

DUVAL CORP.
AMAX EXPLORATION, INC.

IBLA 79-262
79-264

Decided February 7, 1980

Appeal from decision of Eastern States Office, Bureau of Land Management, partly sustaining protest of junior prospecting permit applicant, and, pursuant thereto, rejecting appellants' applications.

Affirmed as modified.

1. Acquired Lands -- Mineral Lands: Generally -- Mineral Lands:
Prospecting Permits -- Reorganization Plans

There is no authority pursuant to which a pro rata or set-off formula can be read into 43 CFR 3503.3-1. Nor do the regulations require BLM to accept all tenders of rental against an anticipated unavailability of some or all of the lands included in a hardrock prospecting application, which may or may not materialize. In the event that some or all of the lands applied for are unavailable, the applicant's remedy is a refund of excess rental paid, and not a set-off against deficiencies.

2. Acquired Lands -- Mineral Lands: Generally -- Mineral Lands:
Prospecting Permits

Failure to remit the "full amount" of the first year's rental as defined at 43 CFR 3503.3-1(a), means failure to remit either a \$20 minimum rental for 80 or fewer acres, or the amount computed for the total acreage if known, or the total acreage computed on the basis of 40 acres for each smallest subdivision of the acreage involved in the

application. An application which is not accompanied by the full amount of advance rental is properly rejected.

3. Acquired Lands -- Mineral Lands: Generally -- Mineral Lands: Prospecting Permits

The regulation pertaining to attorneys-in-fact, as it relates to corporate applicants, 43 CFR 3502.6-1(a)(3), calls for evidence that the individual who signs an application is also empowered to execute the instrument and bind the corporation. Where an existing file of corporate qualifications sets forth the names of individuals or corporate officers authorized to act for the corporation in mineral applications and leases, and the terms of such authority, the requirements of 43 CFR 3502.6 are fully satisfied by reference to such file. 43 CFR 3502.7-2.

4. Acquired Lands -- Mineral Lands: Generally -- Mineral Lands: Prospecting Permits

Regarding curable defects in a hardrock prospecting permit application, 43 CFR 3511.2-4(b), priority exists as of the date of cure. Compliance with that regulation establishes priority for those lands not included in junior acceptable applications or otherwise unavailable for hardrock prospecting.

APPEARANCES: W. D. Ellis, Esq., Houston, Texas, for Duval Corporation; E. Dale Trower, Esq., Denver, Colorado, for AMAX Exploration, Inc.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Duval Corporation (Duval) and AMAX Exploration, Inc. (AMAX), appeal 1/ the February 1, 1979, decision of the Eastern States Office, Bureau of Land Management (BLM), partly sustaining the protest of a junior acquired lands prospecting permit applicant, and pursuant thereto, rejecting appellants' senior applications.

On August 23, 1976, Duval filed permit applications ES 16431 and ES 16433 through ES 16438 inclusive, all for hardrock minerals prospecting. On September 20, 1976, AMAX filed permit applications

1/ We have sua sponte consolidated the appeals of Duval (79-262) and AMAX (79-294).

ES 16537 through ES 16540 inclusive. Thereafter, on October 20, 1976, Duval filed permit applications ES 16611 and ES 16612. 2/

Permit applications ES 16810 through ES 16812 inclusive, ES 16814, and ES 16962 through ES 16965 inclusive, were filed by Paul D. Beard, Jr., and Leon F. Scully, Jr., the named adverse parties herein, on January 21 and 27, 1977 (as respectively amended January 28 and February 4, 1977).

On February 4, 1977, Beard and Scully filed their protest against the three 3/ senior applicants alleging fatal defects, infra, in the several applications.

The decision of February 1, 1979, rejected certain of protestants' contentions pertaining to the number of copies of the permit applications filed and the propriety of reference to corporate qualifications on file at BLM state offices other than the Eastern States Office. 4/ On the latter point, the decision states:

While regulation 43 CFR 3502.1-3(a) mandates that all applicants must file their statement of qualifications and evidence thereto in the proper office, unless previously filed, in which event a reference by serial number to the record and the proper office in which filed . . . , an ambiguity is created. The regulation, although mandatory, does not state when the statements must be filed. See Virgil V. Peterson, A-30685 (1967).

The import of the quoted paragraph is unclear to us, nor is it further explained within the decision. It is apparent from the statements of reasons that appellants interpret the language as sustaining protestants' contention, and accordingly, have argued vigorously against it.

2/ Appellants' applications are for lands situated in Forest County, Wisconsin: T. 34 N., R. 15 E.; T. 35 N., R. 14 E.; and T. 35 N., R. 15 E., fourth principal meridian. No useful purpose would be served by setting forth the subdivisions.

3/ Rayrock Mines, Inc., a Canadian corporation, had filed permit applications on June 21 and 29, 1976 (as amended December 28, 1976), for lands in Forest County, Wisconsin, n.2. Those applications were rejected for failure to comply with the mandatory disclosure of corporate qualifications provisions at 43 CFR 3502.1-1(a) and 3502.4-1(a). Rayrock did not appeal the decision.

4/ The corporate qualifications of Duval are on file in the BLM New Mexico State Office, NM 0558400. The corporate qualifications of AMAX are on file in the BLM Colorado State Office, COL 0126354.

Of the remaining contentions urged by protestants, two comprised the bases for the decision to reject appellants' applications. First, the required advance rental was deficient for each of Duval's applications and for ES 16611 and ES 16612 of AMAX. 43 CFR 3503.3-1(a). Secondly, both appellants failed to accompany the respective applications with evidence of the signing officers' authority to execute the instruments, 43 CFR 3502.6-1(a)(2).

On appeal, two principal issues are presented. First, appellants question whether de minimis deficiencies constitute a proper ground for rejection of prospecting permit applications. Secondly, it is argued that reference to an existing record of corporate qualifications fully satisfies the requirements of 43 CFR 3502.6-1(a)(2), infra, pertaining to the authority of a corporate officer to execute the instrument.

Regarding the first principal contention, the regulations provide in material part:

§ 3503.3 Rentals and royalties.

§ 3503.3-1 General statement rentals.

(a) Permits (Prospecting). A prospecting permit application must be accompanied by full payment of the first year's rental at the rate of 25 cents per acre or fraction thereof, but no less than \$20 per year, the rental payment to be for the total acreage if known, and if not known, for the total acreage computed on the basis of 40 acres for each smallest subdivision. Thereafter, payment of the annual rental shall be made on or before the anniversary date of the permit. [Emphasis supplied.]

* * * * *

§ 3511.2-4 Rejection.

(a) Except as provided in § 3511.2-3 an application will be rejected if:

* * * * *

(3) The full amount of the filing fee and the first years's rental do not accompany the application, the rental payment to be for the total acreage if known, and if not known, for the total acreage computed on the basis of 40 acres for each smallest legal subdivision.

* * * * *

(7) There is noncompliance with the requirements specified in Subpart 3502. [Qualifications requirements.]

(b) Curable defects. If an application is defective to the extent set out in paragraph § 3511.2-4(a) of this section, the applicant will be given an opportunity to file a new application within 30 days from service of the rejection, and the fee and rental payments on the old application will be applied to the new application if the new application shows the serial number of the old application. The advance rental will be returned unless within the 30-day period another application is filed. [Emphasis supplied.]

Neither appellant denies that its computations of rental payments are arithmetically incorrect. In Duval's case, the deficiencies range from 2 to 22 cents. AMAX submitted an additional \$2.50 on February 14, 1977, for ES 16611, but rental for ES 16612 was deficient by 25 cents. Appellants argue, however, that the conceded deficiencies are de minimis and should not result in loss of priority for two reasons, as stated by Duval:

1) The general scheme of the regulations pertaining to Minerals Management in 43 CFR allows minor rental deficiencies to be corrected without loss of priority; and

2) Even if rentals for fractional acreage are calculated as stated in the Decision, in all Applications except one, the rental is in excess of the required rental and no shortage exists which could be corrected or cured.

In support of the first proposition, appellants direct our attention to other mineral leasing regulations which permit correction of nominal rental deficiencies without loss of priority. See, e.g., oil and gas leasing, 43 CFR 3103.3-1; preference right mineral leases, 43 CFR 3521.1-1(i); and geothermal leasing, 43 CFR 3205.3-2 and 3244.2-2(a). We are asked to extend those regulatory provisions to hardrock prospecting on acquired lands by analogy, on the theory that the Department of the Interior regards all mineral leasing provisions as pari materia, "at least as to rentals and applications." We are referred to 41 FR 18845, Comment 11 at 18847 (May 7, 1976), for evidence of the Department's policy on this point. The import of Comment 11 will be discussed, infra.

Duval argues "that any such de minimis deficiencies as results [sic] from interpreting this regulation to require payment for a fraction * * * in the same amount as charged for a full acre should not require rejection." Appellant attempts to buttress this position with the additional argument that the phrase "or fraction thereof" does not appear among the reasons for rejection at 43 CFR 3511.4(a), supra, nor does subsection (b) of that regulation "apply to adjustments in the amount of rental required." It appears that Duval's argument is that as to fractional acres, rental should be computed by pro rata formula.

Appellant seems to conclude that where advance rental is nominally deficient, rejection of the application is improper if the deficiency is less than the pro rated rental due for a fractional acre.

Alternatively, Duval contends, as does AMAX with regard to ES 16612, that the regulations

do not require the BLM to exercise discretion by allocating a deficient rental to certain available tracts and rejecting other available tracts. * * * In all instances, except with respect to ES 16436, the final rent payment would require, as is often the case, an adjustment when the permit was issued because the applications contain acreage which is not available for prospecting or leasing. * * * Except for ES 16436 the rental submitted with the applications exceeds that which could be retained by the B.L.M. and therefor [sic] must be, in any sense of the words, the "full amount of the first years [sic] rental."

Regarding ES 16611, AMAX argues that failure to submit the minimum rental of \$20 is not a ground for rejection. As previously noted, AMAX submitted additional rental after the filing of junior acceptable applications and after BLM had received the protest of Beaird and Scully. Nevertheless, AMAX points out that the grounds for rejection, 43 CFR 3511.2-4(a)(3), supra, do not include failure to remit a minimum rental payment of \$20. Our attention is again directed to other mineral leasing provisions.

Duval also asserts that the regulation pertaining to the manner in which rental is computed, 43 CFR 3503.3-1(a), is ambiguous in that there exist at least two approaches to computing rental due for fractional acres. We repeat here an edited version of appellant's example.

sec. 7= 83.57
 sec. 8= 640.00
 sec. 9= 157.35
 880.92 Total Acres

Possibility No. 1:

880 acres at \$.25 per= \$220.00
 .92 acres at \$.25 per= +.25
 \$220.25 Rental Due

Possibility No. 2:

880 acres at \$.25 per= \$220.00
 .57 acres at \$.25 per= +.25
 .35 acres at \$.25 per= +.25
 \$220.50 Rental Due

Appellant states that "[t]he regulations appear to mandate payment on the basis of 'total acreage if known' as contrasted with the total 'computed' acreage on the basis of 40 acres for each smallest legal subdivision. * * * In the above example the applicant must, at his peril, guess which of the above payments should be submitted."

The arguments thus far advanced by appellants misapprehend the clear import of the regulation governing advance rentals. Moreover, appellants' contentions fail to appreciate the direct relationship between the rental provision and its corresponding ground for rejection.

We find no ambiguity in either regulation. With respect to rental, the rate is 25 cents per acre, computed on the total acreage included in the application. The total acreage may include fractional acreage, which is chargeable at the full rate of 25 cents. In any event, however, the minimum rental is \$20, notwithstanding the fact that the actual acreage may be less than 80 acres. Those applicants who know the precise acreage involved in the application must compute the rental due at the stated rate; those who do not know the precise acreage involved must compute it on the basis of 40 acres for each smallest subdivision included. Compliance with these principles of computation constitutes acceptable payment of the advance rental. 43 CFR 3503.3-1(a).

[1] There is no authority by which we could read a pro rata or set-off formula into the regulation, and accordingly, those arguments are rejected. The regulations do not require BLM to accept all tenders of rental against an anticipated unavailability of some or all of the lands included in an application, which may or may not materialize. In the event that some or all of the lands applied for are unavailable, the applicant's remedy is a refund of excess rental paid, and not, as we have said, a set-off against facial deficiencies.

[2] It must therefore follow that failure to remit the "full amount" of the first year's rental as defined at 43 CFR 3503.3-1(a), means failure to remit either a \$20 minimum rental for 80 or fewer acres, or the amount computed for the total acreage if known, or the total acreage computed on the basis of 40 acres for each smallest subdivision involved in the application. An application which is not accompanied by the full amount of advance rental is properly rejected. 43 CFR 3511.2-4(a)(3).

As for the argument that we should rule that hardrock prospecting permit applicants may cure nominal rental deficiencies without loss of priority, by analogy to other previously cited leasing provisions, this Board has no authority to administratively promulgate a regulation under the guise of resolving an appeal. See 43 CFR 4.1. Such authority is exclusively committed to the Secretary of the Interior.

We should note, however, that the Federal Register publication to which Duval refers us, supra, is inapposite to its position. Comment 11 pertains solely to whether the standard defining a valuable deposit of mineralization should apply to hardrock prospecting permits. Interested parties had requested that the standard be made inapplicable thereto in response to proposed rule making. Comment 11 merely points out that the Department has used the same standard for mineral leasing under section 402 of Reorg. Plan No. 3 of 1946, 60 Stat. 1099, as for the Mineral Leasing Act, as amended, 30 U.S.C. § 181 (1976).

The second ground of the decision was appellants' failure to accompany the applications with proof of the signing corporate officers' authority to execute the instrument, 43 CFR 3502.6-1(a)(3). The pertinent regulations provide:

§ 3502.4 Corporations.

§ 3502.4-1 Statements.

(a) If the applicant is a corporation, it must submit statements showing (1) the state in which it is incorporated; (2) that it is authorized to hold leases for mineral deposits; (3) names of the officers authorized to act in such matters in behalf of the corporation; * * * . [Emphasis supplied.]
 * * * * *

§ 3502.6 Attorney-in-fact.

§ 3502.6-1 Statements.

(a) Evidence required. (1) All applications must be signed by the applicant or his attorney-in-fact, and if executed by an attorney-in-fact must be accompanied by the power of attorney and the applicant's own statement as to his citizenship and acreage holdings unless the power of attorney specifically authorized [sic] and empowers the attorney-in-fact to make such statements or to execute all statements which may be required under these regulations.

(2) Applications on behalf of a corporation must be accompanied by proof of the signing officer's authority to execute the instrument.

(3) Except in a case where an officer of a corporation signs an application on behalf of the corporation, as to which see § 3502.4[,] evidence of the authority of the attorney in fact to sign the application and permit, if

the application is signed by such attorney on behalf of the applicant. [Emphasis supplied.]

§ 3502.6-2 Evidence previously filed.

Where such power of attorney has been filed in the same proper office where the application is filed reference thereto by serial number of the record in which it has been filed may be made upon the filing of subsequent applications.

Duval contends that the emphasized language in 43 CFR 3502.6-1(a)(2) refers to authority to execute powers of attorney or applications only, and that compliance with 43 CFR 3502.4-1(a)(3) constitutes compliance with section 3502.6-1(a)(2).

Specifically, Duval argues:

The term "instrument" can not refer to the "applications" but to the power of attorney required by the immediately preceding subsection 3502.6-1(a)(1). If the term "instrument" referred to the application form itself, this would be in direct contradiction of the immediately succeeding [sic] subsection 3502.6-1(a)(3) * * *.

AMAX states:

[A]s applies in the instant case, if the application is signed by a corporate officer, Section 3502.4 "Corporations" applies and Section 3502.6 "Attorney in Fact" does not. If, on the other hand, the corporate officer has delegated signing authority to an attorney-in-fact, and the application has been signed by the attorney-in-fact, Section 3502.6 (and thus the subsection cited by the Bureau would apply).

Appellants assert that an interpretation contrary to their respective positions would be against the established practice of the Department which permits reference to an existing file of corporate qualifications. We believe the statement of AMAX correctly interprets applicable regulations.

[3] Where an existing file of corporate qualifications sets forth the names of individuals or corporate officers authorized to act for the corporation in mineral applications and leases, 43 CFR 3502.4-1(a)(3), and the terms of such authority, the requirements of 43 CFR 3502.6 are fully satisfied by reference to such file. 43 CFR 3502.6-2.

Our view of the matter is supported by the following analysis. All applications must be signed by the applicant. 43 CFR 3502.6-1(a)(1). A corporation acts by and through its directors and officers. All else being regular, the signature of the designated officer(s) constitutes the corporation's signature. The language of subsection 3502.6-1(a)(1) pertaining to attorneys-in-fact is thus inapplicable to corporate "signatures." Even if it is assumed arguendo that a corporate officer is the corporation's attorney-in-fact, evidence of the power of attorney need not accompany the application if that instrument specifically authorizes and empowers the attorney-in-fact to make and execute all statements required. As will appear, appellants have conferred such authority on their respective officers.

Subsection (a)(2) of the regulation applies only when corporate qualifications are not on file in a proper State office. The final subsection, 3502.6-1(a)(3), provides additional support for our view. Signings by corporate officers are specifically excepted from the requirement that attorneys-in-fact furnish evidence of their authority to sign the application and permit. The regulation refers back to corporate qualifications, 43 CFR 3502.4-1, for evidentiary statements required of corporate officers signing on behalf of the corporation.

We hold, therefore, that it was error for BLM to assert lack of compliance with 43 CFR 3502.6-1(a)(2) as an additional ground for rejecting appellant's applications. Notwithstanding the vagueness of the paragraph from the decision quoted above on this point, it is established Departmental practice that reference to evidence of corporate qualifications on file in any BLM State office fully satisfies the requirements of 43 CFR 3502.1-3. See Christiansen Oil, Inc., 37 IBLA 52 (1978), rev'd on other grounds sub nom. Christiansen Oil & Gas, Inc., v. Andrus, No. C78-257K (D. Wyo., Aug. 20, 1979); Anchor and Holes, Inc., 33 IBLA 339 (1978); Churchill Corporation, 27 IBLA 234 (1976). Our holding on this point is of little avail to appellants, as the decisions rejecting the respective applications must be sustained on the ground of the deficient advance rentals. See Chester Carthel, A-30496 (Mar. 10, 1966) (noncompetitive oil and gas lease offer); Duncan Miller, 31 IBLA 371 (1977) (noncompetitive oil and gas lease offer).

We note that the individual who executed Duval's applications, M. Fred Owens, failed to designate his capacity. The applications of AMAX were signed by a senior vice president and attested to by an assistant secretary. We contacted the Colorado and New Mexico State Offices to ascertain the names of those empowered to act for the respective appellants, and the extent of, and conditions on, the authority conferred.

Among others, M. Fred Owens, a vice president and secretary, is authorized to execute mineral applications and leases on behalf of Duval. Thus Duval's reference to its corporate file was sufficient with regard to the requirements of Subpart 3502 only.

In the case of AMAX, any president or vice president may execute the required documents if their signatures are attested to by the signature of a secretary or assistant secretary, and the corporate seal is affixed thereto. While the applications of AMAX were executed by the designated corporate officers, none bear the corporate seal which, as just noted, appellant has determined is a necessary incident to the exercise of the authority conferred. As the AMAX applications are facially deficient according to the procedure established by appellant, we conclude that BLM was correct in rejecting these applications. The proper authority therefor, however, is 43 CFR 3511.2-4(7).

[4] Finally, with respect to curable defects, 43 CFR 3511.2-4(b), the decision correctly holds that priority exists as of the date of cure. Virgil V. Peterson, A-30685 (Mar. 30, 1967). Compliance with the requirements of that regulation establishes priority for those lands not included in junior acceptable applications or otherwise unavailable for hardrock prospecting.

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.

Douglas L. Henriques
Administrative Judge

We concur:

Newton Frishberg
Chief Administrative Judge

Edward W. Stuebing
Administrative Judge

APPENDIX

DUVAL

	<u>CASE NUMBER</u>	<u>ACTUAL ACREAGE</u>	<u>RENTAL PAID</u>	<u>RENTAL DUE</u>
	ES 16431	2,551.42	\$637.86	\$638.00
	ES 16433	2,356.13	\$589.03	\$589.25
	ES 16434	652.64	\$163.16	\$163.25
	ES 16435	1,782.53	\$445.63	\$445.75
	ES 16436	2,557.50	\$639.38	\$639.50
	ES 16437	2,523.57	\$630.89	\$631.00
	ES 16438	2,523.57	\$630.89	\$631.00

AMAX

	ES 16537	1,360.00	\$340.00	\$340.00
	ES 16538	1,760.00	\$440.00	\$440.00
	ES 16539	1,177.00	\$294.25	\$294.25
	ES 16540	2,400.00	\$600.00	\$600.00
	ES 16611	70.26	\$17.50	* \$20.00
	ES 16612	543.48	\$135.75	\$136.00

* Arithmetically, the amount due would be \$18.25. However, the minimum rental is \$20. 43 CFR 3503.3-1.

