

PASS MINERALS, INC.
KIMINCO, INC.
PILOT PLANT, INC.
K. IAN MATHESON

IBLA 2003-348

Decided March 16, 2006

Appeal from a decision of the Bureau of Land Management finding a willful mineral trespass in the sale of mineral material from a mining claim. N-63126.

Affirmed.

1. Administrative Procedure: Administrative Review--
Administrative Procedure: Burden of Proof--Evidence

An appellant carries the burden of showing error in the decision being appealed, failing in which, the decision will be affirmed. Further, an appellant must show adequate reason for appeal with some particularity, and support the allegations with arguments or appropriate evidence showing error.

2. Administrative Procedure: Administrative Review--
Administrative Procedure: Burden of Proof--Evidence

No error is demonstrated by a decision to go forward with a mineral trespass action following a mining contest in which the underlying mining claim was declared invalid. Nothing legally, factually, or procedurally compels BLM to postpone action on the trespass charge until all pending or potential appellate review is concluded. The trespass charge does not depend on the validity of the underlying mining claim, because the essence of the charge is disposal of common variety mineral material without BLM's authorization to do so.

3. Mining Claims: Surface Uses--Surface Resources Act:
Occupancy--Trespass

Under the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000), mining and mill site claims located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining, or processing operations and uses reasonably incident thereto. Where appellants had no viable mining operation on their claim and it contained no valuable mineral deposit, the disposition of common sand and gravel from the claim for use as Type II road base and as aggregate in other commodities was properly held a mineral trespass.

APPEARANCES: K. Ian Matheson, Henderson, Nevada, pro se and for corporate parties; John W. Steiger, Esq., Office of the Regional Solicitor, Intermountain Region, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Pass Minerals, Inc. (PMI), Kiminco, Inc. (Kiminco), Pilot Plant, Inc. (Pilot), and K. Ian Matheson have timely appealed the August 1, 2003, decision of the Las Vegas Field Office (LVFO), Bureau of Land Management (BLM), finding appellants in willful mineral trespass for the unauthorized removal of sand and gravel from public lands embraced in the Mijo 16 association placer mining claim located by appellants or their predecessors.^{1/} The decision was issued to PMI, Kiminco, Pilot, and Matheson, and to Industrial Construction (Industrial) and American Asphalt & Grading Company (AAGC), with which appellants had contracts.^{2/} The decision seeks damages of \$2,531,935 from appellants for willful trespass, and \$20,315 and \$336,564 from Industrial and AAGC, respectively, for nonwillful trespass. PMI,

^{1/} The Mijo 16 is located in the NW $\frac{1}{4}$ sec. 14, T. 23 S., R. 63 E., Mt. Diablo Meridian, in Railroad Pass, Nevada. The claim was located in 1983 by appellants or their predecessors. See United States v. Pass Minerals, Inc., 168 IBLA 115, 118 n.1 (2006).

^{2/} In its response to appellants' stay petition, BLM advised that the decision issued to Industrial was returned undelivered. BLM states its belief that Industrial is now defunct.

Kiminco, Pilot, and Matheson timely appealed the decision; AAGC did not file an appeal and agreed to pay the trespass damages demanded. The decision is the conclusion to a Notice of Trespass issued on January 11, 1999 (Notice), to PMI and Industrial. Appellants also petitioned for a stay of BLM's decision. On September 22, 2003, BLM filed its opposition to the stay and moved to consolidate this appeal with the appeal in IBLA 2003-268 (described below), and further moved to expedite consideration of both. By order dated October 29, 2003, we denied the petition for stay, and denied BLM's motions.

The Notice charged appellants with removing sand and gravel from the Mijo 16 placer mining claim pursuant to a plan of operations, N54-95-031P, submitted for mining gold. According to the Notice, the mineral material was being removed from an alluvial deposit. The mining operation consisted of screening, crushing and magnetic separation purportedly to extract precious metals from the mineralized material. The waste rock was then sold for use as sand and gravel without authorization, in violation of the Materials Act of July 31, 1947, as amended by the Surface Resources Act of July 23, 1955, 30 U.S.C. § 601 (2000). Since they are not locatable minerals, BLM advised that sand and gravel could not be sold from the mining claim. The Notice afforded appellants five days from receipt in which to provide any information or evidence showing that they were not in mineral trespass.

Prior to issuing the Notice, it appears Matheson inquired about selling tailings from the mining operation.^{3/} The record shows that BLM formally responded to that inquiry by letter dated April 9, 1996. BLM described the factual situation to which its response pertained as follows:

You inquired about selling tailings from a mining operation where the ore would be crushed or fractured to allow valuable concentrate to be refined by magnetic separation. The concentrate would be sent off for further processing and the tailings would be sold and removed from the site to eliminate the need for tailings piles or any possible rehandling of material.

(Apr. 9, 1996, BLM letter to Matheson at 1.) BLM distinguished "tailings" by reference to the process by which they are produced:

Milled tailings are the end product of crushing and grinding material to a very fine size and using some form of leaching process to remove as much of a locatable mineral as is possible under the prevailing

^{3/} We were unable to locate a written inquiry or a conversation record or file memorandum otherwise documenting that initial inquiry.

conditions. The milled tailings have had their physical and chemical nature changed. Placer tailings result from a simple washing of sand and gravel to separate out a heavy mineral by gravity with no crushing, grinding, or leaching to change the physical or chemical nature of the host deposit. Sand and gravel after being washed in a placer operation is still sand and gravel, a common variety material since July 23, 1955.

Id. The letter noted that mill tailings are considered personal property under Nevada State law, and further noted that tailings deposited on unappropriated public land that remain unworked for 10 successive years are deemed abandoned and may be located as a placer claim.

Citing U.S., George B. Conway, Intervener v. Grosso, 53 L.D. 115, 125-26 (1930), and Terry Maley's *Mining Law* (5th Ed. 1992), BLM stated that, once severed, tailings become personal property and remain such while being held for later processing. From this proposition, BLM reasoned that "[t]his leads to the conclusion that the tailings are personal property only so far as they lead toward further development of a mine based upon a locatable mineral." (Apr. 9, 1996, BLM letter to Matheson at 2.) BLM analogized the status of tailings to other property attached to a mining claim, such as timber, which may be used in the construction of mine facilities, but cannot be sold in the open market, stating that sand and gravel may be used in making concrete for mine facilities or to maintain a haul route on the claim, but cannot be sold for off-claim uses. Id. Therefore, Matheson could use the sand and gravel for any mining purpose, but lacked authority to appropriate and sell it. Id. BLM clearly advised that a sale would result in a charge of trespass.

Repeated inquiries by Matheson followed, to which BLM replied in writing on June 26, July 12, twice on July 31, August 8, and September 12, 1996. Throughout, BLM adhered to its position that the sale of sand and gravel for other than mining purposes constitutes a mineral trespass. Despite those responses, in December 1998 and January 1999, BLM found reason to suspect a mineral trespass on the Mijo 16 claim, resulting in issuance of the Notice. On January 20 and 21, 1999, an inspection was conducted, in which Industrial showed BLM its sand and gravel operation on the Mijo 16 claim.

Then, as now, Matheson argued that the sand and gravel constitute tailings, which are personalty that he may dispose of as he sees fit. On January 12, 1999, Matheson responded to the Notice at length, declaring he had disclosed a "substantial discovery" of a valuable mineral deposit, and providing citations to various judicial authorities and mining treatises in which ownership of tailings in various circumstances is discussed. (Matheson Letter dated Jan. 12, 1999, at 2.) Matheson

renewed his arguments after a meeting with BLM in letters dated January 20, 21, and 29, 1999.

By letter dated November 15, 1999, BLM again stated its position that Matheson had no authority to sell sand and gravel from the claim, and reiterated that position yet again on July 28, 2000, and on March 15, 2002. In June 2002, Matheson entered into an agreement with AAGC by which it was allowed to remove sand and gravel from the Mijo 16 claim. AAGC began operations, and continues to do so pursuant to a mineral material sales contract issued by BLM on or about September 2, 2003. See BLM Response to Stay Petition at 3. On June 19, 2003, BLM conducted a volumetric study. Using a conversion figure of 1.7 tons per cubic yard (i.e., the number of tons it takes to make a cubic yard), BLM calculated an in-place value of 29,022 tons at \$.70/ton removed by Industrial between December 1998 and January 1999, and an in-place value as of June 21, 2003, of 469,985 tons at \$.70/ton removed by AAGC between June 2002 to July 12, 2003. (Decision at 5.) BLM prepared a mineral appraisal to value the minerals on a per ton basis, a production report to document the basis for the damages demanded, which was attached to its decision, and enumerated its factual findings in support of its action.

In addition to the details of calculating and pricing the material removed, BLM specifically found that Matheson, on behalf of himself and the corporate parties, had no authority to remove mineral materials from the Mijo 16 claim; that Matheson knew or should have known that the Mijo claim did not contain a valuable mineral deposit, and they were not entitled to remove mineral materials from the claim; that Industrial's and AAGC's primary purpose in removing mineral material was to produce mineral aggregates; that the production of "concentrates" for appellants' mining operation was secondary to Industrial's and AAGC's main purpose; that the status of the "concentrates" was unknown and not part of the trespass action; that, with one possible exception, appellants did not monitor or oversee the production of mineral material by AAGC, or provide security or protection of any "concentrates" being produced by AAGC; and that the Mijo claims were not being held in good faith. ^{4/}

Earlier, on November 16, 1999, BLM initiated contest proceedings against the Mijo 16 and 17 mining claims on three grounds: lack of a discovery; the claims are nonmineral in character; and the claims were not held in good faith, based on the facts of this trespass. While the contest was pending, further action on this trespass case was suspended, although it was the facts of the trespass that furnished the basis for the charge in the contest complaint that the Mijo claims were not held in good

^{4/} The latter point is a reference to the Mijo 17 association placer mining claim, as well as the Mijo 16 claim.

faith. In a decision on the contest was issued on May 8, 2003, Administrative Law Judge Harvey C. Sweitzer held the claims to be null and void because the claims lack a discovery of a valuable mineral deposit and contestees failed to show quantity of reserves. He explicitly did not reach the questions of whether the claims were nonmineral in character or not held in good faith. (May 8, 2003, contest decision at 2.) PMI, Kiminco, Pilot, and Matheson timely filed an appeal, which was docketed by this Board as IBLA 2003-268.^{5/}

When appellants filed their Notice of Appeal and Petition for Stay on September 2, 2003, they indicated that a complete statement of reasons would be filed within 30 days. On October 14, 2003, appellants filed a pleading captioned "Statement of Reasons to Reverse and Stay the Las Vegas Office Decision for Mineral Trespass" (SOR). Appellants have filed nothing further, nor indicated an intention to do so, and accordingly, we assume that this pleading contains the reasons for appealing, which are quoted in full below:

There is no final decision yet regarding the appeal of Judge Sweitzer's decision regarding the status of the Mijo 16 and Mijo 17 placer mining claims. Judge Sweitzer's decision upon which the Notice of Trespass is based is under appeal. It is therefore premature to file a Mineral Trespass at this early stage of judicial procedures as it is our intention to pursue any adverse decision in the Federal court system.

Until such a final adjudication is reached which may include recourse to the federal court system we do not chose [sic] to challenge the validity of those persons and/or companies charged nor the accounting for the charges although we consider it to be erroneous and inaccurate in all respects.

For the above reasons we request the Mineral Trespass Decision be stayed.

(SOR at 2.) Thus, coupled with a general assertion of error, appellants argue that BLM should have taken no action on the trespass until this Board, and presumably a Federal court, decided their appeal of Judge Sweitzer's decision in the mining contest.

^{5/} This Board recently affirmed Judge Sweitzer's decision in all respects. United States v. Pass Minerals, Inc., 168 IBLA 115.

[1] We have noted many times that a party challenging a decision rendered by BLM in the exercise of its delegated authority has the affirmative burden of establishing error by a preponderance of the evidence. D.J. Laughlin, 154 IBLA 159, 163 (2001), and cases cited. Further, an appellant must show adequate reason for appeal with some particularity, and support those reasons with appropriate arguments and evidence showing error. Conclusory allegations of error, standing alone, do not suffice to discharge the burden. Dale Daugherty, 139 IBLA 56, 65 (1997); Charles S. Stoll, 137 IBLA 116, 126 (1996); Fred Wilkinson, 135 IBLA 24, 25 (1996); Glenn B. Sheldon, 128 IBLA 188, 191 (1994); Shama Minerals, 119 IBLA 152, 155 (1991); B.K. Lowndes, 113 IBLA 321, 325 (1990).

[2] No error is demonstrated by BLM's decision to go forward with the trespass action following the mining contest in which the Mijo 16 mining claim was declared invalid. Nothing legally, factually, or procedurally compels BLM to postpone action on the trespass charge until all pending or potential appellate review is concluded. The trespass charge may have been the basis for the contest charge that the claims were not being held in good faith, but the legality of disposing of Mijo sand and gravel for uses not associated with mining on the claim does not necessarily depend on the validity of the claim, because the essence of the charge is disposal of common variety mineral material without BLM's authorization to do so. Moreover, after finding that the Mijo claims were not and had never been supported by a discovery, Judge Sweitzer expressly did not rule upon the good faith contest charge, so that the date when the trespass decision was issued neither implicates nor vitiates any procedure required by statute, regulation, or administrative practice. Appellants have cited no authority to the contrary.

In addition to arguing that the trespass action should be held in abeyance pending a final contest decision, appellants generally assert that the trespass decision is erroneous. They do not offer any facts or specific arguments to counter the factual details and rationale of BLM's decision. What thus remains is BLM's application of the law to the uncontroverted facts of the case.

Below, appellants repeatedly asserted that, upon severance, ore generally ceases to be realty and becomes personalty. Appellants characterize the sand and gravel sold to Industrial and AAGC as mine "tailings" to support the suggestion that, as holders of the unpatented mining claim, they acquired title to the severed mineral material as personalty and could therefore dispose of such personalty as they chose. However, the mere act of severing mineral material on or in a mining claim can create no title or right to the material not authorized by law.

[3] A mining claim can be held only in accordance with the Federal law under which it was initiated. Under the Mining Law, a claimant may enter the public lands

and locate a valuable mineral deposit. 30 U.S.C. §§ 22, 35 (2000). The requirements for permitted use or occupancy of the public lands under the Mining Law were revised in section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (2000). That Act provides that mining and mill site claims located under the mining laws of the United States “shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining, or processing operations and uses reasonably incident thereto.” Precious Metals Recovery, Inc., 163 IBLA 332, 340 (2004).^{6/}

Here, there is no viable mining operation on the Mijo 16 claim, and there never has been one; at best, evidence in the mining contest showed research and possibly exploration or prospecting efforts and a pilot facility in aid of those efforts that never became viable, because appellants were unable to reliably assay or extract the gold deposit they hypothesized. As stated, we upheld Judge Sweitzer’s ultimate conclusion that the Mijo 16 and 17 claims did not and never had contained a valuable mineral deposit, and on that ground, were properly declared invalid. Pass Minerals, Inc., 168 IBLA at 143. There is therefore no mining claim and no mining activity that could properly support the assertion that the sand and gravel appellants disposed of constitute mine tailings.^{7/}

^{6/} With respect to what uses are “reasonably incident” to prospecting, mining, or processing operations, implementing regulations at 43 CFR Subpart 3715 provide that the term “includes those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit, using methods, structures, and equipment appropriate to the geological terrain, mineral deposit, and stage of development and reasonably related activities.” 43 CFR 3715.0-5.

^{7/} In mining, *tailings* are “mining debris or simply debris remaining after hydraulic mining” (sand and gravel formerly were viewed as tailings, but now are regarded as debris); the “gangue and other refuse material resulting from the washing, concentration or treatment of ground ore,” especially debris produced from ore-dressing machinery rather than material that is to be smelted (concentrates); those “portions of washed ore that are regarded as too poor to be treated further;” or “the residuum after most of the valuable ore has been extracted.” *A Dictionary of Mining, Mineral, and Related Terms*, Bureau of Mines, U.S. Department of the Interior (1968). *Gangue* is defined as “[u]ndesired minerals associated with ore, mostly nonmetallic;” the usually valueless “fraction of ore rejected as tailing in a separating process;” “[w]aste” or “[r]ock associated with ore but having no mineral content or value.” *Id.* As these definitions show, the term *tailings* contemplates the byproduct of a mining operation conducted to actually extract or recover valuable ore or minerals that is

(continued...)

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 generally establish no right to dispose of deposits of common varieties of building stone or gravel found within the claim. John Steen, 166 IBLA 187, 190 (2005); Matthew J. Brainard, 138 IBLA 232, 234 (1997); United States v. Multiple Use, Inc., 120 IBLA 63, 76A (1991).

Finally, none of the sand and gravel appellants disposed of was used by appellants for prospecting or mining or any purposes reasonably incident to activity authorized under the mining laws, as required by the Surface Resources Act; to the contrary, it was used as Type II road base and as aggregate in other commodities by Industrial and AAGC customers. It is accordingly plain that the mineral material appellants disposed of was common variety sand and gravel. Such dispositions are subject to sale by BLM under the Materials Act of 1947, as amended, 30 U.S.C. §§ 601-604 (2000). Matthew J. Brainard, 138 IBLA at 234; United States v. Multiple Use, Inc., 120 IBLA at 76A.

There are thus no circumstances in the facts of this appeal, either before or after Judge Sweitzer's decision, under which the disposition of common sand and gravel for purposes not reasonably incident to mining activity ever was authorized. BLM correctly held appellants in willful trespass.

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.

T. Britt Price
Administrative Judge

²⁷ (...continued)

waste. See also U.S., George B. Conway, Intervener v. Grosso, 53 L.D. at 125-26.

I concur:

Will A. Irwin
Administrative Judge