

INTERIOR BOARD OF LAND APPEALS

Harry E. McCarthy, et al.

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HARRY E. McCARTHY ET AL.

IBLA 91-37, 91-38

Decided November 16, 1993

Appeals from decisions of the Colorado State Office, Bureau of Land Management, rejecting sodium prospecting permit applications. COC 51820, COC 51749, and COC 51750.

Affirmed.

1. Mineral Leasing Act: Generally--Sodium Leases and Permits: Permits

BLM properly rejected sodium prospecting permit applications for lands withdrawn from sodium leasing (except if the Secretary or his delegate should find that development of the sodium would not adversely affect oil shale values) when BLM concluded that additional information from operations on existing leases was needed to determine whether sodium production would significantly damage oil shale resources.

APPEARANCES: Harry E. and Ethel R. McCarthy, pro sese; Jack M. Merritts, Esq., Denver, Colorado, and Stephen P. Quarles, Esq., and R. Timothy McCrum, Esq., Washington, D.C., for Bruce Resources (U.S.A.), Ltd.; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Harry E. and Ethel R. McCarthy (McCarthy) and Bruce Resources (U.S.A.), Ltd. (Bruce), have appealed from separate October 1, 1990, decisions of the Colorado State Office, Bureau of Land Management (BLM), rejecting sodium prospecting permit application COC 51820 (IBLA 91-37) and sodium prospecting permit applications COC 51749 and COC 51750 (IBLA 91-38), respectively. Because these appeals raise substantially similar issues, we have consolidated them for review.

On June 8, 1990, Bruce filed two sodium prospecting permit applications pursuant to 30 U.S.C. § 261 (1988) and 43 CFR Subpart 3522, embracing 2,502.49 acres in secs. 34, 35, and 36, T. 1 S., R. 98 W., and secs. 1 and 2, T. 2 S., R. 98 W., sixth principal meridian, Rio Blanco County, Colorado (COC 51749), and 2,545 acres in secs. 1, 2, 10, 11, and 12, T. 1 S., R. 98 W., and secs. 6 and 7, T. 1 S., R. 97 W., sixth principal meridian, Rio Blanco County, Colorado (COC 51750). On July 26, 1990, McCarthy

filed sodium prospecting permit application COC 51820 seeking 2,535.61 acres located in secs. 19, 20, 29, and 30, T. 2 S., R. 98 W., secs. 25, 26, and 36, T. 2 S., R. 99 W., and secs. 1 and 2, T. 3 S., R. 99 W., sixth principal meridian, Rio Blanco County, Colorado. All the requested land lies within the Piceance Creek Basin.

In both of the appealed decisions BLM stated:

Public Land Order No. [(PLO)] 4522, dated September 13, 1968, withdrew deposits of oil shale and lands containing such deposits from sodium leasing, except as provided, for protection of the multiple development of the minerals and other resources in the lands. The lands may be leased for sodium development where the Secretary of the Interior or his delegate finds that development of the sodium deposits would not adversely affect the oil shale values of the lands.

Minerals nahcolite and dawsonite are closely associated with and disseminated in the oil shale. The minerals appear to be so intimately mixed that recovery of sodium may not be possible without mining or adversely affecting the oil shale.

Technical problems for protection of the oil shale resources have remained unresolved. Until operations on existing leases in the area demonstrate whether sodium production can occur without significant damage to the oil shale resource, [BLM's] Director has determined not to issue additional prospecting permits in the Piceance Creek Basin (see memorandum of September 12, 1990).

(Decisions at 2). Citing the discretionary authority of the Secretary of the Interior, BLM rejected all three applications.

In the September 12, 1990, memorandum referred to in BLM's decisions, the Assistant Director, Energy and Mineral Resources, BLM, agreed with an assessment by the Colorado State Director in an August 27, 1990, memorandum, that sodium prospecting permits should not be issued in the Piceance Creek Basin because of PLO 4522 and the current lack of knowledge about the impact of sodium mining on oil shale deposits in the area. The State Director's evaluation, which apparently was triggered by the filing of the three sodium prospecting permit applications at issue here, rested on a preference for multiple mineral development stated by PLO 4522 and the decision in Yankee Gulch Joint Venture v. BLM, 113 IBLA 106 (1990) (Yankee Gulch), finding that issuance of sodium prospecting permits in the Piceance Creek Basin would likely lead to sodium leases. While suggesting that exploration licenses could be issued in accordance with 43 CFR Subpart 3524 if interest were expressed in gathering additional geologic data, the State Director stated his intent to reject the three filed sodium prospecting permit applications because of PLO 4522 since the technical problems of protection of the oil shale resources remained unresolved and the experimental solution mining which had been performed on existing sodium leases was insufficient to provide assurances that overlying oil shale beds would be protected. According to the State Director, the impact of sodium mining

on the oil shale deposits would remain unknown until the results of actual commercial scale solution mining were analyzed; he recommended that BLM should refrain from issuing sodium prospecting permits until the existing leases demonstrated whether sodium production could occur without significant damage to the oil shale resource.

The McCarthy statement of reasons for appeal disputes each of the grounds relied upon by BLM in justification of rejection of their sodium prospecting permit application. They contend the determination that the impact of sodium mining on oil shale deposits remains unknown was rejected by the Administrative Law Judge and the Board in Yankee Gulch. They claim that BLM's concerns about possible adverse impacts to the oil shale not only are unfounded, but will be further alleviated by advances in technology and may not even apply to the relatively thin nahcolite deposits thought to exist within the area covered by their permit application. In fact, they suggest, solution mining of the nahcolite would likely enhance the potential development of the associated oil shale. They also assert that BLM's statement that the minerals appear to be so intimately mixed that the recovery of sodium may not be possible without mining or adversely affecting the oil shale is inconsistent with available geological data and was implicitly rejected by the Administrative Law Judge's finding in Yankee Gulch that nahcolite development would have no adverse impact on the oil shale. McCarthy objects to BLM's conclusion that additional prospecting permits should not be issued pending the results of operations under existing leases, complaining that such results may not be available for many years, if ever, and that refusing to grant prospecting permits in the interim contravenes the public interest by effectively granting a monopoly to the current leaseholders. They further aver that BLM's decision ignores the distinctions between the thick, known resources covered by the existing leases and the speculative resources in the permit application area.

McCarthy maintains that BLM should issue them a prospecting permit because there is no known nahcolite deposit in the area of their permit application and issuance of a permit could lead to a unique opportunity to dispel BLM's concern about technical problems for protection of the oil shale. They argue that the Administrative Law Judge in Yankee Gulch found that, by issuing sodium prospecting permits in 1964, BLM exercised its discretion in favor of issuing prospecting permits for nahcolite in the Piceance Creek Basin and irreversibly committed itself to a policy of issuing sodium prospecting permits in areas containing oil shale. They insist that since the existence and extent of any nahcolite deposit in the area covered by their permit application are unknown, a prospecting permit, rather than an exploration license, should be issued to them. They acknowledge, however, that any permit and subsequent lease issued to them would be subject to restrictive stipulations protecting the oil shale resource.

Bruce argues that BLM's decision would indefinitely bar the issuance of all sodium prospecting permits to the potentially significant sodium resource in the Piceance Creek Basin with no valid justification. Asserting that the decision is contrary to the express findings of fact affirmed by the Board in Yankee Gulch, Bruce contends that sodium mining in the Piceance Creek Basin is technologically feasible without adversely affecting

oil shale. Bruce also avers that BLM's reading of Yankee Gulch as virtually guaranteeing issuance of a preference right lease to anyone who obtains a prospecting permit is baseless since that decision, as well as the applicable regulations, confirms that proving discovery of an economically valuable deposit sufficient to warrant issuance of a lease remains a difficult task requiring extensive site-specific exploration and economic data.

Bruce maintains that BLM's decision is contrary to PLO 4522, which Bruce claims was issued to encourage multiple mineral development of sodium and oil shale in the Piceance Creek Basin and only requires the prevention of significant damage to the oil shale in connection with sodium exploration and development. According to Bruce, the issuance of a sodium prospecting permit alone could not possibly adversely affect the oil shale since no actual mining is authorized by a prospecting permit. Bruce submits that any future preference right lease application would be subject to further review under PLO 4522, and any potential sodium mining impacts on the oil shale would be evaluated at that time.

Bruce charges the BLM decision is arbitrary and capricious because it contradicts a conclusion made by BLM in a 1987 environmental impact statement (EIS), prepared for sodium development on nearby Wolf Ridge sodium leases, that mining of nahcolite presents virtually no risk to the detriment of future uses of the oil shale. Bruce contends that BLM's decision also contravenes the current BLM national minerals policy favoring the availability of public lands for mineral exploration and development unless the national interest clearly justifies prohibition of mineral activities. Bruce argues that rejection of its prospecting permit applications constitutes a clear abuse of discretion.

Bruce further argues that BLM's decision does not conform to applicable 43 CFR Subpart 3520 regulations providing that evaluation of a prospecting permit application should focus on exploration impacts, not speculative mining impacts. Bruce suggests that BLM's management concerns about possible future mining impacts should be addressed through oil shale protective stipulations in the prospecting permits. Such stipulations, Bruce avers, will ensure that BLM retains the ability to fully review and assess mining impacts at the lease application stage. Accordingly, Bruce requests that the Board direct BLM to expeditiously issue the requested prospecting permits.

In answer to the appellants, BLM has separately addressed each of the arguments raised by them. BLM has also raised two additional arguments in support of the decision, contending that available geologic data demonstrates that the requested tracts contain workable deposits of sodium and that the Piceance Basin Resource Management Plan (RMP) provides an additional basis for rejecting the sodium prospecting permit applications. Bruce has responded to these arguments. Because we affirm BLM on the initial issues presented by appellants, we need not reach these additional arguments and therefore decline to express unnecessary opinions about them that would be mere dicta in this opinion.

[1] Section 23 of the Mineral Leasing Act, as amended, 30 U.S.C. § 261 (1988), authorizes the Secretary of the Interior to grant sodium prospecting permits to qualified applicants. Under 43 CFR 3522.1, a sodium prospecting permit may issue where prospecting or exploratory work is necessary to determine the existence or workability of deposits of sodium. The filing

of a prospecting permit application does not give the applicant a right to a permit. See Elizabeth B. Archer, 102 IBLA 308, 315 (1988). Permit issuance is discretionary and the Secretary or his delegate may reject an application for a sodium prospecting permit when he finds for sufficient reason that permit issuance is not in the public interest. Permian Mud Service, Inc., 31 IBLA 150, 158 n.4, 84 I.D. 342, 346 n.4 (1977). Such a determination may be based on fear that mining might interfere with other uses of the land. Elizabeth B. Archer, supra at 316.

If BLM issues a sodium prospecting permit and the permittee makes a discovery of a valuable deposit of sodium during the term of the permit and demonstrates that the land is chiefly valuable therefor, the permittee is entitled to a sodium preference right lease. 30 U.S.C. § 262 (1988); 43 CFR 3522.1, 3523.3. When a prospecting permit issues, therefore, BLM relinquishes authority to refuse to grant a preference right lease for any reason other than the failure of the permittee to satisfy the "valuable deposit" or "chiefly valuable" criteria established by regulation.

BLM based its rejection of the three sodium prospecting permit applications at issue here on PLO 4522, 33 FR 14349 (Sept. 24, 1968). That PLO withdrew the oil shale and lands containing oil shale identified in the order, including the Piceance Creek Basin, from appropriation under the mining laws and from sodium leasing, except as provided, for protection of the multiple development of the minerals and other resources in the lands. In accordance with the PLO, the lands could be leased for sodium development

where the Secretary of the Interior or his delegate finds that the development of these sodium deposits would not adversely affect the oil shale values of the lands. Any sodium prospecting permit or preference right lease that may issue on these oil shale lands will be restricted to those beds valuable for sodium which the Secretary of the Interior or his delegate determines to be workable without removal of significant amounts of organic matter and without significant damage to oil shale beds.

33 FR at 14355. BLM concluded that unresolved technical problems involving protection of the oil shale resources remained and that no additional sodium prospecting permits would be issued in the Piceance Creek Basin until operations on existing leases in the area demonstrated whether sodium production could occur without significant damage to the oil shale.

Bruce emphasizes the changes in the potential value of both the oil shale and nahcolite resources in the Piceance Creek Basin between the time PLO 4522 was issued and now. Neither such changed circumstances nor BLM's general mineral resources policy favoring the availability of public lands for mineral development cited by Bruce affects the validity or applicability

of PLO 4522. When lands are withdrawn from entry under some or all of the public land laws, the withdrawal remains in effect until there is a formal revocation or modification published in the Federal Register. Resource Associates of Alaska, 114 IBLA 216, 220 (1990). Consequently, sodium prospecting permits in the Piceance Creek Basin may not be granted unless their authorization is consistent with PLO 4522.

Both McCarthy and Bruce cite Yankee Gulch as support for their challenge to BLM's determinations that the effects of sodium mining on the oil shale in the Piceance Creek Basin remain unknown and that the intermingling of sodium minerals and oil shale in the Piceance Creek Basin and the unresolved technical problems for protection of the oil shale resources suggest that separate recovery of sodium may not be possible without mining or adversely affecting the oil shale. Appellants interpret the Yankee Gulch decision as though it were a Secretarial finding that sodium mining can be separately conducted on the lands at issue without adversely affecting the oil shale values in those lands. We do not read that case so broadly.

In Yankee Gulch, the Board affirmed the Administrative Law Judge's conclusion that the sodium preference right lease applicants had shown by a preponderance of the evidence produced at hearing that they had discovered valuable deposits of sodium on the lands covered by their applications. In so doing the Board examined site-specific evidence presented by the applicants to determine whether they had demonstrated that the sodium deposit found on those identified lands could be mined without degrading the oil shale resources also found there. Based on site-specific geologic and mining technique data, the Board concluded that "[a]t this point in the development of the proposed mining processes, no party can say with certainty whether [solution mining or room and pillar mining] will result in a degradation or enhancement of the value of the shale oil contained in the oil shale." 113 IBLA at 140. The decision does not find that sodium can be mined without adversely affecting the oil shale, nor can its conclusions be related to other lands or mining plans not considered by the decision. Contrary to assertions by appellants, Yankee Gulch does not contain a general finding that sodium mining can be conducted throughout the Piceance Creek Basin without adversely affecting oil shale. We also reject McCarthy's contention that the Administrative Law Judge's decision in Yankee Gulch found that the Secretary had already exercised his general discretion to issue or withhold sodium prospecting permits in the entire Piceance Creek Basin and established a policy in favor of permit issuance when he issued the permits to those applicants in 1964. The issuance of the 1964 prospecting permits committed the Government only to issuing sodium preference right leases to those specific applicants if they satisfied the statutory criteria; it did not establish a general policy of issuing sodium-only prospecting permits. Instead, PLO 4522 and the Piceance Basin RMP embody the Secretary's sodium leasing policy for lands in the Piceance Creek Basin.

Similarly, the Wolf Ridge EIS does not constitute a finding that sodium can be mined throughout the Piceance Creek Basin without adversely affecting the oil shale. The scope of the EIS was limited to an evaluation of the specific environmental effects of solution-mining the 40-foot thick Boies Bed, a discrete, nahcolite rich bed found on the Wolf Ridge leases.

It did not address the effects of solution mining thinner beds or disseminated nahcolite, nor did it assess the impacts of room and pillar mining on other discrete sodium beds or disseminated sodium minerals. The narrow focus of the EIS prevents expansion of its conclusion so as to encompass all mining of sodium in the Piceance Creek Basin.

Bruce correctly states that the applicable regulations do not require a detailed review of the speculative impacts of mining before issuance of a prospecting permit. Once BLM issues a prospecting permit, however, it irrevocably commits itself to issue a preference right lease if the permittee discovers a valuable deposit of sodium and the land is determined to be chiefly valuable therefor. 30 U.S.C. § 262 (1988); 43 CFR 3522.1, 3523.3. Consequently, BLM properly considered the effects of leasing, as well as the usually negligible impacts of exploratory prospecting, when it evaluated whether issuance of the requested sodium prospecting permits fell within the exception to withdrawal of the lands from sodium leasing by PLO 4522.

We find that appellants have failed to demonstrate that BLM relied in error on PLO 4522 when it rejected their respective sodium prospecting permit applications. Without the necessary Secretarial finding that development of the sodium deposits would not adversely affect the oil shale values of the lands, withdrawal of the requested lands from sodium leasing by PLO 4522 negates appellants' claims that the public interest would best be served by issuing them the prospecting permits. We conclude that BLM's decision to defer the issuance of additional sodium prospecting permits in the Piceance Creek Basin until operations on the existing leases dispel the remaining uncertainties concerning the effect of sodium production on the oil shale resources falls within its discretionary authority to reject permit applications consistent with the public interest. Vernal E. Bess, 27 IBLA 4, 10-11 (1976); see Clear Creek Inn Corp., 7 IBLA 200, 221, 79 I.D. 571, 581-82 (1972).

To the extent not specifically addressed herein, McCarthy's and Bruce's arguments have been considered and rejected.

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.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge