

INTERIOR BOARD OF LAND APPEALS

Jerry Grover d.b.a. Kingston Rust

141 IBLA 321 (December 2, 1997)

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Editor's Note: Reconsideration denied by order dated February 19, 1998

JERRY GROVER D.B.A. KINGSTON RUST

IBLA 93-588, 94-463

Decided December 2, 1997

Consolidated appeals from two decisions of the Wyoming State Office, Bureau of Land Management, declaring unpatented oil shale placer mining claims abandoned and void. WMC-183601, et al.

Reversed.

1. Energy Policy Act of 1992: Notice--Notice: Generally--Oil Shale: Mining Claims

Notice by registered mail of the existence of an election required by the Energy Policy Act of 1992 was to be given to a holder of unpatented oil shale mining claims before action affecting his claims could be taken by BLM; a decision declaring the claims abandoned under 30 U.S.C. § 242(d)(2) (1994) is reversed because BLM failed to provide the holder with the required statutory notice.

2. Energy Policy Act of 1992: Notice--Notice: Generally--Oil Shale: Mining Claims

When a decision declaring mining claims is reversed on appeal because a required notice of election was not given, and the effect of the decision was not stayed during appeal, BLM is required, after giving the required notice, to apply IM 98-01 in the further administration of the affected claims.

APPEARANCES: Jerry Grover, Provo, Utah, pro se; 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

Jerry Grover, d.b.a. Kingston Rust, has appealed from two Decisions of the Wyoming State Office, Bureau of Land Management (BLM), dated July 8,

1993, and March 9, 1994, declaring 197 unpatented oil shale placer mining claims abandoned and void by operation of law and returning a tendered annual filing for 68 of the claims. These two appeals are consolidated because they involve the same claims and present related issues.

On December 15, 1992, BLM sent Production Industries Corporation (PIC), then the record owner of the claims at issue, a notice required by the Energy Policy Act of 1992 (EPA), 30 U.S.C. § 242 (1994). Enacted by Congress on October 24, 1992, the EPA sought to resolve "a long-standing dispute over the validity of oil shale claims located over 72 years ago in Colorado, Utah, and Wyoming," before passage of section 37 of the Mineral Leasing Act on February 25, 1920, banned location of such claims under the general mining laws in favor of leasing. H.R. Rep. No. 474 (VIII), 102nd Cong., 2d Sess. 89 (1992), reprinted in 1992 U.S.C.C.A.N. 2282, 2307-8. It was intended to bring finality to outstanding claims whose claimants had taken little or no action to develop them. Id.

The Notice sent to PIC explained that an election whether to apply for patent to the claims was required by the EPA to be made by PIC within 180 days of receipt of the Notice, which PIC received on December 18, 1992, thereby setting a June 16, 1993, deadline for PIC's election. On December 16, 1992, Grover filed an Affidavit of Annual Assessment Labor for all the claims at issue, pursuant to section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1994); this document reported that Kingston Rust, too, was one of the "owners of the claims." See Affidavit dated Dec. 14, 1992, and filed Dec. 16, 1992. Nonetheless, no notice as required by the EPA was sent to Grover or Kingston Rust by BLM. On July 8, 1993, BLM issued a Decision to PIC declaring all 197 oil shale placer mining claims abandoned and void for failure to file a notice of election under the EPA. The appeal from this Decision was docketed as IBLA 93-588.

On December 15, 1993, while the appeal in IBLA 93-588 was pending, Grover filed with BLM a copy of an "Affidavit of Annual Assessment Labor" for 68 of the 197 mining claims involved in IBLA 93-588. The Affidavit reported performance of assessment work during the 1993 assessment year for each of the claims. With the Affidavit, Grover paid \$5 per claim, for a total payment of \$340. The filing and payment were made pursuant to section 314(a) of FLPMA and implementing regulations. There is no evidence that Grover made any similar filing or payment for the remaining 129 claims. On March 9, 1994, BLM returned Grover's Affidavit, stating the \$340 payment would be refunded because the claims became abandoned and void by operation of law when a \$550 maintenance fee required by the EPA was not paid for each claim by December 31, 1993, and because the claims were declared abandoned and void on July 8, 1993, for failure to file the notice of election required by the EPA. On March 17, 1994, Grover filed a letter dated March 12, 1994, objecting to BLM's rejection of his FLPMA filing; BLM treated his letter as a notice of appeal from its March letter and forwarded the appeal to the Board, where it was docketed as IBLA 94-463.

Grover has standing, under 43 C.F.R. § 4.410(a), to appeal these Decisions. On March 30, 1994, in response to a March 9, 1994, Order requiring him to demonstrate that he was adversely affected by the July 1993 BLM Decision, Grover filed a copy of a deed, executed by PIC on February 13, 1992, that conveyed to Grover an 80-percent title interest in the 197 mining claims at issue here. In our Order issued on June 8, 1994, we concluded Grover had standing to appeal the case docketed as IBLA 93-588 since he was a party to the case and, by virtue of his ownership, adversely affected by the July 1993 BLM Decision. We now conclude he also has standing to appeal from the March 1994 BLM Decision affecting 68 of the same claims as the 1993 Decision.

Arguing that he was entitled to the statutory notice provided by the EPA before BLM could take action against his claims, Grover cites 43 C.F.R. § 3833.5(d) (1992), a regulation governing notice to claimants of actions affecting their rights as owners that provided, pertinently: "In the case of any action * * * initiated by the United States affecting an unpatented mining claim, * * * owners whose names show on annual filings * * * shall be personally notified and served by certified mail."

When Kingston Rust declared an ownership interest in the claims to BLM, Grover contends, BLM was put on notice that he was an oil shale claim holder to whom a registered notice under 30 U.S.C. § 242(a) (1994) was required to be sent.

Under section 242(a), the Secretary must: "Notwithstanding any other provision of law, within 60 days from October 24, 1992, * * * provide notice to each holder of an unpatented oil shale mining claim of the requirements of this Act * * * by registered mail." The EPA requires the Department to provide this notice to all oil shale claimants not later than December 23, 1992. *Id.* Giving the required notice begins a 180-day period during which a claim holder must give notice of an election, under 30 U.S.C. § 242(d)(1) (1994), to either apply for patent or continue maintaining an unpatented mining claim; failure to make the required election causes affected claims to become abandoned by operation of law. The Department did not promulgate regulations implementing this provision of the EPA. *See Answer (IBLA 93-588)*, dated Sept. 29, 1993, at 2.

[1] In December 1992, BLM was required to serve notice of mining claim actions or contests on claim owners identified by annual filings made under section 314(a) of FLPMA. *See Topaz Beryllium Co. v. United States*, 649 F.2d 775, 779 (10th Cir. 1981). There is no statutory or regulatory definition of who is a "holder" of an unpatented claim entitled to notice in the EPA. We therefore look to 43 C.F.R. § 3833.5(d) (1992), because notice is needed to activate the election requirement, which constitutes notice of an impending action affecting the claim. Under that rule, BLM was required by the statute to provide notice to owners whose names show on annual filings. After Grover filed his Affidavit on December 16, 1992,

BLM was on notice that Kingston Rust was an owner of the claims, and BLM was required by the EPA to provide notice to Kingston Rust because it was a "holder" of the claims. See 30 U.S.C. § 242(a) (1994).

We reject BLM's argument that 43 C.F.R. § 3833.5 (1992) should not apply here because BLM sent a notice to PIC on December 15, 1992, several days before Grover filed his Affidavit. See Answer (IBLA 93-588) at 8. The EPA requires the Secretary to "provide notice to each holder of an unpatented oil shale mining claim of the requirements of th[e] Act." 30 U.S.C. § 242(a) (1994) (emphasis supplied). Giving the notice is a critical action because it defines a 180-day period at the end of which a holder is required to file his election or his claim will cease to exist. Since the EPA required notice to each holder of an oil shale claim, and because of the critical importance of the notice to further administration of claims subject to the EPA, we conclude that BLM was bound to notify every holder of an oil shale claim of whose existence it became aware before the December 23, 1992, deadline.

Without notice of the election requirement, no 180-day period began so as to enable Grover to file a notice of election; he was not, therefore, required to file a notice of election by June 16, 1993 (PIC's deadline), and his failure to do so could not invalidate the claims under the EPA, to the extent of his interest in the claims. Cf. United States v. Montgomery, 75 IBLA 358, 361 (1983) (contest proceeding not binding on co-owners of claim not served with notice thereof). Because BLM failed to give Kingston Rust the required statutory notice, the July 1993 Decision improperly declared all 197 unpatented oil shale placer mining claims abandoned and void for failure to make an election under 30 U.S.C. § 242(d)(2) (1994), no such action being required of Grover in the absence of prior notice.

[2] The March 9, 1994, BLM Decision returned Grover's Affidavit of Annual Assessment Labor for the 1993 assessment year for 68 of the 197 claims involved in IBLA 93-588 along with his payment of \$5 for each of the 68 claims because Grover had not paid maintenance fees believed to be required by December 31, 1993. In the meantime, however, BLM has concluded that a mining claimant need not pay maintenance fees for claims declared void while an appeal is pending, if, after a claimant takes an appeal, the Board of Land Appeals does not stay the decision. See Instruction Memorandum (I.M.) No. 98-01, dated September 29, 1997. "If a voidance decision is not stayed, you must not accept any filings or fees submitted by the claimant for the voided claim during the pendency of the appeal to IBLA." Id. Applying this I.M. to Grover's claims means BLM's March 9, 1994, Decision was correct in returning his Affidavit and fees, but not correct in declaring the claims void for failure to pay maintenance fees or to file the election required by the EPA. Because BLM improperly declared Grover's 197 claims void on July 8, 1993, although he was not given the required statutory notice, but properly returned his Affidavit and fees on March 9, 1994, BLM must now give Grover the required notice, allow him to make his election, and apply I.M. 98-01.

Accordingly, pursuant to the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM's July 8, 1993, Decision is reversed, the March 9, 1994, Decision is affirmed in part, and these cases are remanded to BLM for action consistent with this opinion.

Franklin D. Amess
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

David L. Hughes
Administrative Judge