INTERIOR BOARD OF LAND APPEALS

Mid-Continent Resources, Inc. and Pitkin Iron Corporation

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MID-CONTINENT RESOURCES, INC.
PITKIN IRON CORPORATION

IBLA 94-421 Decided May 14, 1999

Appeal from a decision of the Glenwood Springs, Colorado, Area Manager, Bureau of Land Management, restricting limestone mining to locatable grade material on mining claims. CMC 246344 - CMC 246350.

Affirmed in part, set aside in part.

1. Mining Claims: Generally--Mining Claims: Common Varieties of Minerals: Generally

   Limestone suitable for use in the manufacture of cement, metallurgical or chemical grade limestone, gypsum, and the like are not "common varieties." Although a deposit of limestone may have physical properties that make it amenable to those uses, it will still be considered a common variety if it is marketable for use only in the same way that ordinary varieties of the mineral are used.

2. Materials Act--Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Generally

   Although BLM may not dispose of mineral material from the public lands where there are any unpatented mining claims which have not been canceled by appropriate legal proceedings, BLM properly may establish a community pit on land formerly embraced by mining claims that were abandoned for failure to pay annual rental fees.

3. Materials Act--Mining Claims: Generally--Mining Claims: Abandonment--Mining Claims: Lands Subject to--Mining Claims: Location--Mining Claims: Relocation--Mining Claims: Rental or Claim Maintenance Fees: Generally

   The fact that an operator possesses a mining permit issued by a state government affords no rights in abandoned claims that BLM must recognize. Appellants could not acquire any interest in the abandoned claims short of making a new location.

4. Materials Act--Mining Claims: Generally--Mining Claims: Abandonment--Mining Claims: Lands Subject to--Mining Claims: Location--Mining Claims: Relocation--Mining Claims: Rental or Claim Maintenance Fees: Generally

When BLM establishes a community pit on land formerly embraced by mining claims that became abandoned and void, any rights arising from subsequently located claims are subordinate to the community pit. BLM properly may preclude a mining claimant from conducting mining operations within the pit area until the pit designation is terminated, and if mining operations are allowed, BLM can require a mining claimant to establish that the mineral mined from the claims is to be sold for qualifying uses.

APPEARANCES: Robert Delaney, Esq., Glenwood Springs, Colorado, for Appellants; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Mid-Continent Resources, Inc. (MCR) and Pitkin Iron Corporation (Pitkin) have appealed from a February 25, 1994, letter (hereinafter Decision) issued by the Glenwood Springs, Colorado, Area Manager, Bureau of Land Management (BLM), in response to receipt of Notices of Location for the Calcite No. 1 through 7 placer mining claims (CMC 246344 - CMC 246350) dated January 28, 1994, which MCR filed on February 22, 1994. The seven Calcite claims cover essentially the same ground as the Lion Nos. 2 through 4 and Lynx Nos. 3 through 6 mining claims (CMC 38073 - CMC 38075 and CMC 38090 - CMC 38093), which were declared abandoned and void when no rental fees were submitted by August 31, 1993, as required by a provision of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1993 (the Act), Pub. L. No. 102-381, 106 Stat. 1378-79 (1992). 1/

The Calcite claims encompass the limestone quarry and three stockpiles of limestone that had been quarried and processed while the Lion and Lynx claims were valid. BLM determined that two of the three stockpiles contained locatable limestone, while the third did not. The stockpiles consist of material that is 1/4 inch or less in size (fines), material that is less than 1 inch but not more than 1/4 inch in size, and material that is less than 3 inches but more than 1 inch in size. Grab samples from the stockpiles were independently assayed. The results of the assay showed that the fines contained slightly less than 95 percent total carbonates, while the two remaining stockpiles contained total carbonates that exceeded that standard. In making its determination that one stockpile did not

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1/ The claims were declared abandoned and void by a decision dated Oct. 22, 1993, from which no appeal was taken.

contain locatable limestone, BLM relied on U.S. v. Foresyth, 100 IBLA 185, 247-48, 94 I.D. 453, 487-88 (1987), in which it was held that limestone containing 95 percent or greater total carbonates constitutes an uncommon variety of limestone.

BLM's Decision informed MCR that a community pit had been established effective October 21, 1993, that it covers a permitted disturbance area on the abandoned claims, 2/ and that the community pit "constitutes a superior right to remove material as against any subsequent claim or entry of the land," citing 43 C.F.R. § 3604.1(b). BLM stated that it was not its intention to restrict or forbid the extraction of locatable grade material for qualifying markets, and that it would allow limestone mining to proceed within the pit boundary, subject to certain restrictions. Specifically, the letter precluded Appellants from selling any of the waste material on the Calcite claims, including what it describes as limestone waste rock. The Decision advised:

> The abandonment of the previous mining claims * * * under which operations were formerly conducted, serves as an abandonment of any title or legal interest in the locatable mineral estate. As of September 1, 1993, any right that may have been established by the previous claimant, lessee, or operator to the limestone waste rock was lost to the U.S. Government. Hence, none of the existing waste material present within the quarry, regardless of how it was generated, can be sold from the site by the new claimants, their lessees, or operators. Anyone removing limestone waste rock from the quarry will be held accountable for willful trespass of mineral material.
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> The Calcite mining claims located within the community pit only establish a right to the royalty-free removal of locatable grade limestone for qualifying locatable-grade end uses.

(Decision at 1-2.) Finally, BLM advised Appellants that it will be necessary to revise the existing operating plan and mining permit to acknowledge these restrictions.

The abandoned Lion and Lynx claims were located on October 5, 1956, by the Colorado Fuel and Iron Corporation, later named CF&I Steel Corporation (CF&I), which leased the claims to MCR. Pitkin was the operator of the claims under a "Quarry Operating Agreement" with MCR. In a Memorandum to BLM's Colorado State Director dated October 21, 1993, the Glenwood Springs Resource Area Manager stated that MCR's primary market was its plant in Carbondale, Colorado, where the limestone was pulverized for use as rock dust in MCR's coal mines. The material was also sold to the Craig

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2/ The disturbance area is situated in sec. 36 of T. 5 S., R. 89 W., Sixth Principal Meridian, and consists of 210 acres comprising Lots 3 and 4, the N½NE¼, SW¼SE¼, and W½SE¼SE¼. The Calcite claims and the stockpile area occupy the same ground to the extent of 140 acres in the SE¼ of sec. 36. (Decision at 1.)

power station as a sulfur dioxide scrubbing agent. MCR's Coal Mining Basin Complex ceased operation in January 1991 and the company filed for bankruptcy in 1992.

The State of Colorado sought to foreclose on the company's reclamation bond for the coal mines, which was secured by the deed to the Carbondale rock dust plant. 3/ When the claims were abandoned for failure to pay the rental fees, the Area Manager became concerned that the abandoned claims would be relocated by another party with no interest in supplying the plant. He believed that if this source of limestone thereby became unavailable, it would devalue the Carbondale rock dust plant that secured the reclamation bond. By establishing a community pit, BLM believed a source of supply for the rock dust plant could be assured, with the expectation that the bond for reclamation would remain secure.

The background of this case can be found in a letter from BLM to MCR dated June 3, 1987. In May 1987, BLM had discovered that MCR was selling "a small fraction of [MCR's] undersized waste material generated by the crushing and screening of the pit-run limestone for the size fraction to be shipped as scrubbing agent." BLM had confirmed that this "waste" material was sold to the County for use in road beds. The issue thus posed by this discovery was framed as follows:

> With regard to the legality of such non-qualifying end-use sales under the mining laws, a review of the applicable case law reveals that no direct legal precedent exists on the question of whether or not locatable grade limestone from a valid claim can be disposed of for common variety purposes. This situation has, however, been examined by the * * * Regional Solicitor's Office and they have advised us to allow "pit run waste material from locatable limestone processed for qualifying sales * * * to be disposed of by the mining claimant[,] provided the claim is otherwise valid." To further clarify this, two points must be made emphasized [sic]. First, the validity of the claim(s) must be maintained solely on the mining and marketing of locatable-grade limestone for an acknowledged locatable end-use. Second, the material sold or otherwise disposed of for the non-qualifying (common variety) end use must be waste material and it can

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3/ Appellants contend that BLM is in error in stating that the State is set to foreclose on the bond, at least as the statement may relate to the quarry. (Statement of Reasons (SOR) at 4.) Appellants note that the reclamation bond to which the Area Manager referred was not the bond for the quarry, but the bond for MCR's coal mines. The reclamation bond for the quarry is secured by a senior trust deed to the Carbondale Industrial Park. Appellants note that their quarry permit is in "good standing," that the quarry is not being reclaimed, and that no order to begin reclamation has been issued. Id. We agree that the bond that concerns BLM is not the quarry bond.

> only be generated through the processing of the locatable [grade] limestone for qualifying sales. Separate mining and processing of locatable limestone solely to generate material for non-qualifying end-use sales is forbidden.

(BLM's June 3, 1987, Letter to MCR (emphasis added).)

A memorandum from the District Manager to the State Director provides additional background and further reveals BLM's motivation in establishing the community pit:

> Mid-Continent's primary market for the quarry [when the Tiger, Lynx and Lion claims were valid] was as a supply of locatable-grade limestone to the company's rock dust plant in Carbondale, Colorado where the rock was pulverized and sold as rock dust for coal mines. A large captive market for this use existed in the form of Mid-Continent's own coal mines within its Coal Basin Mines Complex west of Redstone, Colorado. * * * Since the locatable grade limestone had to be selectively mined from a much larger section of non-locatable limestone and waste rock, the operation did generate a considerable quantity of material that could not be directly marketed under the mining laws. In accordance with a Solicitor's Opinion on this type of waste material, this office did allow a certain tonnage of this waste material to be disposed of by Mid-Continent, royalty-free, for non-qualifying end-uses. This tonnage was tied to the requirement that the waste material only be generated through the necessary extraction of locatable grade limestone and that the operation's validity was always maintained solely on the sales of locatable grade limestone for qualifying end-uses. This situation was closely monitored by this office and was held to be in compliance until the quarry ceased operation earlier this year.
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> This office is very concerned as to the State's pending disposal of the Carbondale rock dust plant. For the State to recover even a fraction of the stated bond value of this property ($3 million) it is essential that the plant be marketed for its highest and best use - this being as a rock dust plant in its current location. For that to be the case the buyer will need a secure source of suitable quality limestone in the immediate vicinity of the plant. The only such source is the Glenwood Springs limestone quarry formerly operated by Mid-Continent. [4/]

4/ Notwithstanding BLM's desire to secure a supply source for the rock dust, it is clear that if the mineral material is of such quality that its marketability would justify its classification as locatable under 30 U.S.C. § 611 (1994), the limestone would be subject to disposition under the mining laws.

(October 21, 1993, Memorandum from Area Manager to State Director at 1-2 (emphasis added).)

As stated, BLM asserts that two of the three stockpiles are of locatable grade limestone that Appellants may sell, but only for "qualifying uses." 5/ (Answer at 2.) BLM asserts that the third and largest stockpile is common variety limestone, based on the finding that the assay of two grab samples from that stockpile indicated that the limestone contained less than 95 percent combined carbonates, and that it therefore is marketable only for uses which do not imbue the material with uncommon characteristics -- that is, for use in road base surfacing, parking lots and other uses. (Answer at 5, Reply to Answer at 1.) BLM acknowledges that there is in-place limestone of locatable grade on the Calcite claims, and although BLM harbors some doubt as to whether there is a qualifying market for this material, has decided, since Appellants have not initiated mining operations, that it is premature to contest the claims. (Answer at 3.)

In their SOR, Appellants attack the establishment of the community pit as unlawful, and assert that the mineral material on the claims was lawfully mined and stockpiled as a necessary adjunct to the extraction of locatable minerals. (SOR at 2.) Appellants assert that "upon * * * extraction and stockpiling, title vested in the owner/operator [Pitkin], whether the material was stockpiled on the claims or removed to a point off the claims." (SOR at 2.) They characterize BLM's action as "confiscatory," and contend that the establishment of the community pit on ground that is subject to a State mining permit, which they are required to maintain and reclaim, is "unlawful." (SOR at 6.)

In its pleadings, BLM agrees that when ore from a mineral deposit embraced by a valid mining claim is extracted and processed, it becomes the personal property of the person who has the right to sever it, citing Forbes v. Gracey, 94 U.S. 762, 765-66 (1876). (Answer at 8.) Indeed, BLM states that this right extends to waste material or tailings removed from ore during processing operations, unless that right is lost by abandonment or some other reason, citing United States v. Grosso, 53 I.D. 115, 125-26 (1930). (Answer at 9.) However, BLM asserts that ownership of this material was abandoned with the underlying Lion and Lynx claims by operation of law when the rental payment required by the Appropriations Act was not received by August 31, 1993. It is BLM's position that abandonment of the stockpiled material is derived not only from the statutory abandonment of the claims, but also from Pitkin's breach of its contractual obligations under the operating agreement with MCR and Pitkin's alleged failure to take any action to protect its rights in the stockpiles in the 5 months between the statutory abandonment of the claims and the Calcite location at the end of January 1994. (Answer at 10.) Once abandoned in this manner, BLM

5/ BLM's term "qualifying uses" refers to those uses attributable to a unique property giving the limestone a special value that makes it an uncommon variety of stone, which is locatable, as distinguished from a common variety, which is not. See discussion infra.

argues, the stockpiles accreted to the realty and reverted to the United States. (Answer at 11.)

Because the Lion and Lynx claims were located after July 23, 1955, they were subject to the Multiple Use Mining Act of 1955, also called the Common Varieties Act, Pub. L. No. 167, 69 Stat. 367, section 3 of which provided as follows:

> No deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders * * * shall be deemed a valuable deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: Provided, however, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" * * * does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value.

30 U.S.C. § 611 (1994).

[1] The regulatory definition of "common varieties" provides, with respect to limestone, that "[l]imestone suitable for use in the manufacture of cement, metallurgical or chemical grade limestone, gypsum, and the like are not `common varieties.'" 43 C.F.R. § 3711.1(b). Although a deposit of limestone may have physical properties that make it amenable to those uses, it will still be considered a common variety if it is marketable only for use in the same way that ordinary varieties of the mineral are used. See United States v. Lease, 6 IBLA 11, 79 I.D. 379 (1972).

Appellants deny that the stockpiles were selectively mined from a larger section of nonlocatable limestone and waste rock as BLM alleges in the October 1993 Memorandum to the State Director from the Area Manager, at 1. Specifically, Appellants state that the "screened fines are the product remaining after screening of the locatable quality limestone for qualifying purposes. The larger sizes of qualified limestone stockpiles in the quarry were extracted from a locatable deposits [sic]." (SOR at 4.) In their Reply, Appellants state that the stockpiled material is "simply a smaller size component of the locatable product mined which, because of moisture content, partial soil contamination, or for other reasons is screened out of the primary product and has an immediate sale value without further processing." (Reply at 2.) However, Appellants further contend:

> [W]here ownership is gained by extraction of a product from a qualified claim * * * meeting the marketability test, it is not the function or prerogative of the BLM to follow disposition of the entire product to its end use and discriminate between qualified and non-qualified sales. This is not a situation of mingling high grade and low grade product to produce a locatable

mineral[,] but rather a method of maximizing the economic realization from the total product, with [sic] a locatable component by itself establishes marketability.

(Reply at 3 (emphasis added).)

The issue of whether a mineral is a common or an uncommon and hence locatable variety stone depends on whether it can be shown that the particular deposit has "distinct, special economic value * * * over and above the normal uses of the general run of such deposits." 43 C.F.R. § 3711.1(b). Of necessity, it includes a showing that the stone in fact can be sold for a use that gives the limestone special value.

In this case, two stockpiles consist of limestone that assayed at more than 95 percent total carbonates, while the assayed value of the third was slightly less than 95 percent. Under U.S. v. Foresyth, supra, limestone that is 95 percent or better total carbonates is an uncommon variety and therefore subject to location under the general mining laws. In Foresyth, it was shown that limestone from the Foresyth claims having a total carbonate content of 95 percent or better could be sold at a premium for manufacture and sale as rock dust. Testimony and other evidence also established that the critical factor for rock dust was the requirement that it must contain no more than 4 percent and/or combined silica. United States v. Foresyth, supra at 237, 94 I.D. 482; see 30 C.F.R. § 75.2 (1997). Our holding that limestone having a total carbonate content of 95 percent or better is locatable does not preclude location of a limestone deposit containing less than 95 percent total carbonate content, so long as the limestone has a property giving it a unique value which is reflected in a higher price than a common variety limestone would command. McClarty v. Secretary of Interior, 408 F.2d 907, 909 (9th Cir. 1969); United States v. Multiple Use, Inc., 120 IBLA 63, 83 (1991); United States v. Foresyth, supra at 245, 94 I.D. at 486; United States v. Pierce, 75 I.D. 255, 260 (1968); United States v. Lease, supra at 17, 79 I.D. at 381-82.

Moreover, although neither the assay sampling nor the methodology and results have been directly called into question by Appellants, we note that grab sampling is not an acceptable sampling method for quantitative purposes, 6/ and thus we question the significance attributed to the assay

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6/ The BLM Manual, Handbook for Mineral Examiners, H-3890-1, at Ch. IV-3C provides:
"C. Grab Samples.
Although grab sampling may yield valuable information, it is not systematic or statistically valid. The mineral examiner should use grab sampling cautiously because unintentional high grading is always possible. Layering or segregation of mineral values may be present. Grab sampling is not recommended; it carries little probative value on the witness stand. Grade and tonnage figures are not reliable if calculated from grab samples."
See also F. Pitard, Pierre Gy's Sampling Theory and Sampling Practice 2d (1993), at 206.

results, particularly where, as here, BLM took only two samples from the fines stockpile, and a total of only four samples from the three stockpiles, despite the volume of material involved. We therefore set aside the Decision insofar as it declares the third stockpile to be subject to disposition only pursuant to the Common Varieties Act. BLM has stated that Appellants are authorized to quarry and remove locatable grade limestone and to market it for qualifying uses, and that this authorization encompasses the locatable grade mineral in two stockpiles. See BLM letter of February 25, 1994. On the record before us, we conclude that the authorization must extend to the third stockpile as well. As to that third stockpile, although it is argued that the fines have "immediate sale value without further processing" (SOR at 2), we observe that Appellants do not aver that the fines can be sold for a qualifying end use, and as noted, the record suggests the opposite conclusion. We hold that Appellants may dispose of mineral material from any or all of the stockpiles, provided they can show to BLM's satisfaction that they can market it for qualifying end-uses. In these circumstances, we find it unnecessary to decide whether the premise of this authorization is that the stockpiles remained Pitkin's personal property after statutory abandonment, or that MCR subsequently located the Calcite mining claims, and accordingly, we do not reach the merits of other arguments advanced by Appellants.

[2] As to the pit designation, the Materials Act of 1947, 30 U.S.C. § 601 (1994), authorizes the Secretary to prescribe rules for the disposition of mineral materials not subject to disposal under the General Mining Laws or other law. One means of disposal established by regulation is the designation of a community pit. 43 C.F.R. § 3604.1. Although BLM may not dispose of mineral material from public lands where there are any unpatented mining claims which have not been canceled by appropriate legal proceedings, 43 C.F.R. § 3601.1-1(a), no further proceedings are required when a mining claim has become abandoned and void for failure to pay the rental fee. See United States v. Hix, 136 IBLA 377 (1996); United States v. Ballas, 87 IBLA 88 (1985). Therefore, upon abandonment of the Lion and Lynx claims, the land therein became open to the establishment of a community pit, just as it also became subject to the location of MCR's new mining claims.

Appellants contend that a stockpile is not a "deposit" subject to designation as a community pit. (SOR at 6.) The Common Varieties Act provides that "[n]o deposit of common varieties" is subject to location, 30 U.S.C. § 611 (1994). On the other hand, the Materials Act, 30 U.S.C. § 601 (1994) authorizes the Secretary to dispose of "mineral materials;" the word "deposit" does not appear in that provision. 7/ Given our disposition of this appeal, however, we leave for another day the question of whether a stockpile can constitute a "deposit."

7/ Departmental regulation 43 C.F.R. § 3604.1(a) provides as follows: "Non-exclusive mineral material sales and free use under permit may be made from the same deposit within the area designated by the authorized officer, and consistent with other provisions of this part. These designated community pit sites or common use areas are not limited in size."

[3] Appellants suggest that BLM may not establish a community pit because the mining permit issued by the State of Colorado remains in effect. (Reply to Answer at 4.) However, after the abandonment of the Lion and Lynx claims, MCR and Pitkin as CF&I's lessee and operator could assert no greater right of use and occupancy against the United States than CF&I itself could assert. As Congress has the exclusive power under the Property Clause to "dispose of and make all needful Rules and Regulations respecting" public land, the fact that Pitkin may possess a mining permit issued by a state government gives it no additional rights with respect to the claims that BLM must recognize. Because neither CF&I, MCR, nor Pitkin could acquire any interest in the area claimed by any act short of making a new location, they can assert no greater right than any other person who could have located a new claim, and such a right cannot relate back to a time prior to the date of location. Thus, when BLM established the community pit on October 21, 1993, it did so on land for which Appellants could no longer assert a valid possessory interest.

[4] As we stated earlier, the Materials Act does not authorize the disposal of locatable minerals on land subject to location, only common variety minerals, and thus the land subject to the community pit remained open to location for uncommon varieties of limestone. Under 43 C.F.R. § 3604.1(b), however, "[t]he designation of a community pit constitutes a superior right to remove material as against any subsequent claim or entry of the lands," and therefore any rights arising from subsequently located claims are subordinate to the community pit. In Robert L. Mendenhall, 127 IBLA 73 (1993), appeal dismissed with prejudice, Civ. No. CV-S-93-912 LDG-LRL (D. Nev. Sept. 17, 1993), we affirmed a BLM decision that disapproved mining operations by a mining claimant within the boundary of a community pit until the pit designation was terminated. BLM properly may preclude a mining claimant from conducting mining operations within the area of the pit until the pit designation is terminated, and if mining operations are allowed, BLM can require the claimant to establish that the mineral mined pursuant to an approved plan of operations is a locat
able mineral and that sales will be to qualifying markets.

Therefore, 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 insofar as it authorizes Appellants to dispose of material from two stockpiles and is set aside insofar as it denies Appellants' authorization to dispose of material from the third stockpile.

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T. Britt Price
Administrative Judge

I concur:

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John H. Kelly
Administrative Judge