



NORTHERN IMPROVEMENT COMPANY

181 IBLA 62

Decided April 11, 2011



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

NORTHERN IMPROVEMENT COMPANY

IBLA 2011-64

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Appeal of a decision of the Field Manager, Kingman (Arizona) Field Office, Colorado River District, Bureau of Land Management, requiring immediate suspension of all mining and related operations and payment of trespass damages for unauthorized use of public land in connection with land use trespass case AZA-35476, and denying land use application AZA-35517.

Affirmed in part; set aside in part, and case remanded; petition for stay denied as moot.

1. Federal Land Policy and Management Act of 1976:
Permits–Trespass: Generally

A person extracting and removing mineral materials from public lands, who establishes ownership of the mineral materials being extracted and removed, must still obtain an appropriate surface use authorization under 43 C.F.R. § 2920.1-1. Failure to do so is an unauthorized use trespass under 43 C.F.R. § 2920.1-2. However, if it is determined that the United States owns the mineral materials being removed, the person is not liable for an unauthorized use trespass under 43 C.F.R. § 2920.1-2. Instead, the person may be liable for a mineral trespass in accordance with 43 C.F.R. §§ 3601.2 and/or 9239.0-7. It is premature to charge a person who is extracting and removing mineral materials from public lands under a colorable claim of title to those minerals with unauthorized use of public land under 43 C.F.R. § 2920.1-2, absent a final determination by a court of competent jurisdiction that the person owns the mineral materials being extracted.

Alfred Jay Schritter, 171 IBLA 123 (2007), clarified as discussed herein.

APPEARANCES: James T. Braselton, Esq., Phoenix, Arizona, for appellant; Wonsook S. Sprague, Esq., Office of the Solicitor, Phoenix Field Office, U.S. Department of the Interior, Phoenix, Arizona, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Northern Improvement Company (NIC) has appealed from a November 8, 2010, decision of the Field Manager, Kingman (Arizona) Field Office, Colorado River District, Bureau of Land Management (BLM), requiring it to immediately suspend all mining and related operations and pay trespass damages in the amount of \$10,099.93, within 30 days of receipt of the decision, in accordance with 43 C.F.R. Part 2920, for unauthorized use of the public lands in connection with land use trespass case AZA-35476, and denying land use application AZA-35517, which had been filed under protest, to authorize the use of the surface, under 43 C.F.R. Part 2920, in connection with such operations. Both actions related to the extraction and removal of mineral materials from the DW Ranch Road Pit (Pit) near Kingman, Arizona.¹

NIC also requests a stay of BLM's decision and a suspension of further proceedings by the Board while NIC pursues a Federal lawsuit to establish its claim to the mineral materials on the site. Notice of Appeal/Petition for Stay (NA/Petition) at 3. BLM opposes any stay of its decision and any suspension of further proceedings by the Board, noting that "the public's interest is best served by proceeding with the appeal to review the merits of the Decision without delay." Opposition to Request for Stay (Opposition) at 6.

In this decision, we affirm BLM's decision to the extent it directs the immediate cessation of mining and related operations by NIC at the Pit and denies the land use application, absent a showing that NIC owns the mineral materials being extracted and removed. However, we set aside the decision to the extent it demands payment of trespass damages for unauthorized use under 43 C.F.R. Part 2920 because such damages may only be assessed in this case if, in fact, NIC owns the minerals being extracted and removed. We also remand the case to BLM and deny the petition for a stay as moot.

Background

On September 30, 1924, the United States patented both the surface and mineral estates of certain Federal lands, including the land at issue, which is a portion of a 160-acre parcel of land situated in the N $\frac{1}{2}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ S $\frac{1}{2}$ NE $\frac{1}{4}$, NE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 19, T. 21 N., R. 15 W., Gila and Salt River Meridian, Mohave County, Arizona, to the Santa Fe Pacific Railroad Company (Santa Fe), pursuant to the Act of July 27, 1866, 14 Stat. 292. See Patent No. 945412. Thereafter, in a February 10, 1938, Indenture (1938 Indenture), Santa Fe conveyed the surface estate of those lands to

¹ McCormick Construction Company (MCC), a subsidiary of NIC, conducts operations at the Pit. References hereinafter to NIC refer to NIC and/or MCC.

Willie Wall, reserving the mineral estate. In 1989, Wall's successor-in-interest reconveyed the surface estate to the United States.² See Warranty Deed No. AZA-22792-A, dated Oct. 31, 1989. Thus, the United States is presently the owner of the surface estate of the land at issue, which is unimproved, leaving only the question of ownership of the mineral estate.

The mineral reservation in the 1938 Indenture stated:

EXCEPTING and *reserving to the grantor, its successors and assigns all oil, gas, coal and minerals whatsoever*, already found or which may hereafter be found, upon or under said lands, *with the right to prospect for, mine, and remove the same and to use so much of the surface of said lands, as shall be necessary and convenient* for shafts, wells, tanks, pipe lines, rights of way, railroad tracks, storage purposes and other and different structures and purposes necessary and convenient for the digging, drilling, and working of any mines or wells which may be operated on said lands. [Emphasis added.]

1938 Indenture at 1. In that document, Santa Fe also reserved and excepted from the surface estate lands devoted to a railroad and railroad purposes, "if any such there be," and lands appropriated, dedicated, or otherwise required for public roads and highways, or other public uses. Finally, Santa Fe also created a right to appropriate lands for certain listed railroad and related purposes, including the right "to operate on said premises gravel and ballast pits and quarries and to take material therefrom for railroad purposes."³

On November 13, 2002, Santa Fe quitclaimed to Tri-R Construction, Inc. (Tri-R) "all of Santa Fe Pacific Railroad Company's right, title and interest, if any, in

² Since the surface estate is owned by the United States, and administered by BLM, such lands constitute "public lands," within the meaning of section 103(e) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1702(e) (2006).

³ This provision required Santa Fe to pay or offer to pay Wall, or his successors and assigns

a fixed price per acre for the land so appropriated, which price shall be equal to the average price per acre paid for all the land above described, together with the value of all buildings and permanent improvements constructed upon the land so appropriated; and [Wall, or his successors and assigns,] . . . will convey to such company such appropriated right of way upon demand and tender of payment as aforesaid.

and to sand, gravel and decorative rock located within 100 feet of the surface (the 'Subject Materials')" of the lands at issue. Tri-R quitclaimed that interest to NIC on April 15, 2004.

Following an inspection of the Pit on July 22, 2010, BLM required NIC to provide proof of ownership of the minerals it wished to mine, noting that "[w]ithout adequate proof of ownership, [it] cannot issue a surface use authorization," and NIC's operation would be deemed "in Trespass as defined in 43 CFR 2920.1-2."⁴ Letter to NIC, dated Aug. 26, 2010, at 1.

In response, NIC provided various documents, including copies of the 1924 patent, the 1938 Indenture, and the later quitclaim deeds from Santa Fe to Tri-R and then to NIC. It also included a copy of an opinion of an attorney who had reviewed those documents concluding that NIC held title to "that portion of the mineral estate, including the right to prospect for, mine and remove[] described sand, gravel and decorative rock located within 100 feet of the surface of the Section 19 Property," as well as the "right to use so much of the surface of the lands as is necessary and convenient for the mining operations." Letter to NIC from Jamie Kelley, Esq., dated Sept. 13, 2010, at 7.

On October 12, 2010, BLM served NIC with an October 8, 2010, Notice of Unauthorized Use (Notice), stating that it intended to institute trespass proceedings, pursuant to 43 C.F.R. § 2920.1-2, for unauthorized use of the public land in the Pit. BLM rejected NIC's proof of mineral ownership, since "[t]he documents received do not identify the material being removed by [NIC] and the chain of title does not provide sufficient evidence of mineral ownership." Notice at 2.

On October 21, 2010, NIC informed BLM that it owned "that portion of the mineral estate, including the right to prospect for, mine and remove sand, gravel and decorative rock located within 100 feet of the surface of the" lands in the Pit, and was engaged in selling "these minerals." Such a statement indicated that NIC was engaged in the extraction and removal of all those materials from the Pit. In its Notice, BLM stated that NIC was engaged in the "removal and processing of mineral material to create aggregate for use on a Federal Highway Administration highway project." Notice at 1.

⁴ BLM further stated that, once NIC's mineral ownership was verified, it would schedule a meeting to discuss the permitting process, which would entail, *inter alia*, submission of a land use application, along with a plan of development and a reclamation plan and bond, preparation of an appropriate environmental review document, and payment of fair market value rent. See Letter to NIC, dated Aug. 26, 2010, at 2.

On October 26, 2010, NIC filed, under protest, land use application AZA-35517, pursuant to section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (2006), and 43 C.F.R. Part 2920, seeking BLM authorization to use the surface of the public lands at issue in connection with the extraction and removal of sand, gravel, and decorative rock from the Pit.

In its November 2010 decision, BLM required NIC to immediately suspend all operations in the Pit “until such time as all outstanding issues have been resolved and appropriate authorization has been granted.” Decision at 1. BLM stated that it had considered NIC’s claim of ownership in light of the State court opinion in *Spurlock v. Santa Fe Pacific Railroad Co.*, 694 P.2d 299 (Ariz. Ct. App. 1984), and two Board decisions, *Alfred Jay Schritter (Schritter I)*, 171 IBLA 123 (2007), and *Alfred Jay Schritter (Schritter II)*, 177 IBLA 238 (2009), both of which referred to *Spurlock* as determinative of the question of mineral ownership involving a Santa Fe mineral reservation.⁵ BLM concluded, relying on the three cited opinions, that NIC had

⁵ *Spurlock* involved a dispute between Santa Fe, which had retained the mineral estate, and Spurlock, who was the successor-in-interest to the surface estate, under a conveyance of patented lands similar to the 1938 Indenture in this case. The minerals at issue in that case were helium, nitrogen, potash, industrial clay, and petrified wood, and the court held that they were all reserved by Santa Fe under the general mineral reservation. 694 P.2d at 311; *see id.* at 302-03. Santa Fe did not claim ownership of sand and gravel under the general mineral reservation. Instead, Santa Fe claimed a nonexclusive right to take sand and gravel for railroad purposes pursuant to a different provision of the conveyance allowing Santa Fe to enter the surface to operate gravel and ballast pits and quarries to gather material for railroad purposes. *See id.* at 311. The trial court held that Santa Fe had abandoned that right, and because Santa Fe did not dispute that ruling on appeal, the court of appeals affirmed the trial court’s judgment granting Spurlock, the surface owner, title to the sand and gravel. *See id.* at 311, 316. In 1996, the Board issued a decision, *James A. Simpson*, 136 IBLA 77 (1996), affirming a BLM determination that the United States owned the sand and gravel in certain lands in Arizona. Those lands had been patented by the United States to the Atlantic and Pacific Railroad Company (A&P) in 1923. In 1958, A&P’s successor-in-interest conveyed the surface of those lands to a third party, reserving all oil, gas, and minerals, and the right to enter and remove the same, and in 1988 the United States acquired that reserved mineral interest. Relying on *Spurlock*, the Board interpreted the general mineral reservation to include the sand and gravel, based on its conclusion that “[i]f sand and gravel is to be extracted and sold, it is a mineral under Arizona law.” *Id.* at 82. We note, however, that in a subsequent unpublished memorandum decision involving interpretation of a similar gravel and ballast pits provision in a Santa Fe conveyance, the Arizona Court of Appeals expressly held that sand and gravel were not included (continued...)

failed, based on the evidence submitted to date, to establish that it owns the minerals. BLM determined NIC to be in trespass under 43 C.F.R. § 2920.1-2, and it required NIC to pay trespass damages in the amount of \$10,099.93, within 30 days of receipt of the decision. It also denied the land use authorization application, adding that it could be resubmitted if NIC could provide “additional evidence to demonstrate ownership of the materials.” Decision at 3.

NIC filed a timely appeal, requesting that the Board stay the decision and suspend the proceeding while it pursues a court determination of the extent of its mineral interest in the lands in question. BLM opposes any stay or suspension.

Discussion

[1] BLM’s decision is based on its conclusion that the information provided by NIC does not establish that NIC is the owner of the material being extracted and removed from the Pit. BLM’s decision, however, does not preclude NIC from demonstrating ownership and pursuing a surface use authorization. As such, BLM’s decision does not necessarily represent a final determination as to ownership of the mineral materials in question.

NIC seeks a suspension of this administrative proceeding in order to pursue a court resolution of mineral ownership, because, while NIC asserts ownership of the material being removed, it recognizes that a definitive answer to the ownership of that material must come from the courts, as discussed in *Schritter II*, 177 IBLA at 248-249. It asserts that it would be “wasteful” for BLM and NIC to proceed with the administrative proceeding at this time. NA/Petition at 2. While we agree with NIC that a court determination of ownership of Pit materials is in order, we need not await such a determination in order to resolve NIC’s appeal.

There are three aspects to BLM’s decision, the first of which is BLM’s order to cease all operations. NIC filed a land use authorization application, but it did so under protest based on its claim to the sand, gravel, and decorative rock within 100 feet of the surface together with a claimed right to use the surface to prospect for and remove the same. However, nowhere in its NA/Petition does NIC offer any argument or supporting evidence establishing that it may properly undertake mining operations on the surface of public lands, because even if NIC were to prevail on the question of ownership of the material being extracted, it would still need a land use authorization, under 43 C.F.R. Part 2920, to use the surface of the public lands in connection with its mining operation. *See Schritter II*, 177 IBLA at 253-54 (citing

⁵ (...continued)

in the Santa Fe general mineral reservation. Decision, *U.S. Power Systems, Inc. v. Red Mountain Mining, Inc.*, 1 CA-CV 98-0415 (Ariz. Ct. App., Apr. 22, 1999), at 6.

Duncan Energy Co. v. U.S. Forest Service, 50 F.3d 584, 588-92 (8th Cir. 1995)). Moreover, if the mineral materials are owned by the United States, cessation of operations would also be appropriate, until NIC secured proper authorization or authority under applicable statutes and regulations. *See infra*. Therefore, BLM's direction to cease operations must be upheld.

We turn next to the question of trespass. BLM charged NIC with nonwillful trespass under 43 C.F.R. § 2920.1-2 because NIC had failed to obtain a land use authorization. The record shows that NIC was first informed of the necessity to secure a land use authorization under 43 C.F.R. Part 2920 during the field inspection on July 22, 2010. However, such an authorization would only be necessary if, in fact, NIC owned the mineral materials in question. If it is determined that NIC does not own the rights to the mineral materials in the Pit, NIC may seek to acquire them through a mineral materials sale in accordance with the Materials Act of 1947, 30 U.S.C. §§ 601-604 (2006), and its implementing regulations in 43 C.F.R. Part 3602, or if the minerals are considered to be uncommon varieties, they might be available through mineral location under the general mining laws.⁶ In either case, no 43 C.F.R. Part 2920 authorization would be required. However, NIC would be liable for a mineral trespass under 43 C.F.R. §§ 3601.2 and/or 9239.0-7 for the past removal of material from the Pit, but not for a 43 C.F.R. Part 2920 trespass.

At this juncture, the ownership of the Pit material has not been conclusively determined by a court, and NIC has stated its intent to seek such a determination. Therefore, while it is clear that NIC is liable for some form of trespass for past activities at the site, it is premature to charge NIC with a trespass under 43 C.F.R. Part 2920 for those activities. Only after a final determination of the ownership of those materials has been made in the courts will BLM know what regulations to cite in charging NIC with trespass. Therefore, we cannot uphold the assessment of trespass damages in the decision.⁷

⁶ Section 3 of the Multiple Use Mining Act of 1955, also known as the Surface Resources Act or Common Varieties Act, 30 U.S.C. § 611 (2006), removed common varieties of sand, stone, or gravel from the purview of the mining law and made them subject to the provisions of the Materials Act. *United States v. Multiple Use, Inc.*, 120 IBLA 63, 76A (1991). Congress made clear, however, that the term "common varieties" did "not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value." 30 U.S.C. § 611 (2006); *see United States v. Guzman*, 18 IBLA 109, 120, 81 I.D. 685, 690 (1974).

⁷ We note that in its Nov. 8, 2010, decision, BLM stated at page 3 that "[t]respass damages *to date* are shown on the enclosure." (Emphasis added.) The enclosure, however, calculates trespass damages, under 43 C.F.R. § 2920.1-2, based on fair

(continued...)

The third aspect of BLM's decision is the denial of the land use authorization application. Denial at this time is appropriate. Again, only if it is conclusively determined that NIC owns the mineral materials in the Pit will a 43 C.F.R. Part 2920 authorization be needed. If NIC receives such a determination from the courts, it may reapply.

To the extent our ruling on a 43 C.F.R. § 2920.1-2 trespass is inconsistent with *Schritter I*, in which we affirmed a BLM decision charging Schritter with unauthorized use of public land under 43 C.F.R. § 2920.1-2 for his removal of mineral materials from public land, that decision is clarified, for the reasons stated below.

In *Schritter I*, BLM issued a decision notifying Schritter that it was asserting Federal ownership of mineral materials he was extracting and removing from public land and that his actions constituted an unauthorized use of the public lands pursuant to 43 C.F.R. § 2920.1-2. In that case, Schritter operated under an identical chain of title to that of NIC's in this case, beginning with a conveyance by Santa Fe, identical to the 1938 Indenture, with a reservation of minerals, and a subsequent quitclaim deed, identical to the 2002 quitclaim deed, transferring the sand, gravel, and decorative rock within 100 feet of the surface to Schritter. *See Schritter II*, 177 IBLA at 239-40.

We stated that "Schritter does not challenge BLM's decision to the extent that it excludes 'sand and gravel'" from the general mineral reservation, noting that Schritter asserted that he was only mining decorative rock by surface methods, which he had a right to do pursuant to the general mineral reservation. *Schritter I*, 171 IBLA at 130. In support of his position, he cited an Arizona state court case, *State of Arizona v. Carley*, No. 1 CA-CV 03-0792, Memorandum Decision (Ariz. Ct. App. Oct. 19, 2004). In commenting on that case, we stated: "Schritter is correct to note that the *Carley* court suggested that decorative rock would come within the general mineral reservation." *Id.* at 132-33. We noted, however, that while that case was not precedential, we had accepted its premise for purposes of deciding the appeal, but that "[t]he record in the case at hand does not show that, during the time period in question, Schritter was engaged in removing decorative rock." *Id.* at 133.

Thus, we concluded that Schritter did not own the mineral materials that he had been removing, *i.e.*, sand and gravel, and upheld the 43 C.F.R. § 2920.1-2 trespass.

⁷ (...continued)

market rent from "Aug. 2010-Dec. 2010." Based on our disposition, we need not address this issue.

In *Schritter II*, the Board addressed a BLM decision assessing damages for a willful trespass based on Schritter's removal of mineral materials owned by the United States from public land in violation of 43 C.F.R. §§ 3601.2 and/or 9239.0-7. Therein, we set aside the determination of willful mineral trespass under those regulations because we were unable to determine, based on the case record, "that the rock Schritter sold does not constitute decorative rock under any circumstances," to which he would arguably have title under *Carley*. *Schritter II*, 177 IBLA at 251. However, we affirmed a trespass, as modified, under 43 C.F.R. § 2920.1-2, based on the assumption of Schritter's ownership of decorative rock, and we affirmed "BLM in requiring Schritter to cease operations until he obtains an appropriate surface use authorization." *Id.* at 254. We remanded to determine whether trespass liability under 43 C.F.R. Part 2920 was appropriate, "under the circumstances," noting that if Schritter were to seek a land use authorization under 43 C.F.R. § 2920.1-1, BLM might decline to issue such an authorization until Schritter "establishes ownership of whatever material he seeks to extract through an action under the Quiet Title Act." *Id.*

Based on the rationale as expressed in *Schritter II*, it is clear that a 43 C.F.R. Part 2920 unauthorized use trespass is appropriate only if the person extracting and removing mineral materials owns that material and the United States owns the surface estate. Yet, in *Schritter I*, we upheld such a trespass based on an express ruling that Schritter did not own the sand and gravel at the site, a fact conceded by Schritter.

In this case, NIC asserts ownership of sand, gravel, and decorative rock within 100 feet of the surface, and it states that it will proceed in court to establish its ownership of those materials.

We clarify *Schritter I* to the extent it is inconsistent with *Schritter II* and our express ruling herein that a mineral material trespass is appropriate if the United States owns the mineral materials being extracted and removed without proper authority under the mining law or authorization under the Materials Act, and a 43 C.F.R. Part 2920 unauthorized use trespass is appropriate only if the person owns the mineral materials being extracted and removed and has failed to obtain appropriate land use authorization under 43 C.F.R. Part 2920.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision is affirmed in part, set aside in part, and the case is remanded. The petition for a stay of the decision is denied as moot.

_____/s/_____
Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

_____/s/_____
H. Barry Holt
Chief Administrative Judge