

Appeal from a decision of the Barstow Resource Area Office, Bureau of Land Management, rejecting a material sale application. CA-060-MP6-19.

Set aside and remanded.

1. Applications and Entries: Generally -- Materials Act

When an application for a mineral material sale is received which covers land embraced in an unpatented mining claim, which claim is not manifestly invalid for a reason appearing of record, BLM should first make a preliminary determination whether it believes that a basis exists for concluding that the claim is invalid and, if such a determination is in the affirmative, BLM should then decide whether the benefits to be obtained by a successful challenge to the mining claim outweigh the administrative costs in pursuing a mining claim contest.

APPEARANCES: Roger B. Woody, San Bernardino, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Roger B. Woody has appealed from a decision of the Barstow Resource Area Office, Bureau of Land Management (BLM), rejecting material sale application, CA-060-MP6-19. For reasons which we explicate below, we set aside that rejection and remand the case file to BLM for further consideration.

On February 20, 1986, appellant filed an application to purchase 1,000 tons of decorative rock for use in landscaping and masonry work, pursuant to § 1 of the Act of July 31, 1947, as amended 30 U.S.C. § 601 (1982) and 43 U.S.C. § 1185 (1982), from the SW 1/4 sec. 22 and the NE 1/4 sec. 28, T. 12 N., R. 5 E., San Bernardino Meridian. On May 29, 1987, BLM rejected this application.

In its decision, BLM noted that the parcels of land covered by Woody's application were embraced within two mining claims, the Silver Sericite Nos. 1 and 2, which had been located on March 22, 1968, and thereafter duly

recorded with BLM pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (1982). Noting that the applicable regulation, 43 CFR 3601.1-1(a)(1), provided that mineral material disposals may not be made where "[t]here are any unpatented mining claims which have not been cancelled by appropriate legal proceedings," BLM denied appellant's application. Woody thereupon appealed to this Board.

In his statement of reasons (SOR) in support of his appeal, Woody advanced three arguments. First, he contended that a review of the San Bernardino Court Records failed to disclose annual filings of assessment work for the years 1984 through 1986. Second, he stated that there were no visible monuments or location notices on the claims. Third, he argued that the sericite vein should have been located as a lode rather than as a placer claim.

[1] We note initially that 43 CFR 3601.1-1(a)(1) clearly prohibited BLM from granting the mineral material application since the existing mining claims had not, at the time that the application was adjudicated, been cancelled by an appropriate legal proceeding. ^{1/} However, the more troublesome question which this appeal presents relates to the appropriate course of action which BLM should undertake when a mineral material sale application is filed for lands covered by an existing unpatented mining claim.

It appears from the record that the Barstow Area Office proceeded on the assumption that the mere fact that a mining claim had been duly recorded under FLPMA required rejection of a mineral material application. The problem with this approach is that it necessarily equates the recording of a mining claim with the recording of a valid mining claim. This is so, because rights of a mineral claimant arise, as against the United States, only upon the discovery of a valuable mineral deposit, locatable under the mining laws. Thus, absent a discovery, there are no property rights which inure as against the United States. See generally, Bruce W. Crawford, 86 IBLA 350, 358-72, 92 I.D. 208, 212-20 (1985).

In fact, the regulation merely provides that until a mining claim has been cancelled, the application cannot be allowed. Thus, the real questions which BLM faces when it receives an application for a mineral material sale which conflicts with an unpatented mining claim are whether proceedings can be brought to nullify the claim and, assuming BLM determines that adequate grounds exist to nullify the claim, whether they should

^{1/} This regulation is based on two Associate Solicitor's Opinions which concluded, for reasons which need not be explored herein, that the Surface Resources Act, 30 U.S.C. §§ 611-615 (1982), did not authorize the Department to dispose of the non-vegetative resources located within an unpatented mining claim. We note, however, that the U.S. Forest Service, Department of Agriculture, has asserted that it does possess the authority to dispose of mineral materials within an unpatented claim located after July 23, 1955, so long as disposal does not materially interfere with mining operations incidental to those claims. See 36 CFR 228.41(b)(3).

be brought. Obviously, if a review of the appropriate BLM case records discloses that the claim has not been maintained in accordance with section 314 of FLPMA or that the claim was located on land not open to mineral location, the proper course of action is to hold the material sale application in abeyance and proceed to issue a decision declaring the claim null and void.

More problematic, however, is the situation which arises when the records of the Department do not show a clear invalidity. Certainly, BLM cannot be expected to challenge every mining claim merely because another individual expresses an interest in purchasing mineral materials that may be located therein. In this regard, the BLM Manual Handbook on Minerals Materials Disposal (H-3600-1) is instructive. Thus, it notes:

If disposal is necessary from areas covered by mining claims, the simplest procedure is that of requesting a relinquishment of the unpatented claim. If that fails, performing a validity examination is necessary. Applicants should be warned that it could take years for a final decision to be reached in a validity contest. The Government should also determine if validity procedures are justified.

H-3600-1.V-1.

Under these guidelines, assuming that no relinquishment of the claim is filed, BLM must first determine whether there is an adequate basis to conclude that the mining claim is invalid. If this first determination is made in the affirmative, BLM must then decide whether, considering all of its myriad responsibilities as well as the limitations of time and financial resources, the filing of a mining contest can be justified.

Applying these procedures to the instant case, we have already noted that appellant's assertion that proofs of labor had not been filed in San Bernardino County was erroneous. Appellant also alleged that there were no "visible" monuments or location notices within the claims. In this regard, we note that the State of California does not require posting of placer claim boundaries where the boundaries conform to the public land surveys, as these claims apparently do. See Department of the Navy, 108 IBLA 334, 337 n.2 (1989). Moreover, as we noted in United States v. Pool, 78 IBLA 215 (1984), even in situations in which a mining claimant is required to initially monument a mining claim, there is no requirement that the monuments be maintained by the claimant so long as the subsequent destruction of the monuments is not caused by the claimants. Id. at 217. Thus, the fact that appellant asserted that there were no "visible" monuments could not, by itself, provide an adequate basis for a determination that the claims were invalid.

Appellant also asserts that the mineral deposit is in lode form whereas the claims are placer claims. As the United States Supreme Court held long ago, "A placer discovery will not sustain a lode location nor a lode discovery a placer location." Cole v. Ralph, 252 U.S. 286, 295 (1920). Whether the claim is properly located, however, is as much a

question of fact as is the existence of a discovery of a valuable mineral deposit. Indeed, the instant case shows how involved such a determination could become.

Thus, the location notices for the two claims at issue do not expressly indicate what mineral is being claimed therein, though it might be assumed from the name of the claims that it is sericite. Sericite is a white potash mica. As the Department had occasion to note in United States v. Pierce, 75 I.D. 270 (1968), mica has been located in both a lode and a placer form, depending upon the nature of its deposition. Moreover, to the extent that low-quality mica is used for building stone purposes, a mica deposit must be located in a placer form under the Building Stone Act, 30 U.S.C. § 161 (1982), regardless of the nature of its deposition. ^{2/} See United States v. Haskins, 59 IBLA 1, 42-43, 88 I.D. 925, 945-46 (1981). The record before the Board is completely devoid of any indication as to the type of sericite deposit claimed, much less its intended use. Only a mining contest could adequately explore these questions.

Thus, quite apart from the question of whether a discovery might be shown to exist within the limits of the two claims involved herein, the determination of whether or not the claims were properly located as lodes or placers could, itself, require analysis of significant complexity which could only be made after a fact-finding hearing. While we might, therefore, doubt that the cost of a contest could be justified, particularly in light of the limited amount of mineral material which appellant seeks to purchase, we feel that this is a decision which should, in the first instance, be made by BLM. Accordingly, we will remand this matter to BLM so that it might make the initial review of these questions. ^{3/}

^{2/} Of course, a subsidiary question would then be whether or not the deposit was an uncommon variety of building stone since, if not, the claim would be null and void ab initio because § 3 of the Act of July 23, 1955, 30 U.S.C. § 611 (1982), expressly removed common varieties of building stone from location under the Building Stone Act, supra.

^{3/} We note that, in certain limited circumstances, the Department has issued mineral leases where United States title to the minerals was in some doubt, conditioned upon an express stipulation that the United States made no warranty of title to the minerals and assumed no obligation to defend the validity of the lease. See Georgette B. Lee, 5 IBLA 295 (1972).

Along these lines, we believe BLM might find it beneficial if a specific provision were added to the regulations which authorized the issuance of a material sale contract on land embraced in an unpatented mining claim, expressly preconditioning any removals upon the prior determination of the claim's invalidity. This material sale contract would then provide the purchaser with sufficient interest to maintain a private contest under 43 CFR 4.450-1, an interest which a mere applicant does not possess. See, e.g., Duguid v. Best, 291 F.2d 235 (9th Cir. 1961), cert. denied, 372 U.S. 906 (1963); Thomas v. Andrus, 552 F.2d 871 (9th Cir. 1977); State of California v. Doria Mining and Engineering Corp., 17 IBLA 380 (1974), aff'd, 420 F. Supp. 837 (1976). However, under the present regulatory scheme, this option is not available.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Barstow Resource Area Office is set aside and the case file is remanded for further consideration by BLM.

James L. Burski
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge.