

DENMAN INVESTMENT CORP.

IBLA 83-519

Decided January 12, 1984

Appeal from a decision of the Canon City District Office, Colorado, Bureau of Land Management, rejecting application for conveyance of mineral interests. C-29930.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

An application for conveyance of mineral interest to the owner of the surface estate pursuant to sec. 209(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1976), may be approved where BLM determines (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate nonmineral development of the land and that such development is a more beneficial use of the land than mineral development. Absent a finding of the existence of one of these conditions, an application is properly rejected.

2. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests

An applicant for conveyance of a mineral interest may not be entitled to such a conveyance even when either or both of the conditions in sec. 209(b)(1) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1719(b) (1976), are satisfied. The language of that subsection is discretionary and entitles the Secretary or his designated representative to reject an application upon a determination supported by facts of record that conveyance of the mineral interest would not be in the public interest.

APPEARANCES: Ben S. Wendelken, Esq., Colorado Springs, Colorado, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE HARRIS

Denman Investment Corporation has appealed from a decision of the District Manager, Canon City District Office, Colorado, Bureau of Land Management (BLM), dated March 9, 1983, rejecting appellant's application, 1/ C-29930, filed pursuant to section 209(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b) (1976), for conveyance of the mineral interest owned by the United States.

Section 209(b)(1) of FLPMA provides that:

The Secretary, after consultation with the appropriate department or agency head, may convey mineral interests owned by the United States where the surface is or will be in non-Federal ownership, regardless of which Federal entity may have administered the surface, if he finds (1) that there are no known mineral values in the land, or (2) that the reservation of the mineral rights in the United States is interfering with or precluding appropriate non-mineral development of the land and that such development is a more beneficial use of the land than mineral development.

43 U.S.C. § 1719(b)(1) (1976).

BLM rejected the application because it failed to meet the requirements of section 209(b)(1) of FLPMA, supra. BLM found that there are mineral values in the form of granite deposits with an appraised in-place value of \$2,079,300. BLM also found that the applicant failed to show that its proposed use 2/ is a more beneficial use of the land than developing its mineral potential would be.

Appellant is the record owner of the surface of the subject land. The United States issued a patent for this land in 1941 which excepted and reserved "to the United States all the coal and other minerals in the lands so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to the provisions and limitations of the Act of December 29, 1916 (39 Stat. 862)." 3/

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1/ The application is for conveyance of the federally reserved mineral estate located in the SE 1/4 NE 1/4, NE 1/4 SE 1/4 of sec. 23, T. 15 S., R. 67 W., sixth principal meridian, Colorado, containing 80 acres.

2/ The proposed use offered by appellant in its application is, "The present owner has plans to develop this entire ranch into high quality single dwellings." The BLM decision notes, "The applicant has failed to respond to a request for more detailed information as to the proposed development of the 80 acres included in the application, stating only that the master plan being developed for the entire subdivision contemplates use of the land as part open space and part one-acre home sites."

3/ This Act is the Stock-Raising Homestead Act, 43 U.S.C. § 291 (1970), which was repealed by section 702 of the Federal Land Policy and Management Act of 1976, 90 Stat. 2787.

In the statement of reasons for appeal, appellant alleges that there is no mineral value in the mineral estate. Appellant states that the land has no coal deposits, no value for oil or gas and that the granite deposits on the land have no commercial value for any purpose. It specifically denies that the in place value of the granite is \$2,079,300.

Appellant also contends that under the doctrine of ejusdem generis the language of the patent reserving "other minerals" cannot be extended to include granite. Appellant further reasons that since the subject land is composed substantially of granite and disintegrated granite, if the granite was reserved, then the patent in essence conveyed nothing, and the grant was destroyed. Finally, appellant denies that it has failed to respond to a BLM request for more detailed information as to its proposed development plans while stating that "it cannot prepare such detailed information until it knows whether or not it can acquire the mineral interests in question."

[1] Under the language of section 209(b)(1) of FLPMA, supra, the Secretary is authorized to convey reserved Federal mineral interests to the owner of the surface estate only where either or both of two specified conditions exist. Absent a finding of the existence of one of these conditions, an application must be rejected. Robert Gattis, 73 IBLA 92 (1983), and cases cited therein.

BLM, in its March 9, 1983, decision found that neither of the specified conditions exist in this case. Appellant, however, disagrees, relying primarily on the argument that there is no mineral value in the mineral estate. In support of this position it quotes Tenth Circuit Court of Appeals and Colorado Supreme Court cases which conclude that "gravel" is not an "other mineral" and therefore not encompassed by such language when it appears in a mineral reservation. 4/ Appellant thus asserts that "granite" is not a mineral encompassed by the Stock-Raising Homestead Act patent reservation in this case.

On June 6, 1983, the Supreme Court rendered a decision styled Watt v. Western Nuclear, Inc., 103 S. Ct. 2218, in which it reversed a Tenth Circuit Court of Appeals decision 5/ and held that commercial deposits of gravel were reserved under the mineral reservation mandated by the Stock-Raising Homestead Act. 6/ Consequently, appellant's argument has been conclusively answered by

4/ Bumpus v. Wagner, 325 F.2d 264 (10th Cir. 1963); Farrell v. Sayre, 129 Colo. 368, 270 P.2d 190 (1954).

5/ Western Nuclear v. Andrus, 664 F.2d 234 (10th Cir. 1981). Here, the Tenth Circuit also applied appellant's destruction of the grant theory stating at page 242, "If the statute were so construed as to reserve to the grantor these ordinary materials of the earth's surface, the effect in many instances would be to completely nullify the grant . . ."

6/ Further Western Nuclear, supra, at page 2228 refers with approval to Northern Pacific R. Co. v. Soderberg, 188 U.S. 526 (1903), which found that lands valuable solely or chiefly for granite quarries are mineral lands within the exception and the meaning of the Act of July 2, 1864, which granted certain property to railroads but exempted "mineral lands."

the Supreme Court. BLM was correct in considering the granite on these lands to be a mineral reserved to the United States under the reservation in this case. See Pacific Power and Light Co., 45 IBLA 127 (1980), and cases cited therein.

This Board has consistently stated that BLM may reject an application for conveyance of mineral interests where BLM's determination is supported by facts of record. Dean A. Clark, 53 IBLA 362 (1981). The BLM decision, with regard to the mineral values of the subject land, is specifically based on the BLM mineral report, which is part of the record. The BLM mineral report, after an analysis of the situation, concludes: "The economic reserves are 13,862,000 short tons of granitic material in place. The appraised in-place value of this material is 15 per ton. The in place value of the material is therefore \$2,079,300." The Secretary is entitled to rely on BLM, the Secretary's technical expert, 7/ in matters concerning geologic evaluation of tracts of land. David D. Plater, 55 IBLA 296 (1981); Dean A. Clark, *supra*, and cases cited therein.

The burden is on appellant to present a convincing and persuasive argument to rebut BLM's determination that the subject land has mineral values. See David D. Plater, *supra*. In the absence of a clear and definite showing of error, we will not disturb BLM's determination. Donnie R. Clouse, 51 IBLA 221 (1980); The Kemmerer Coal Co., 26 IBLA 127 (1976).

Appellant denies that the granite deposits have any commercial value for building stone or other purposes and that the in-place value of the granite resources is \$2,079,300. It asserts that there is not and never will be in the foreseeable future any demand for these granite resources. Appellant presents no evidence to support its allegation. A mere allegation with no offer of specific proof cannot establish that the BLM report was incorrect.

In addition, appellant in effect states that it cannot provide sufficient information for BLM to determine whether appellant can meet the other statutory requirement for conveyance until it knows whether or not it can acquire the mineral interest in question. The record indicates that appellant desires the land in question in order to undertake residential development. 8/ However, the El Paso County Land Use Department stated, in response to an inquiry from BLM, that the topography of the land would preclude development. Letter of May 13, 1981. Based on the information appellant did provide, BLM correctly determined that appellant did not establish that its proposed development is a more beneficial use of the land than mineral development.

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7/ Secretarial Order No. 3087, dated Dec. 3, 1982, consolidated the onshore mineral leasing functions of the Minerals Management Service within BLM, making BLM the Secretary's technical expert in matters such as these. 48 FR 8982 (Mar. 2, 1983).

8/ Appellant contemplates residential development of 1,080 acres, of which only the 80 acres in question have federally reserved minerals. The 80 acres involved herein are the western most acreage in the tract and are described in the record as containing extremely steep slopes and rough topography.

[2] An applicant for conveyance of a mineral interest may not be entitled to conveyance even when either or both of the conditions in section 209(b)(1) of FLPMA are satisfied. The language of this portion of the statute is discretionary and entitles the Secretary or his designated representative to reject an application upon a determination supported by facts of record that conveyance of the mineral interest would not be in the public interest. See Basin Electric Power Corp., 50 IBLA 197 (1980). In this case, even assuming appellant satisfied either or both of the conditions, there are public policy considerations which militate against the conveyance in any event.

In a letter to BLM from the Department of the Air Force, dated September 10, 1980, objecting to the application, it is stated:

Denman Investment Company wants to obtain mineral rights to eighty acres which are immediately adjacent to \* \* \* the NORAD Cheyenne Mountain Complex (NCMC).

The eighty acres to which Denman Investment Company seeks mineral rights are, according to your office, on a steeply sloping hillside which overlooks the South Portal to the NCMC. The NCMC is one of the most critical defense installations in this country. It serves as the operations and communications center for surveillance and warning of enemy aircraft and missile attacks against the North American continent. The South Portal is essentially the rear entrance to the tunnels through Cheyenne Mountain which make up the heart of the NCMC. It is in a secluded area and is guarded continuously. The diesel fuel pumping station for the NCMC is located adjacent to the South Portal.

One of the primary protections furnished the South Portal is the absence of people in the area. The residential or mineral development of the eighty acres in question together with the presence of the number of people normally associated with such development in such close proximity to the South Portal constitutes an unacceptable burden to the security of the complex.

Subsequently, in the March 9, 1983, "Decision Record/Rationale" contained in the case record the Canon City District Manager stated:

The U.S. Air Force has expressed concern that use of the subject 80 acres for mineral development by the present or future owner would present a severe security risk to the NORAD Cheyenne Mountain Complex (NCMC). This facility serves as the operations and communications center for surveillance and warning of enemy aircraft and missile attacks against the North American continent.

He concluded that "conveyance of the reserved estate would not be in the best public interest because of the potential conflicts this action could have on security of NCMC."

BLM properly rejected appellant's application.

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.

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Bruce R. Harris  
Administrative Judge

We concur:

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Anne Poindexter Lewis  
Administrative Judge

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C. Randall Grant, Jr.  
Administrative Judge

