

INTERIOR BOARD OF LAND APPEALS

Jesse R. Collins

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JESSE R. COLLINS

IBLA 96-44 Decided August 19, 1998

Appeal from a Decision of the California State Office, Bureau of Land Management, remanding a notice to conduct operations on mining claim CAMC 233444 to the Barstow Resource Area Office.

Affirmed in part; set aside in part and remanded.

1. Administrative Procedure: Administrative Review--Appeals: Generally--Rules of Practice: Appeals: Notice of Appeal

In keeping with the principle that the filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, BLM must forward the case (as represented by BLM's case file) to the Board within no more than 10 working days so that it may exercise its authority to resolve the dispute.

2. Appeals: Generally--Rules of Practice: Appeals: Dismissal

A BLM state director's office decision specifically ruling that clay being removed from a mining claim is common or ordinary clay not subject to location under the General Mining Law but is instead a mineral material salable under the Material Sales Act of July 3, 1947, is properly set aside. The proper procedure for such determination is for BLM to prepare a mineral examination and institute contest proceedings. However, BLM properly allows the claimant to remove the clay pending the outcome of the mineral examination and/or contest proceedings, provided that the claimant pays the sale value of the clay into escrow.

APPEARANCES: Jesse R. Collins, Barstow, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Jesse R. Collins has appealed from the August 17, 1992, Decision of the California State Office, Bureau of Land Management (BLM or Bureau), remanding a determination of the Barstow, California, Resource Area Manager, BLM, which rejected a notice to conduct mining on the Percy #1 Placer mining claim, CAMC 233444, and recommended that a mineral material sales be arranged.

On February 20, 1992, Collins filed a Notice to Mine proposing to mine 5 to 10 thousand tons of clay from the Percy placer claim, situated in San Bernardino County, California. On March 9, 1992, the Barstow Area Manager rejected the notice on the grounds the material proposed to be mined is a common clay and not locatable under the mining laws. The Area Manager recommended that the material instead be acquired by Collins through a material sales contract.

Collins appealed to the California State Director on March 23, 1992, arguing that the clay to be mined is an uncommon variety of clay known as Percy bentonite. He argued that the clay has exceptional qualities, in that it seals well, has proper viscosity, and is silica free, thixotropic, and friable in situ. In his Decision, the State Director ruled as follows:

It is the opinion of the BLM that common clay that will be used for purposes that do not require particular specification is a clay that has never been locatable under the Mining Law and is therefore a mineral material salable under the [Material Sales] Act of July 3, 1947, as amended 30 USC 601 (1970). This Act states that Congress has authorized the disposal of mineral material "including but not limited to common varieties of sand, gravel, ... clay" unless disposal is not otherwise expressly authorized by law, including the mining laws of the United States.

The State Director also cited our decision in United States v. Peck, 29 IBLA 357, 84 I.D. 137 (1977), in support of conclusion that the clay was a common variety. Notwithstanding that conclusion, the State Director disposed of Collins' appeal as follows:

On July 27, 1992, BLM issued guidance (Instruction Memorandum WO IM No. 92-290) on the subject of processing notices/plan of operations (POO) for suspected common variety minerals. This IM lists two options if the operator insists on the locatability of the subject minerals.

1. The BLM will suspend consideration of the Notice/POO, pending the outcome of a mineral examination or contest proceeding.

2. BLM will continue with processing the Notice/POO, provided the operator is willing to establish an escrow account for the appraised value of the mineral removed, pending the outcome of a mineral examination or contest proceeding.

Accordingly, the Area Manager's decision that this mineral material may be disposed of from the public lands with a sales contract pursuant to the Material Act of 1947 and the regulations stated in 43 CFR 3610, is remanded to the California Desert District to address the issue consistent with guidance contained in WO IM No. 92-290.

The purpose of the remand was plainly to allow BLM to initiate a mineral examination or contest proceeding against the claim, in order to adjudicate whether the clay was an uncommon variety and, therefore, locatable rather than salable. The State Director provided Collins the option of proceeding with mining during such review and paying the appropriate amount for salable minerals into an escrow account.

The case record contains an August 3, 1992, BLM "short note transmittal" to Collins indicating that (even before the issuance of the State Director's decision) Collins had opted to have his proposal treated as a plan of operations and to put money into an escrow account. The record also indicates that the Barstow Area Office continued to process the plan of operations, recommending on August 7, 1992, that it be approved, provided that money was placed in escrow.

On August 19, 1992, the Barstow Area Office received the State Director's remand decision. On August 21, 1992, the Barstow Area Office prepared a "preliminary common variety determination," again indicating that Collins was "agreeable to * * * placing the appropriate amount of money in an escrow account until the common variety issue is settled through the administrative process." That money represented the sales value of the clay, and payment was made on the presumption that the clay was salable under the law, subject to being refunded to him if a different conclusion was reached. The Bureau's determination also stated that a preliminary appraisal should be conducted to determine what escrow payments should be made; that a formal appraisal, validity exam, and mineral report should be prepared; that, if the conclusion that the clay was a common variety (and, hence, salable) was not changed, the State Office should issue a complaint and contest the claim; that if the clay was found during that contest to be a common variety and the claim invalidated, a material sale contract should be issued; and that, if the clay was found instead to be locatable (and not salable), the money in the escrow account should be refunded to Collins.

On August 28, 1992, the Barstow Area Manager approved a Decision Record/Finding of No Significant Impact, approving the proposed action of mining clay as requested by Collins, subject to various restrictions. On August 31, 1992, the Area Manager notified Collins by letter

of the approval of his plan of operations including the right to remove 10,000 tons, under the conditions described above, namely that BLM considered the clay as a common variety and therefore not locatable, but instead salable; that an escrow account would be established for payment of the value of the clay removed; and that the moneys in the escrow account would be disbursed to Collins of the United States Treasury based on "the final determination on whether on whether the mineral is locatable or salable." The letter also approved removal of an additional 500 cubic yards for use as roof tile and set the amount of the escrow payment per cubic yard of clay removed, based on a preliminary appraisal. The approval was subject to a time restriction, allowing mining only from June 1 through September 1 and November 1 through March 1.

The record indicates that Collins received notice of the August 31, 1992, letter on that date, when he picked up a copy at BLM. Although the letter indicated that BLM's decision was subject to appeal, it does not appear that an appeal was filed.

Collins' Notice of Appeal of the State Director's August 17, 1992, Decision was addressed to the Board with copies to the State Office, BLM, and the Office of the Solicitor. The copy to the State Office, if sent and received, is not in the case file. The copy that was sent to the Solicitor was received there on September 15, 1992, and was apparently forwarded to the BLM State Office. That copy does not bear an official BLM date stamp, but does bear a handwritten note stating "NA 9-16-92 [illegible initials] MM." It thus appears that Collins' notice of appeal of the State Director's August 17, 1992, Decision was timely received in the State Director's office on September 16, 1992. ^{1/}

Collins' notice of appeal complains generally about BLM's decision not to treat the clay from his claim as an uncommon variety. He asserts therein that the clay "formerly passed the rigorous American Petroleum Institute (API) tests a Drilling Mud which classified it as an UNCOMMON bentonite."

The Bureau did not transmit the appeal to this Board following receipt of the notice of appeal. The record contains three additional documents generated after the filing of the appeal. First is a BLM short note transmittal indicating that Collins and Barney Starr had come to BLM's offices to discuss their plans of operations on the claims. Collins requested a waiver of the seasonal use restriction imposed by BLM, but BLM advised him that none could be granted unless he hired a contracted wildlife biologist to be on site. No formal decision on this point was ever issued.

The second document is also a BLM short note transmittal, dated October 13, 1992, indicating that Collins had told a BLM employee that

^{1/} The present record also fails to disclose when Collins received the State Director's Decision. However, as it was not issued until Aug. 17, 1992, the filing on Sept. 16, 1992, the 30th day following, was plainly timely. 43 C.F.R. § 4.410.

it was "too late for him to sell clay for the Santa Fe oil disposal site." The document indicates the employee's belief that BLM could "close the case file."

The final document is a BLM phone call/conversation confirmation related information concerning a visit by Collins to BLM's offices where Collins offered to give a BLM employee a check for additional clay removal from the Percy claim. The employee refused to accept the check until Collins submitted and BLM approved a plan of operations for the additional removal, as the approved plan authorized removal of only approximately 500 cubic yards. Collins noted that he had already removed 2,125.86 tones and stockpiled an additional 2,000 to 2,400 tons. There is no additional documentation in the case record.

[1] Transmittal of the case file to this Board by BLM was unaccountably delayed for over 3 years. The Bureau is admonished that it failed to follow the correct procedure in handling this appeal. The correct procedure is for BLM to forward the complete, original case file to the Board within the 10-day period provided by BLM Manual 1841.15 A. E.g., Patrick G. Blumm, 116 IBLA 321 (1990). The Board reviewed a similar situation in Thana Conk, 114 IBLA 263 (1990):

The filing of a notice of appeal vests exclusive authority over the matter under appeal with the Board of Land Appeals, and BLM's authority is not restored until the Board takes action disposing of the appeal. AA Minerals Corp., 27 IBLA 1 (1976). In keeping with this principle, BLM must forward the case (as represented by BLM's casefile) to the Board so that it may exercise its authority to resolve the dispute.

Under governing procedures, an appellant is not required to serve a copy of his notice of appeal on the Board, which normally becomes aware that a notice of appeal has been filed only when BLM forwards the notice of appeal and its complete, original casefile in the matter to the Board. BLM must forward the record to the Board within no more than 10 business days after receipt of the notice of appeal. Utah Chapter Sierra Club, 114 IBLA 172, 175 (1990) (citing with approval BLM Manual 1841.15 A). Until the file is received, the Board is unable to intelligently review the details of the dispute, and may not even be aware (as in this case) that a notice of appeal has been filed.

The Board is very sensitive to delays in forwarding the case when a notice of appeal is filed, as BLM's failure to promptly transmit a file might be seen as recalcitrance, resulting in delaying an appellant's right to have BLM's decision reviewed by the Board. See Harriett B. Ravenscroft, 105 IBLA 324, 331 (Hughes, A.J., concurring). We are surprised by BLM's failure to initially realize (or to become aware during the more than 13 months that it held the case following the filing of the

notice of appeal) that it was required to forward the case to the Board, so that the administrative appeals process could begin to run its course. It is hoped that BLM will take steps to conform their procedures to these realities to avoid similar mishandling of appeals in the future.

Thana Conk, *supra*, at 273-74 (footnotes omitted). The Board's response to BLM's handling of the Conk matter applies equally here. We perceive no justification for failing to timely submit the case record here. If BLM believed that the appeal was premature or had been rendered moot by subsequent agency action or agreement with Collins, it should have transmitted the case file along with a motion to dismiss the appeal. It is evident that Collins did not believe that his appeal was moot, as he contacted the Board in 1995 to inquire about its status. ^{2/} As noted below, we agree that the appeal is justiciable.

[2] To the extent that the August 17, 1992, Decision protected Collins' rights to mine the clay as a locatable mineral by directing that the sales proceeds be placed in escrow, allowing for their return to Collins if the clay were found to be salable, it conformed with reasonable agency-wide BLM procedures (set out in Instruction Memorandum WO IM No. 92-290) that are reasonable and consistent with the law, and it is properly affirmed. See Lone Mountain Production Co., 139 IBLA 244, 249 (1997); Atlantic Richfield Co., 121 IBLA 373, 380, 98 ID. 429, 432-33 (1991); Beard Oil Co., 105 IBLA 285, 288 (1988). This procedure amply protects the rights of both the Government to receive proceeds of sales of mineral material and the due-process rights of claimants to have the legal status of minerals on their claims fully and fairly adjudicated.

On appeal, Collins is justifiably concerned that the legal status of the clay (whether an uncommon variety and, hence locatable, or a common variety and, hence, salable) was decided against him by BLM's August 17, 1992, Decision. As noted above, the State Director did specifically rule in that Decision that the clay to be mined was a common variety. To the extent that he did so, the Decision adversely affected Collins. Further, as the State Director lacked authority in the context of that Decision to rule on the common-variety status of the material, his Decision must be set aside.

The proper manner to make a common-variety determination is to initiate a mineral examination and (if that examination determines that the clay is a common variety) to initiate a contest against the claim. See, e.g., United States v. United Mining Corp., 142 IBLA 339 (1998). As we held in Matthew J. Brainard, 138 IBLA 232, 235-37, BLM may not make a common-variety determination without providing notice and an opportunity

^{2/} It appears the only reason that BLM ever transmitted the file was that, in October 1995, Collins filed an inquiry with this Board about the status of his appeal.

for a hearing. See Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450, 459-60 (1920); Rawls v. Secretary of the Interior, 460 F.2d 1200-1201 (9th Cir. 1972), cert. denied, 409 U.S. 881 (1972); United States v. Diven, 32 IBLA 361, 366 (1977); United States v. Bergdal, 74 I.D. 245, 249-50 (1967). When the governing agency (in this case BLM) has determined that the mineral claimed to have been discovered under a mining claim on Federal lands is a common variety not subject to location under the General Mining Laws, but rather subject to disposal only under the Materials Sales Act of 1947 (thus requiring payment of the purchase price for the mineral), the proper recourse is to initiate a Government contest. See Matthew J. Brainard, 138 IBLA at 237, citing United States v. Cook, 71 IBLA 268, 273 (1983); United States v. Diven, 32 IBLA at 365; and United States v. Bergdal, 71 I.D. at 251.

The Area Office has recognized that the question of the legal status of the clay on Collins' claim has not resolved. It indicated in its August 31, 1992, Decision that "BLM would conduct a common variety determination on the claim and investigate its validity. You will be given an opportunity to appeal the outcome of that determination and decision, anticipated within 90 days." However, it is not clear that BLM proposed to conduct a mineral examination and (if that examination shows the clay to be a common variety) to contest this claim. That must be done in order to resolve the status of the money placed in escrow, since, as discussed above, the common- (or uncommon-) variety status of the clay removed will determine whether those moneys are deposited in the U.S. Treasury or returned to Collins. If no such examination and contest have been initiated, BLM should undertake them as soon as possible.

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 Decision appealed from is affirmed in part, set aside in part, and remanded.

David L. Hughes
Administrative Judge

I concur:

James L. Bymes
Chief Administrative Judge