

MOBIL OIL CORP.

IBLA 83-393

Decided February 16, 1984

Appeal from a decision of the Casper (Wyoming) District Office of the Bureau of Land Management holding that the removal of scoria not severed pursuant to expired material sales contract (WY-061-MP-1-07) would constitute a trespass in absence of execution of a new contract. WY-061-MP-1-07.

Affirmed as modified and remanded.

1. Materials Act

The purchaser under a material sales contract who has paid for the right to mine and remove a quantity of scoria, but who has been unable to mine and remove a substantial part of the scoria purchased prior to expiration of the contract, may be entitled to a credit for the appraised value of the scoria purchased but not taken as limited by the pro rata share of the contract price. Where the purchaser remains ready, willing, and able to mine and remove the balance of the scoria purchased, the contract is properly extended or renewed to authorize removal of the balance of the scoria, subject to reappraisal of the value of the remaining scoria, in the absence of a compelling countervailing public interest.

APPEARANCES: Patricia B. Walker, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by Mobil Oil Corporation (Mobil) from the January 18, 1983, decision of the Manager of the Casper (Wyoming) District Office of the Bureau of Land Management (BLM), regarding appellant's material sales contract (WY-061-MP-1-07) for the mining of scoria. That decision informed appellant that an inspection by the BLM personnel of scoria pit number 2 subject to the contract had led to the finding that all except 1,000 cubic yards of scoria remaining at the pit had not been "severed or extracted." Accordingly, the District Manager held that since the scoria had not been severed or extracted prior to expiration of the material sales contract, removal of that scoria from the deposit without entering into a new contract would constitute a trespass.

Appellant contends in its statement of reasons for appeal that it had severed or extracted the remaining scoria on the land prior to expiration of the contract. Appellant alleges that it undertook all the ordinary and usual steps necessary for the mining of the scoria prior to loading and transporting the scoria to the location where it was to be used. Counsel for appellant points out that Mobil is entitled under the contract terms to remove, within 1 year after expiration of the contract, the scoria severed or extracted during the term of the contract. Further, Mobil claims ownership of the scoria deposit as the successor in interest to patentees under the Stock-Raising Homestead Act of 1916. Counsel argues that although minerals were reserved to the United States under the terms of such patents, scoria does not constitute a reserved mineral. Counsel cites the precedent of Western Nuclear v. Andrus, 664 F.2d 234 (10th Cir. 1981), in support of this contention.

Review of the record discloses that appellant is the owner of the subject land as successor in interest to the Stock-Raising Homestead Act patentees. <sup>1/</sup> The file further reveals that Mobil holds a coal lease from the United States for the subject land and that the Caballo Rojo coal mine is being developed on the leased lands. The scoria that appellant seeks to mine under the material sales contract at issue in this appeal is needed for development of roads in conjunction with the mine operation.

Material sales contract WY-061-MP-1-07 was entered into by Mobil and the United States on May 27, 1981. The contract authorized appellant to mine and remove 208,000 cubic yards of scoria (clinker). The contract was issued pursuant to the Act of July 31, 1947, as amended, 30 U.S.C. §§ 601-604 (1976), authorizing the disposal of mineral materials on the public lands other than those locatable under the mining law or leasable under the mineral leasing law. The contract was awarded to appellant pursuant to competitive bidding procedures. The price of the contract is \$49,920 (\$0.24 per cubic yard) which the record indicates that appellant has paid. The contract, by its terms, expires December 31, 1982, and expressly provides that no extension can be granted. It further appears that the reason for this stipulated termination date was to protect Mobil against interference with anticipated coal mining operations on that portion of its coal lease covered by the scoria deposits in the event that the scoria contract was awarded to a third party as a result of the competitive bidding.

Appellant by letter of November 3, 1982, to the Buffalo Area Office, requested that BLM grant an extension of the term of the contract. In support of the request, Mobil stated that 60,000 cubic yards of scoria had been removed at that time out of a total of 208,000 cubic yards purchased. Mobil indicated that the scoria had been found to be neither as plentiful nor as accessible as contemplated at the site mined up to that time. By followup letter of November 17, 1982, to the Buffalo Area Office of BLM, Mobil

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<sup>1/</sup> Lands patented under the Stock-Raising Homestead Act of Dec. 29, 1916, ch. 9, § 1, 39 Stat. 862 (repealed by Federal Land Policy and Management Act of 1976, P.L. 94-579, § 702, 90 Stat. 2743, 2787) were patented with a reservation to the United States of all minerals in the land together with the right to mine and remove the minerals. 43 U.S.C. § 299 (1976); Massirio v. Western Hills Mining Ass'n, 78 IBLA 155 (1983).

renewed its request for extension, pointing out that the early termination date was requested by Mobil to protect the integrity of its coal mine operation and that this was no longer necessary in light of the fact that the scoria contract was successfully bid by Mobil. A copy of this letter was mailed to the Casper District Office where it was date stamped as received on November 19, 1982.

In response to appellant's request for extension in the November 3, 1982, letter, the Acting District Manager issued a letter-decision dated November 22, 1982, denying the request for extension of the contract. The ground for the holding was that to grant an extension was contrary to the no-extension clause contained in the prospectus used to solicit bids and that, hence, to allow Mobil an extension would be unfair to other potential bidders who may have refrained from bidding on the basis of the restriction.

In response to the denial of the extension request, by letter of December 28, 1982, Mobil advised BLM of its intention to sever or extract the balance of the 208,000 cubic yards of scoria prior to termination of the contract. Mobil further stated that it intended to remove, during the year following expiration of the contract, the balance of the scoria severed or extracted prior to expiration and already paid for in accordance with the contract terms.

Subsequently, BLM issued the decision of January 18, 1983, which is the subject of this appeal. The BLM District Manager recited that inspection of scoria pit number 2 subject to the contract disclosed that only about 1,000 cubic yards of scoria had been removed from the site. BLM held that although the topsoil and overburden had been removed from over the remaining scoria, this did not constitute severance or extraction of the remainder of the scoria. Further, the BLM decision warned appellant that removal of the balance of the scoria from this deposit without executing a new contract would constitute a trespass.

Appellant contends on appeal that the balance of the scoria has been severed or extracted. Counsel protests the lack of factual evidence in the record to support the BLM finding, but Mobil presents no evidence of its own. Mobil asserts that the topsoil was stripped and stockpiled. Mobil does not allege that either of the mining methods set forth in exhibit C of the contract was employed. BLM acknowledged in its decision that the overburden had been removed. Counsel cites no authority for finding that this constitutes severance or extraction. It does not appear from the record or appellant's allegations that an evidentiary hearing would establish that the bulk of the remaining scoria was severed or extracted. Thus, we decline to order an evidentiary hearing in this case.

Further, we cannot uphold appellant's view that the scoria is a part of the surface estate patented to Mobil's predecessor in interest rather than a mineral reserved to the United States. This Board has held that scoria which is valuable for surfacing roads is a mineral reserved to the United States in patents issued under the Stock-Raising Homestead Act. Pacific Power & Light Co., 45 IBLA 127 (1980), aff'd., Pacific Power & Light Co. v. Andrus, C80-0073 (D. Wyo. June 17, 1983). Since appellant's brief was filed in this case, the decision relied upon in support of appellant's contention has been reversed. Watt v. Western Nuclear, Inc., \_\_\_ U.S. \_\_\_, 103 S. Ct. 2218 (1983).

There is substantial doubt whether the denial of appellant's extension request could be sustained on appeal. Appellant is the intended beneficiary of the no-extension term of the contract and, as such, the term may be waived by it. A decision denying a requested extension in the exercise of the Secretary's discretion must be supported by a finding that it is required in the public interest. See Shoshone Highway District #2, 45 IBLA 151 (1980). Although BLM spoke of fairness to other bidders in denying the extension, the only relevant concern now is apparently whether the value of the contract as bid would be greater as a result of the longer term and thus would support a higher bid. <sup>2/</sup> This concern is obviated by the fact that the regulations and the contract terms provide for reappraisal of the materials under contract at the time of extension. 43 CFR 3610.8. Appellant, however, failed to appeal the denial of an extension, electing instead to endeavor to extract the scoria prior to the termination date.

The issue raised by this appeal is whether the purchaser of the right to mine and remove 208,000 cubic yards of scoria under a material sales contract is to be deprived of the opportunity to do so because the term of the contract has lapsed before the material can be mined and removed, although the purchaser has paid in full for the right, and is apparently ready, willing, and able to perform.

[1] This case is analogous in certain key respects to the appeal decided by the Board in American Pozzolan Corp., 17 IBLA 105 (1974). In that case the purchaser under a material sales contract paid \$24,000 for the right to extract and remove 200,000 tons of cinders within the contract term. During the term of the contract, the purchaser paid BLM the full purchase price. The contract was for an initial term of 5 years and thereafter purchaser received three separate 1-year extensions. Finally, request for a further extension was denied. During the term of the contract and the extensions thereof, purchaser had only removed a little over one-half of the cinders contracted to be taken. Upon denial of the last extension request, purchaser requested a refund based on the amount of cinders purchased but not removed. The Board held that the purchaser was entitled to a credit for the appraised value of the material not taken under the contract as limited by the pro rata share of the contract price for the amount not taken. 17 IBLA at 110. The Board in Pozzolan directed BLM to offer the remaining cinders for sale and to pay any refund due the original purchaser from the net proceeds of the resale. 17 IBLA at 110-11.

In a case such as the one under appeal now, it would make little sense to order a refund to Mobil for the appraised value of the scoria not taken since appellant stands ready, willing, and able to remove the balance of the scoria it has purchased. Therefore, it appears appropriate for BLM to enter into a new contract with Mobil for sale of the balance of the scoria

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<sup>2/</sup> Obviously denial of the extension request would not make the situation any fairer for those potential bidders who might have declined to bid the first time based on the short term of the contract. However, equity does demand that the scoria subject to the contract be reappraised and that the scoria mined and removed during the extended term of the contract be subject to the reappraised price.

contracted for and paid for under the first contract, but not taken by Mobil. <sup>3/</sup> The price of the remaining scoria under the new contract should be equal to the appraised value thereof, but not less than the price (\$0.24 per cubic yard) under the expired contract. Appellant must be given a credit against this price for the sum already paid under the expired contract for amounts of scoria not taken thereunder. This is the same relief which appellant would have secured had the contract been extended by BLM as a reappraisal of the materials sold is required when an extension is granted. 43 CFR 3610.7, 3610.8.

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 as modified and the case is remanded for action consistent with this decision.

C. Randall Grant, Jr.  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

Will A. Irwin  
Administrative Judge

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<sup>3/</sup> Disposal of mineral materials by negotiated contract without competitive bidding is authorized where it is "impracticable to obtain competition." 30 U.S.C. § 602(a) (1976).

