

In an Answer filed by intervenor, the Navajo Nation contends that if the BLM decision is not sustained on the ground of lack of commercial quantities, the Board should uphold BLM on the alternative ground that the prospecting permits at issue were improperly issued by BLM and are invalid. (Answer at 3-4.) Intervenor notes that the Department long ago provided for the protection of off-reservation Indians residing on the public lands by holding that entries and appropriations of public lands would not be allowed until surveys have been made of lands within the region of Indian settlements and the lands occupied by Indians have been ascertained, citing Indian Occupants, 3 L.D. 371-72 (1884). (Answer at 6-7.) Intervenor also cites the regulations at 43 CFR 2013.6 (1967) regarding protection of Indian occupancy and 43 CFR 2013.9-3 (1967) to the effect that lands occupied by Indians in good faith are not subject to entry or appropriation by others. (Answer at 8, 19.) Intervenor states that certain public lands included in the PRLA's were withdrawn for Navajo use by Public Land Order (PLO) 2198 (Sept. 3, 1960), arguing they are not subject to mineral entry under the public land laws. Id. at 13-14, 23-24. Contending that much of the area within the PRLA's was occupied by Indians when the applications were filed, intervenor asserts that this occupancy was protected from disturbance by mineral leasing under the regulation at 30 CFR 2091.5 (1971). Id. at 9-11. Intervenor notes that several allotments held in trust for Navajo Indians which predate issuance of the prospecting permits exist on lands within the PRLA's, asserting that mineral leasing is precluded on these lands. Id. at 12-13, 21. Citing conflicts with

lands held in trust for the Navajo Nation and lands withdrawn under PLO 2198, intervenor argues these lands are unavailable for mineral leasing without Tribal consent. Id. at 13-14, 22-23.

Intervenor also contends the applicants failed to disclose their interest in other permits and leases and to disclose the interest of other parties in the PRLA's causing the applications to be null and void ab initio, citing 43 CFR 3131.2(e) (1967). (Answer at 24-27.) Asserting that the MLA limited the filing of prospecting permits to "unclaimed, undeveloped" areas and noting the presence of oil and gas leases and abandoned wells on the lands, intervenor argues the lands in these PRLA's were not unclaimed and undeveloped, and, hence, were not subject to the filing of applications, citing the regulation at 43 CFR 3430.5-1(b)(1). (Answer at 28-31.) Intervenor also contends that BLM is required to prepare an EIS prior to issuing any leases in response to the PRLA's. Id. at 34-39.

In a Reply brief, appellants argue that post-1997 data considered by BLM is irrelevant to the question of whether it is entitled to a preference right lease. (Reply at 3-6.) In opposing intervenor's objection to the validity of the prospecting permits, appellants incorporate by reference the relevant portions of its brief in response to the prior appeal in which this issue was raised by the Navajo Nation. No response to intervenor's brief was filed by BLM.

As a threshold matter, we note that the issue regarding the validity of the prospecting permits, which was previously raised by the Navajo Nation in the initial appeal and reasserted in this appeal, was also presented to BLM in the Navajo's December 5, 1997, comments on the CED prepared by BLM and published in the Federal Register. In its response to comments, BLM upheld issuance of the prospecting permits, noting that the reference in the Mineral Leasing Act of 1920 to "unclaimed, undeveloped" land relates to coal claims and coal development pursuant to statutory authority predating the MLA which was superseded by provisions of the MLA. (Final CED at unnumbered p. 13.) BLM pointed out that a different construction would vitiate the coal reservation to the Government in lands patented subject to a reservation of the coal, precluding development pursuant to the MLA. Id. Further, BLM noted that the MLA expressly applies to all deposits of coal in lands of the United States which have been disposed of subject to a reservation of the coal. 30 U.S.C. § 182 (2000).

[1] To the extent that intervenor challenges the validity of the prospecting permits on the ground of an asserted initial deficiency in the applicants' disclosure of an interest in other permits or leases or disclosure of other parties in interest to their applications, we find that intervenor has failed to establish error. The fact that BLM issued decisions in 1968 which required the applicants for two of the prospecting permits (NM 3752 and NM 3754) to provide a statement regarding disclosure of

interests in other coal leases and permits on Federal lands does not establish either that the information was not provided to BLM or that applicants were in violation of the acreage limitations. See 30 U.S.C. § 184(a)(1) (2000); 43 CFR 3132.2(a)(3) (1968). Evidence of qualifications, which may pertain to multiple applications, was not necessarily retained by BLM in each serial case file, but was often contained in separate qualifications files. See TXO Operating Co., 99 IBLA 355, 358 (1987). There is a presumption of regularity which supports the actions of BLM officials and, in the absence of clear evidence to the contrary, they will be assumed to have properly discharged their official duties. Harold E. Wilson, 67 IBLA 21, 23 (1982).

Intervenor's argument that any initial failure to file a disclosure statement requires rejection or cancellation of the prospecting permit errs in relying upon precedent relating to the Department's former simultaneous noncompetitive oil and gas leasing program. Oil and gas leases which are issued without competitive bidding (noncompetitive leases) must be issued to the first qualified applicant. 30 U.S.C. § 226(c)(1) (2000) see McKay v. Wahlenmaier, 226 F.2d 35, 39 (D.C. Cir. 1955). In the McKay case the failure of the noncompetitive oil and gas lease applicant to disclose his interest as a shareholder in certain Federal oil and gas leases held by a corporation was held to be a violation of the regulation requiring such disclosure. This rendered his application defective so that, although his application filed in the simultaneous drawing procedure was the first drawn, he was not the first qualified applicant, mandating cancellation of the lease. 226 F.2d at 40-41. With respect to noncompetitive oil and gas lease applications not entered in the simultaneous drawing (known as over-the-counter noncompetitive lease applications), defects in the application have been regarded as curable defects with priority attaching as of the date the error is corrected or the missing information is provided when the curative document or information is provided to BLM prior to rejection of the application. Gian R. Cassarino, 78 IBLA 242, 244-45, 91 I.D. 9, 11 (1984); see Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976), aff'g Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974). The asserted defects in the prospecting permit applications would be curable defects. See American Gilsonite Co., 111 IBLA 1, 46, 96 I.D. 408, 431-32 (1989).^{2/} Thus, even if there had been a failure to file a disclosure statement, intervenor errs in asserting this would require cancellation of the permits.

[2] Intervenor notes that issuance of coal prospecting permits under the MLA was limited to lands "in any unclaimed, undeveloped area" and argues that the land was not unclaimed and undeveloped since the lands contained abandoned oil and gas wells, mining claims, and had been subject to coal exploration activity. (Answer

^{2/} We note that the right to cancel a permit for violation of regulatory provisions "shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any * * * permit." 30 U.S.C. § 184(h)(2) (2000). Appellants state they are good faith bona fide purchasers.

at 28-31.) In examining the meaning of this limitation, the Solicitor for the Department noted that at the time of enactment of the MLA the public lands containing coal were subject to occupancy and entry for the purpose of opening or improving a coal mine under the Coal Lands Act of 1873, as amended, 30 U.S.C. §§ 71-76 (2000). Sol. Op., “Effect of Mining Claims on Secretarial Authority to Issue Prospecting Permits and Preference Right Leases for Coal and Phosphate,” M-36893 (Supp. II), 88 I.D. 247, 250 (1981).^{10/} In addressing the validity of the prospecting permits in the context of the CED, BLM held that the reference to unclaimed and undeveloped lands refers to coal claims and coal development under the Coal Lands Act. (CED at 12.) Under the Act, coal lands were subject to entry and a preference right of the entryman to purchase the land. 30 U.S.C. §§ 71, 72, 75 (2000). Recognizing the reasonableness of BLM’s finding that the limitation in the coal leasing provisions of the MLA was designed to protect the preexisting claims of entrymen under the Coal Lands Act, the Solicitor found the limitation also extended to other vested adverse rights in the land which existed at the time of permitting, including valid mining claims. *Id.* at 50-51. Observing that no mining claim located after the effective date of the Multiple Mineral Development Act of 1954, 30 U.S.C. §§ 521-531 (2000), vested the locator with a right to patent of leaseable (as distinguished from locatable) minerals,^{11/} the Solicitor held that no mining claim located after that date would be adverse because it would not ripen into a patent of the leaseable mineral deposit. 88 I.D. at 252. Intervenor has presented no evidence of valid adverse mining claims on the lands.^{13/} See Intervenor’s Answer, Ex. 11. The Solicitor also found that there was no basis for construing the limitation to include lands which had been developed under lease for some other mineral (e.g., abandoned oil and gas well) which would not have caused the lands to be unavailable for a coal prospecting permit. 88 I.D. at 251. It is important to recognize that there has been no showing that, at the time the prospecting permits were issued, further prospecting was not necessary to establish the existence of workable coal deposits. Thus, for example, in the case of NM 3919, the record shows the Director, Geological Survey, found that

^{10/} Intervenor notes that the cited opinion modified two earlier opinions, Sol. Op., “The Effect of Mining Claims on Secretarial Authority to Issue Prospecting Permits for Coal and Phosphate,” M-36893 (1977), and Sol. Op., “Effect and Implementation of Solicitor’s Opinion M-363893 on ‘Unclaimed, Undeveloped,’” 86 I.D. 627 (1979). Although intervenor asserts that these prior rulings should be followed despite the fact that they were superseded, no basis for this contention has been shown and we decline to do so.

^{11/} Leaseable minerals were reserved to the United States. 30 U.S.C. § 524 (2000).

^{12/} In the event that a valid adverse mining claim existed at the time the prospecting permit was issued, this would not render the entire permit null and void ab initio, but at most would subject conflicting portions of the permit to cancellation. Sol. Op., 88 I.D. at 253.

“[p]rospecting is necessary to determine the workability of the coal deposits in the lands involved.” Hence, we find intervenor has not shown that mining claims or mineral leasing precluded issuance of the prospecting permits.

With respect to prior Indian occupancy of the lands, we find that intervenor’s contention that the prospecting permits were null and void ab initio is not supported by the relevant law. BLM has pointed out that the coal in all the PRLA lands has always been Federal coal, having been expressly reserved when surface-only patents were issued for a few Indian parcels in the area.^{13/} Although intervenor asserts that the lands were withdrawn pursuant to PLO 2198, 25 FR 8546, 8547 (Sept. 3, 1960), from appropriation under the public land laws, including for leasing under the MLA, this PLO was subsequently modified. Thus PLO 2198 was expressly amended “to permit leasing of the lands under the [MLA].” PLO 3460, 29 FR 14,594 (Oct. 24, 1964). Accordingly, the record fails to support a finding that the land was withdrawn from leasing under the MLA.

The regulation at 43 CFR 2013.6 (1967),^{14/} was cited by intervenor in support of its argument that the applications were invalid. That regulation provided that land managers will “suspend” all applications made by a party other than an Indian occupant for lands in the possession of Indians who have made improvements. As pointed out by appellants, this regulation does not necessarily require that such applications be rejected or cancelled. The regulation at 43 CFR 2091.5 was removed from the CFR in 1987. In addressing the removal of the regulation in its response to comments, the Department indicated in the preamble that the promulgated regulations at 43 CFR Part 2090 “are designed to summarize in one location the regulations that cover all forms of segregation and opening of the public lands.” 52 FR 12172 (Apr. 15, 1987). Explaining the removal of 43 CFR 2091.5, the preamble to the revised regulations stated that the former regulation does “not deal with the issue of segregation and opening of lands, but contain[s] procedural instructions that are part of [the] Bureau of Land Management’s Manual system and will be followed in those instances when Indians are occupants of the public lands”. Id. Thus, the regulation at 43 CFR 2013.6 (43 CFR 2091.5) does not establish that the lands were segregated from mineral leasing and the prospecting permits were

^{13/} The issue of Indian occupancy was addressed in the June 19, 1998, BLM Answer in the prior appeal by the Navajo Tribe. These issues were not addressed by BLM in its latest Answer

^{14/} This regulation was later recodified as 43 CFR 2091.5 (1970). Another regulation cited by intervenor, 43 CFR 2013.9-3 (1968), is not helpful, as this is directed to lands in Alaska occupied by Indians, Aleuts, and Eskimos.

invalid. ^{15/} Accordingly, intervenor has failed to sustain the burden of showing the invalidity of the prospecting permits.

[3] Under the statutory provision governing coal preference right leasing, if the prospecting permittee demonstrates that the “land contains coal in commercial quantities,” the permittee is entitled to a coal lease. 30 U.S.C. § 201(b)(1970). It was not until 1976 that the Department promulgated regulations defining commercial quantities:

A permittee has discovered commercial quantities of coal * * * if the mineral deposit discovered under the permit is of such a character and quantity that a prudent person would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a mine. The permittee must present sufficient evidence to show that there is a reasonable expectation that his revenues from the sale of the mineral will exceed his costs of developing the mine, and extracting, removing, and marketing the mineral.

43 CFR 3520.1-1(c) (1976); ^{16/} see Utah International, Inc. v. Andrus, 488 F. Supp. 962, 968 (D. Utah 1979); Jesse H. Knight, 155 IBLA 104, 108 (2001). We note that while BLM cites a 10 percent rate of return on investment as the standard of whether a prudent person would be justified in the further expenditure of his labor and capital with a reasonable prospect of developing a mine, we know of no authority in statute, regulation, or precedent that necessarily requires this rate of return. See Burlington Resources Oil and Gas Co., 146 IBLA 335, 344 (1998) (upholding BLM use of a rate of return for the operator of approximately 10 percent, but noting that the expected rate of return changes with changes in the economy). In upholding the validity of the 1976 regulatory definition of commercial quantities, the Utah International court noted that under the MLA, entitlement of the prospecting permittee for a lease of other minerals such as phosphates, oil and gas, sodium, sulfur, and potash was

^{15/} Intervenor also cites the policy for protection of Indian occupancy on the public lands set forth at 3 L.D. 371 (1884). This policy designed to avoid dispossession of Indians residing on the public lands required officials of the Government Land Office, BLM’s predecessor, to refuse all entries for adverse claims made by others upon the lands prior to ascertaining the existence of Indian occupancy. 3 L.D. at 372. While the term entry refers to a claim which will potentially ripen into a patent of the public land, the coal has been subject to disposition solely by leasing since enactment of the MLA in 1920, a form of disposition which cannot result in a patent of the lands. Hence, the 1884 circular did not require rejection of the prospecting permits.

^{16/} The regulation in its current form, which now specifically mentions the costs of environmental protection and reclamation measures, is codified at 43 CFR 3430.1-2.

predicated on a showing of “valuable deposits” of the specified mineral and that this term has been construed by the Department under the Mining Law of 1872 as consisting of a prudent man test supplemented by a marketability test. 488 F. Supp. at 968; see United States v. Coleman, 390 U.S. 599, 602-03 (1968); Yankee Gulch Joint Venture v. BLM, 113 IBLA 106, 131 (1990). This standard is applicable to PRLA’s pending on the effective date of the regulation. 43 CFR 3520.1-1(d) (1976); Utah International, Inc. v. Andrus, 488 F. Supp. at 968-69; Kin-Ark Corp., 45 IBLA 159, 167-170 (1980).

In a preference right leasing case involving a showing made on sodium prospecting permits, this Board held that:

The “prudent person” test and “marketability” test require a showing that “as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed.” In re Pacific Coast Molybdenum, 75 IBLA 16, 29, 90 I.D. 352, 360 (1983). Actual successful exploitation need not be shown. The applicant need only show that there is a reasonable potential for success. See Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971). Therefore, the preference right lease applicant is not required to show that mineral of sufficient quantity and quality has been exposed to demonstrate that a profitable mining operation can be developed. The applicant need only show that, based upon the mineralization exposed and reasonable geologic projections, a person of ordinary prudence would expend labor and means with the reasonable expectation that a profitable mine might be developed. Barton v. Morton, 498 F.2d 288 (9th Cir. 1974). [Emphasis in original.]

Yankee Gulch Joint Venture v. BLM, 113 IBLA at 131. In preference right leasing in general we have recognized that evidence of costs and market conditions after the expiration of the prospecting permits have relevance to the extent they reflect what may have been reasonably anticipated at that time. Yankee Gulch Joint Venture v. BLM, 113 IBLA at 134 (sodium preference right leasing). We noted in the Pacific Coast Molybdenum case that “[p]resent marketability’ has never encompassed the examination of either cost or price factors as of a specific, finite moment of time.” 75 IBLA at 29, 90 I.D. at 360.

[4] In the context of coal preference right leasing, we have held that, under the 1976 regulation defining commercial quantities, prices and costs are not “frozen” at the time the PRLA is filed and that price changes that occur prior to a final Departmental decision are properly considered. Thermal Energy Co., 135 IBLA 291, 323 (1996). In upholding consideration of prices and costs occurring subsequent to filing of the PRLA in applying the 1976 regulation, we quoted language in the

regulatory preamble responding to comments requesting clarification of the time to determine costs and prices:

Request for clarification of time to determine prices and costs * * *
3521.1-1(c). The proposed regulations did not state whether the prices and costs should be determined as of the time of application, time of decision, or some other time. While the Mineral Leasing Act clearly limits the time to collect information on the physical property of the coal deposit to the term of the prospecting permit, no such limitation appears for prices and costs. The basic purpose of the prudent person test is to give an indication of whether a particular lease can be developed. In view of the purpose of the test, the Department believes that prices and costs should not be frozen at the time that the application for lease is filed. The Department will administer the regulations to consider, where appropriate, price changes that occur before a final Departmental decision is made. Expected prices and costs over the life of the deposit may be considered.

41 FR 18845-46 (May 7, 1976), quoted in Thermal Energy Co., 135 IBLA at 323 n.36. Thus, we must deny appellants' assertion that the analysis of commercial quantities must be based solely on information before BLM at the time of the 1997 decision approving the PRLA's,^{17/} based on the 1993 Final Showing, and that BLM erred in undertaking a new commercial quantities analysis on remand.

Several documents containing an analysis of the issue of commercial quantities of coal on the CMV are part of the record. The 1993 Final Showing prepared by appellants' consultant PAH, based on 371 exploration holes drilled during the term of the prospecting permits, concludes that there are 660,907,000 recoverable tons of coal with a rating of 8,660 BTU/lb. (1993 Final Showing at 2.2.) Cash and operating costs, including the cost of transportation to the railhead at Thoreau, were calculated for the mine operation based on 4 years of pre-production, a 26-year mine operating life, and 7 years of reclamation expenses. Id. at 2.3. The price of coal in the first year of production was projected to be \$16.56 per ton FOB the railhead rising to \$21.24 per ton in year 26, the last year of production. Id. at 2.2, 10.55 (Table 10-8). The cash flow analysis projected an after-tax cash flow rate of return of 13.3 percent. Id. at 10.6, 10.46 (Table 10-5).

After the last remand in this case and prior to the BLM decision under appeal, PAH prepared the 2002 Update based on the 1993 Final Showing. Capital and operating costs for the project were updated and a change in the analysis was made to take advantage of the transportation cost reductions resulting from a rail spur

^{17/} This was clearly not the final Departmental decision on this matter.

extending toward the lease area which was built in the intervening period and which substantially reduced projected transportation costs. (Ex. 11 to SOR at 1-2.) Reclamation and monitoring costs were included for a period of 10 years after mine closure. *Id.* at 5. A sale price of \$18 per ton of coal, “estimated from known regional power plant purchases, and subtracting rail rates into those plants” was used in the cash flow analysis. *Id.* at 4. Noting a price range of \$16 to \$18 per ton for coal of the quality mined on the Bisti leases, the upper end of the range was chosen based on the anticipated closing of the McKinley Mine in the near future creating an “open market” for local coal. *Id.* Discounted to the beginning of the project, the rate of return was calculated at 14.2 percent. *Id.* at 5.

A 2004 market update has also been provided by PAH. (Ex. 16 to SOR.) That report noted market changes since the 1993 Final Showing including the closure of several coal mines “significantly” diminishing the supply of coal in the Four Corners region creating a regional shortfall which has been “filled by relatively high priced coal from the Powder River Basin (PRB) in Wyoming.” (Ex. 16 at 3-4.) PAH also found changes in coal supply contracts allowing utilities to periodically reopen contracts to realign the contract price with the prevailing market price, thus opening the market to competition from a new mine supplier. *Id.* at 5-6. Observing that PRB coal has been the source of marginal supply for utility demand, PAH used the delivered price of PRB coal at power plants in the Bisti region, which was converted to a delivered price for coal of the quality of Bisti coal (8,660 BTU/lb. and 19.1 percent ash), and subtracted rail transportation costs to compute a price for Bisti coal FOB rail of from \$14.67 per ton to \$17.62 per ton, averaging \$15.67 per ton. *Id.* at 12.

The applicant for a coal preference right lease has a right to an evidentiary hearing before an administrative law judge when the facts presented in support of the application are alleged to be sufficient to show entitlement to a lease. 43 CFR 3430.5-2(b). The conclusion reached by appellants’ consultant is disputed by BLM, as noted above. We find that the conflicting evidence in the record presents a material issue of fact regarding the existence of commercial quantities of coal on the prospecting permits. Under the statute, the regulations, and the precedents, the issue is whether a prudent person would be justified in the further expenditure of his labor and capital with a reasonable prospect of success in developing a paying mine considering the anticipated revenue from sale of the coal and the costs of developing the mine (including environmental and reclamation costs), extracting, removing, transporting, and marketing the coal. 43 CFR 3430.1-2. While Board precedent has long supported setting aside the BLM decision and referring the case for an initial decision by the administrative law judge, subject to appeal to the Board, when material issues of fact raised by the record on appeal preclude affirmation of the BLM decision, see e.g. *Yates Petroleum Corporation*, 131 IBLA 230, 235 (1994), we are

bound by the Director's decision in Samedan Oil Corporation, 32 OHA 61 (2005).^{18/} The Director's decision found it improper for the Board to set aside the decision under appeal pending a hearing and to direct the administrative law judge to make an initial, as opposed to a recommended, decision. Accordingly, the case is referred to the Hearings Division for assignment to an administrative law judge for the purpose of issuing a recommended decision.^{19/}

Intervenor also argues that BLM has failed to comply with requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4332 (2000), in that a site specific EIS for the PRLA's is a prerequisite to further adjudication and lease issuance, citing Natural Resources Defense Council v. Berklund, 458 F. Supp. 925 (D.D.C.), aff'd, 609 F.2d 553 (D.C. Cir. 1979). The requirement to prepare an EIS prior to adjudication of the discovery of commercial quantities of coal and prior to issuing PRLA's is explicitly recognized in the relevant regulations. 43 CFR 3430.3-2(c). This regulation expressly excepts, however, PRLA's previously analyzed in the San Juan Regional Coal Environmental Impact Statement (March 1984). In the preamble to the promulgation of this regulation, BLM indicated that these PRLA'S were excluded "on the ground that the existing environmental statement work completed by [BLM] was felt to be adequate" after negotiation between the parties to the Berklund litigation. 52 FR 5398, 5399 (Feb. 20, 1987). Ark's PRLA's are among those explicitly addressed in the San Juan EIS which is part of the record before us. Accordingly, we do not find that another EIS is required prior to adjudication of the PRLA's.

The parties to this appeal have raised numerous arguments, some of which are less relevant than others. To the extent any of the contentions raised by the parties have not been explicitly addressed in this decision, they have been considered and rejected.

^{18/} Vacating in part and modifying, Samedan Oil Corp., 163 IBLA 63 (2004).

^{19/} Shortly before our decision was issued, appellants filed a motion to supplement the record in this case to include an updated report from appellants' consultant. This motion was received after the conclusion of our deliberations in this case. In view of the fact that this case is being referred for a hearing prior to a resolution on the merits, we do not find it appropriate to further delay our decision in this case to allow the other parties to respond prior to referring the case for a hearing. To the extent it is relevant, the report may be offered into evidence at the hearing in this case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the case is referred to the Hearings Division, Office of Hearings and Appeals, for an evidentiary hearing before an administrative law judge who shall issue a recommended decision in this case.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James F. Roberts
Administrative Judge