

INTERIOR BOARD OF LAND APPEALS

John Steen

166 IBLA 187 (July 19, 2005)

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JOHN STEEN

IBLA 2002-295

Decided July 19, 2005

Appeal from a decision of the Las Vegas Field Office, Bureau of Land Management, denying an application for a noncompetitive sale of a mineral material, sand. N-74980.

Affirmed.

1. Materials Act

Salable minerals subject to disposal under the Materials Act of 1947 are properly distinguished from locatable minerals subject to location under the Mining Law of 1872. Mining claims located subsequent to enactment of section 3 of the Surface Resources Act of July 23, 1955, vest no rights in deposits of common varieties of sand on the claim which are subject to disposal under the Materials Act.

2. Materials Act

Salable minerals, including common varieties of sand, subject to disposition under the Materials Act of 1947, may be sold at a noncompetitive sale only when BLM determines it is in the public interest and finds it is impracticable to obtain competition. A BLM decision rejecting an application for a noncompetitive material sale for a common variety sand deposit will be upheld when BLM finds that there is competitive interest in sale of the sand.

APPEARANCES: John Steen, pro se; Mark R. Chatterton, Assistant Field Manager, Las Vegas Field Office, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

John Steen has brought this appeal from a decision of the Las Vegas Field Office, Bureau of Land Management (BLM), dated April 2, 2002, denying his application (N-74980) for a noncompetitive sale of a mineral material, sand. The application was denied on the ground that public participation in a competitive mineral material sale of a sand deposit in the vicinity caused BLM to believe that a competitive interest exists for the sand deposit appellant is applying to purchase noncompetitively. In denying appellant's noncompetitive application, BLM explained that the regulations at 43 CFR Part 3600 require a competitive sale of mineral materials when BLM believes there is an interest. The BLM decision noted that the sale tract requested was located on the Stella #1 placer mining claim located by appellant and others and that appellant expressly refused to consent to a competitive sale of the sand on the claim.

On February 26, 2001, appellant filed a request for a mineral materials sale with BLM, initially asking for 200,000 tons of sand per year for a term of five years. Maps submitted disclose the request was filed for land within the Stella #1 placer mining claim. The BLM records in the case file indicate that the Stella #1 claim (NMC 823147) was located by John Steen and three other co-claimants on March 14, 2001. By letter dated February 28, 2001, BLM informed appellant that his request exceeded the volume limit for a noncompetitive sale ^{1/2} and, hence, "BLM would be required to hold a competitive sale." Accordingly, BLM inquired whether appellant still wished to pursue his application. Finally, indicating that an environmental assessment (EA) would be necessary to consider a sale, BLM pointed out that the process could "take a minimum of 6 months to complete," and noted that appellant could "contract to have the environmental assessment completed by a private firm to speed up the process." (BLM letter dated Feb. 28, 2001.)

Appellant resubmitted his application with a cover note dated March 8, 2001, for 100,000 cubic yards of sand over a term of one year. Subsequently, in a July 13, 2001, letter to BLM appellant indicated he had contracted with a consultant to prepare an EA. Appellant also recited that he had agreed to relinquish his Stella #1

^{1/2} The applicable regulation in effect at that time, 43 CFR 3610.2-1(a) (2001), limited a noncompetitive sale to 100,000 cubic yards. After appellant filed his application, BLM issued its current version of the mineral material sales regulations and increased the volume limit for individual noncompetitive sales to 200,000 cubic yards. 43 CFR 3602.31; 66 FR 58901, 58906 (Nov. 23, 2001).

mining claim.^{2/} In his letter, appellant protested advice received from BLM “that because of the recent apparent demand for sand and gravel in the general area * * * BLM may require that the material located on my Stella 1 claim be sold through competitive bid.” Appellant asserted that: there had been no mention of competitive bid requirements if he limited his purchase to 100,000 yards per year; he expended funds on an EA in anticipation of a noncompetitive sale; and he would be disadvantaged in a competitive sale because of his need to recover those costs.

A prompt response was issued by BLM. In a letter dated July 17, 2001, BLM explained that while the amount of 100,000 cubic yards of sand in a year could be sold noncompetitively in certain situations, this is restricted by regulation to situations where “it is in the public interest and it is impractical to obtain competition.” (BLM letter dated July 17, 2001.) Citing “the spirited bidding that took place in May of this year for a parcel to the north of your location,” BLM found that there is a competitive interest for materials in the area requiring a competitive sale. Id. Further, BLM explained that appellant was required to relinquish his mining claim prior to any further processing of the sale request. Id.

After reviewing the revised EA provided by appellant, BLM returned the EA for further revision to address comments by letter dated March 19, 2002. In another letter dated March 22, 2002, responding to appellant’s inquiry, BLM reiterated that if any material sale is made it “will be on a competitive basis.”

In his statement of reasons (SOR) for appeal, appellant complains that BLM is denying miners the “right to purchase and mine common variety materials within their claims” noncompetitively (SOR at 1) after they have invested time and money “to prospect, stake & record, sample, trench & run tests to prove quality” when none of the competitors have paid these expenses. Id. at 2. Appellant also indicates it was only after he contracted for development of an EA that he was informed by BLM that the materials sale would have to be competitive because of the strong interest in a competitive sale in the area held in May 2001. Id. at 1. He asserts that the sand was never mined pursuant to this competitive sale contract and that a subsequent competitive material sale at the same property drew only one bid and sold at the minimum price. Id. Appellant attached to his SOR copies of various letters including his July 13, 2001, letter to BLM referred to above.

^{2/} There is no evidence in the record that the mining claim has been relinquished either before that time or since. Rather, the evidence is inconsistent with that assertion. In a letter dated Mar. 25, 2002, appellant indicated that he does “not authorize BLM to auction material at this time.” Further, since appellant is not the sole owner of the claim, relinquishment would require the concurrence of the other claimants.

In its Answer, BLM contends that the relevant regulations require that a material sale be conducted as a competitive sale when BLM finds that there is competitive interest in the material sale. (BLM Answer at 2.) This requirement applies, BLM asserts, even when the competitive interest becomes apparent after the noncompetitive sale application has been filed. Id. Acknowledging that mineral materials may be sold from public lands within a mining claim when either the claimant provides a waiver or BLM determines that disposal of the mineral materials will not be detrimental to the public interest, BLM points out that it found that the public interest is best served by a competitive sale and appellant has refused to provide a waiver for a competitive sale. Id. Consequently, BLM denied the sale application. Id.

[1] As a threshold matter, appellant's assertion of a right as a mining claimant on the public lands to purchase noncompetitively the common variety sand found on his mining claim raises the issue of the distinction between locatable and salable minerals. Section 3 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 611 (2000), provides that deposits of common varieties of sand, gravel, building stone, cinders, and certain other materials are not deemed valuable mineral deposits locatable under the mining laws. Accordingly, mining claims located after that date establish no right to deposits of common varieties of sand found within the claim. United States v. Melluzzo (On Judicial Remand), 32 IBLA 46, 49, 64 (1977); see United States v. Guzman, 18 IBLA 109, 119-20 (1974). Common varieties of sand and other mineral materials not subject to location under the mining law or disposition under other laws^{3/} are subject to sale under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (2000). See City of Sparks, 166 IBLA 21, 25 (2005). Accordingly, appellant's location of a mining claim encompassing a deposit of a common variety of sand establishes no right to develop the common variety sand on the claim.

[2] The Department may dispose of common varieties of sand on the public lands when it would not be detrimental to the public interest. 30 U.S.C. § 601 (2000). We have frequently recognized that BLM has considerable discretionary authority under the Materials Act and the implementing regulations regarding mineral materials at 43 CFR Part 3600, whether to approve an application to purchase mineral materials from the public lands. Melluzzo Stone Company, Inc.,

^{3/} The Materials Act generally authorizes the sale of mineral resources on the public lands which are neither "locatable" under the Mining Law of 1872, as amended, 30 U.S.C. §§ 22-42 (2000), nor "leasable" under the Mineral Leasing Act, as amended, 30 U.S.C. §§ 181-287 (2000). See Southern Utah Wilderness Alliance, 158 IBLA 212, 218 (2003).

154 IBLA 23, 25-26 (2000), citing Echo Bay Resort, 151 IBLA 277, 280 (1999); Jenott Mining Corp., 134 IBLA 191, 194 (1995). The Act provides generally that BLM may dispose of materials to the highest qualified responsible bidder, but authorizes a negotiated contract for disposal of materials “if the contract is for the disposal of property for which it is impracticable to obtain competition.” 30 U.S.C. § 602(a)(3) (2000); 43 CFR 602.31 (formerly 43 CFR 3610.2-1 (2001)); Mary Lee Dereske, 162 IBLA 303, 334-335 (2004). Thus, BLM may sell mineral materials noncompetitively at not less than fair market value (FMV) when BLM determines it is in the public interest and finds it is impracticable to obtain competition. 43 CFR 3602.31(a). In this case, BLM did not find that it was impracticable to obtain competition. Rather, it found that there was a competitive interest for local deposits of sand.^{4/} Accordingly, BLM properly rejected appellant’s noncompetitive material sale application.^{5/}

^{4/} Although appellant challenges the BLM finding on competitive interest, a mere difference of opinion with BLM officials is not sufficient to establish error. The information provided by appellant about the ultimate disposition of the other local competitive material sales is not sufficient to establish error in the BLM finding by a preponderance of the evidence. See Mary Lee Dereske, 162 IBLA at 335; Melluzzo Stone Company, Inc., 154 IBLA at 26.

^{5/} While we are sensitive to appellant’s concern regarding his disadvantage in a competitive sale, BLM is obligated to seek FMV for the right to develop the sand and there is no authority for holding a noncompetitive sale unless BLM concludes that it is impracticable to obtain competition for the deposit. 30 U.S.C. § 602(a)(3); 43 CFR 3602.31(a). To the extent a competitive sale seeks to recover the FMV of the right to develop the sand deposit and the EA prepared by appellant is relied upon to conduct the sale, it would appear that the FMV of the commodity would include the cost of the EA required to support the sale. As this cost has already been paid by appellant, BLM may find it proper in the event a competitive sale is held to consider any of these costs which can be documented as an additional component of any bid tendered by appellant.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James F. Roberts
Administrative Judge