

MISSISSIPPI POTASH, INC.

IBLA 99-373

Decided November 25, 2002

Appeal from a Notice of Trespass issued by the Carlsbad Field Office, Bureau of Land Management. NM-080-8-003.

Affirmed in part, set aside and remanded in part.

1. Act of July 31, 1947 -- Materials Act - Mineral Leasing Act: Generally

When removal of mineral materials from a site on a lease issued under the Mineral Leasing Act of 1920 is not necessary in the process of extracting the mineral under lease, a materials sales contract under the Materials Act is required.

2. Administrative Procedure: Adjudication - Appraisals

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision.

APPEARANCES: Mark K. Adams, Esq., Albuquerque, New Mexico, for appellant; Grant L. Vaughn, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Mississippi Potash, Inc. (MPI), operates a potash mine in Eddy County, New Mexico, under a lease issued pursuant to the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181, 281-287 (2000).

In March 1998, the Carlsbad (New Mexico) Resource Area, Bureau of Land Management (BLM), learned that MPI had removed caliche from a site on the leased land and used it to repair a breached tailings pond dam that was also on the leased land. The site was not part of the mine workings or rights-of-way.

In December 1998, BLM issued MPI a trespass notice for "removal of mineral materials (caliche) from public lands without a valid contract" in

violation of 43 CFR 9239.0-7. 1/ BLM provided MPI 30 days to present evidence that "tends to show you are not a trespasser as we have alleged."

MPI responded:

Tailings ponds are constructed works that are absolutely necessary to the extraction and processing of potash. Caliche is a material located on the Lease that can be successfully used in construction, maintenance and repair of tailing[s] ponds. MPI's use of caliche from the Lease, on that same Lease, to perform acts necessary to the process of extracting minerals is in compliance with the Lease and with 43 CFR § 3610.2-3.

(MPI Answer at 4.) Part I, Sec. 2, of MPI's lease grants it the "right to construct and maintain on the land, such works, buildings, plants, structures, equipment and appliances necessary to the mining, processing and removal of the deposit \* \* \* ." The regulation in effect in March 1998, 43 CFR 3610.2-3 (2001), provides:

Where the materials are to be used in connection with the development of public lands under a mineral lease issued by the United States, the authorized officer may without calling for competitive bids, sell a volume of mineral materials not to exceed 200,000 cubic yards (or weight equivalent) to any one permittee in one State in any calendar year. No charge shall be made for mineral materials necessarily moved in the process of extracting materials under Federal lease, as long as the materials remain within the boundaries of the lease and are used for lease development. [2/]

MPI pointed to the second sentence of this regulation as authorizing it to remove the caliche and excepting it from trespass under 43 CFR 9239.0-7.

On July 27, 1999, BLM issued a decision that stated in part:

The Mineral Leasing Act and the terms of the lease give the lessee the right to use the surface for facilities related to the removal and processing of the leased mineral, but does not give the right to take and use mineral materials. The Materials Act [30 U.S.C. 601 et seq.] does not allow for the free

1/ This regulation provides: "The extraction, severance, injury, or removal of \* \* \* mineral materials from public lands under the jurisdiction of the Department of the Interior, except when authorized by law and the regulations of the Department, is an act of trespass. Trespassers will be liable in damages to the United States \* \* \* ."

2/ As discussed below, this regulation was amended in November 2001.

use of mineral materials by lessees. The Bureau does[,] however, as a matter of policy allow the use of materials necessarily disturbed in the process of removing the leased mineral to be used in the development of the lease. If the lessee desires to use other materials occurring on the lease they may be purchased under a material sales contract.

The caliche pit in question was established solely for the purpose of obtaining mineral materials. The caliche materials were not necessarily disturbed during removal of the leased mineral or construction of facilities related to the mining or processing of the leased mineral. Your mining plan involves a greater area of disturbance than necessary for the removal of the leased mineral, and was developed solely for the purpose of disturbing and thereby obtaining mineral materials free of charge under Section 3610.2-3. The caliche should have been purchased under the terms of the Materials Act, and any further removal of the caliche should be authorized under a materials sales contract.

(Decision at 2.) BLM assessed \$21,545.06 in damages -- \$19,875 for the appraised value of the mineral material; \$1,529.62 for the cost of reclamation of 1.3 acres of land; and \$140.44 in administrative costs -- and requested payment in 30 days.

MPI appealed and filed a petition for stay, which we granted. MPI argues that the Materials Act does not apply to the caliche it removed because it was not "disposed of" within the meaning of 30 U.S.C. §§ 601-602, but rather was simply moved from one place to another on the lease and not changed. It also argues that BLM's appraisal of the value of the caliche and the resulting assessment of damages are flawed.

By its terms, 43 CFR 3610.2-3 applies to "use" of mineral materials in connection with the development of public lands under a mineral lease and provides that no charge shall be made for mineral materials "necessarily moved" in the process of extracting minerals. 43 CFR 3603.1 provides that "[e]xcept when authorized by sale or permit \* \* \* the extraction, severance or removal of mineral materials from public lands under the jurisdiction of the Department of the Interior is unauthorized use." Thus, removal of mineral materials from the public lands for use in the development of a lease constitutes disposal of the mineral materials within the meaning of the Materials Act.

[1] In our view, the second sentence of 43 CFR 3610.2-3 makes clear that it is only the removal of mineral materials necessary to the extraction of the mineral under lease that is free of charge. If, as in this case, mineral materials are removed from a site on a federal lease but that removal is not necessary in the process of extracting the mineral(s) under

lease, the mineral materials must be paid for under the Materials Act even if they remain within the boundaries of the lease and are used for the development of the lease. 3/

We therefore affirm BLM's decision finding MPI removed the caliche in violation of 43 CFR 9239.0-7.

[2] We cannot, however, affirm BLM's appraisal of the value of the caliche. BLM's decision calculated the value of the 15,900 loose cubic yards (lcy) of material that MPI reported it had removed at \$1.25 per lcy based on an appraisal report of the fair market value of caliche, sand, and gravel in the Carlsbad Resource Area, BLM, dated July 14, 1993. For Eddy County and a portion of Chaves County, New Mexico, the recommended fair market value was set at \$1.25/lcy of caliche. The Summary and Conclusions page of the appraisal report states:

In order to find comparable sales of caliche and sand and gravel from private lands, discussions were conducted with dirt contractors who frequently purchase these materials. Good preliminary lists were developed through the cooperation of a few of these contractors. Private landowners from the lists were contacted in most instances by telephone in order to confirm the price, location, date of sale, and other characteristics. Lists of the comparable sales data appear in Appendix A. Three areas will be considered for valuation of caliche, the Jal Area, the remaining portion of Lea County, and Eddy County. This includes a small portion of Chaves County. These areas comprise three distinct markets in the private sector, therefore federal lands within this same area should have similar value.

The record contains only the Summary and Conclusions page of the report and a copy of a (virtually illegible) map labelled "Attachment A-1 Carlsbad Resource Area" and "Map 2-4 Potash Enclave." The map outlines Lea, Eddy, and the southwestern corner of Chaves counties and shows 5 black dots representing comparable sale sites in Eddy County. There are no lists of comparable sales data or any other part of the appraisal in the record.

3/ This reading of § 3610.2-3 (2001) is consistent with the language of the November 2001 amendment of that regulation, now found at 43 CFR 3602.33(b):

**§ 3602.33 How will BLM dispose of mineral materials for use in developing Federal mineral leases?**

(a) If you propose to use mineral materials in connection with developing a mineral lease issued by BLM, we may, without calling for competitive bids, sell you at fair market value a volume of mineral materials not exceeding a total of 200,000 cubic yards (or weight equivalent) in one State in any period of 12 consecutive months.

[2] We have frequently said that we cannot affirm a BLM decision when there is no support for it in the administrative record:

It is incumbent upon BLM to ensure that its decision is supported by a rational basis and that such basis is stated in the written decision, as well as being demonstrated in the administrative record accompanying the decision. Roger K. Ogden, 77 IBLA 4, 7, 90 I.D. 481, 483 (1983). The recipient of a decision by BLM is entitled to a reasoned and factual explanation of the basis for the decision, and must therefore be given some basis for understanding and accepting it or, alternatively, for appealing and disputing it before the Board. Southern Union Exploration Co., 51 IBLA 89, 92 (1980) (and cases cited).

Eddleman Community Property Trust, 106 IBLA 376, 377 (1989); see also The Navajo Nation, 152 IBLA 227, 234-35 (2000). In this case the appraisal report is incomplete. Without it neither appellant nor we can determine if the valuation of the caliche removed is correct. We therefore set aside this portion of BLM's July 27, 1999, decision and remand the matter for re-adjudication of the appraisal. 4/

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fn. 3 (continued)

(b) If the materials remain within the boundaries of the lease, BLM will not charge for mineral materials that you must move in order to extract minerals under a Federal lease, whether or not you use them for lease development.

66 FR 58892, 58907 (Nov. 23, 2001) (emphasis supplied). BLM explained this amendment as follows:

This section, like current § 3610.2-3, would allow BLM to sell up to 200,000 cubic yards of mineral materials in one State in any 12-month period noncompetitively for use in connection with the development of a Federal mineral lease. It would make clear that BLM will not charge for mineral materials that a Federal lessee needs to move in order to extract minerals under a Federal lease, so long as the materials remain within the boundaries of the lease. It would amend the current section by allowing such materials to be used without charge whether or not the lessee uses them for lease development.

65 FR 55864, 55869 (Sept. 14, 2000).

4/ We suggest that BLM review our decisions in H.E. Hunewill Construction Co., 137 IBLA 101 (1996), and Richard C. Nielson, 129 IBLA 316 (1994), in the process of re-adjudication.

Therefore, in accordance with the authority delegated to the Interior Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision is affirmed in part and set aside and remanded in part.

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Will A. Irwin  
Administrative Judge

I concur:

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David L. Hughes  
Administrative Judge