

## DESERT SURVIVORS

IBLA 83-864

Decided April 3, 1984

Appeal from decision of the California State Office, Bureau of Land Management, responding to protest against the approval of a mining plan of operations. CA MC 44683.

Set aside; hearing ordered.

1. Administrative Procedure: Generally--Appeals--Rules of Practice:  
Appeals: Standing to Appeal

An organization appealing a Bureau of Land Management decision will be considered a "party to a case" having standing to appeal an adverse decision of an officer of the Bureau of Land Management where the organization uses the lands in question and actively and extensively participates in the formulation of land use plans for the lands in question.

2. Water and Water Rights: Generally

The Executive order of Apr. 17, 1926, reserved the minimum amount of water necessary in springs and waterholes to provide water for the purposes of human and animal consumption. The entire flow of these water sources was not necessarily reserved.

3. Water and Water Rights: State Laws

The right to use water from reserved springs and waterholes for any purpose other than the purposes of human and animal consumption must be obtained pursuant to applicable state law.

4. Administrative Procedure: Burden of Proof--Evidence: Burden of Proof--Evidence: Presumptions--Evidence: Sufficiency--Mining Claims: Abandonment

A presumption of regularity supports the official acts of public officers and absent clear evidence to the contrary, it will be presumed that they have properly

discharged their official duties. Suggestion that BLM may not have investigated a mining claimant's good faith in locating a claim which includes a water source is insufficient to rebut the presumption of regularity.

5. Rules of Practice: Appeals: Hearings

An evidentiary hearing is properly ordered pursuant to 43 CFR 4.415 where the record is inconclusive on an issue of material fact dispositive of the rights of the parties to an appeal.

APPEARANCES: Doug Kari, president, Desert Survivors, Orinda, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Desert Survivors, an unincorporated association, appeals from a letter decision dated June 30, 1983, by the California State Office, Bureau of Land Management (BLM), which denied its protest against approval of the third Keynot mining plan of operations (plan 3) in the Inyo Mountains. The Keynot Mine, operated by Far West Exploration, Inc., is located in the Inyo Mountains Wilderness Study Area (WSA). The appeal focuses on the water source to be used in the mining operation. With respect thereto the decision on appeal states in pertinent part: "We do not consider the water in the flooded mine shaft in upper Keynot Canyon to belong to the United States. All existing mining improvements on the claims at Keynot belong to the mining claimant. The flooded mine shaft is considered the property of the claimant."

Appellant concedes in the statement of reasons that water for the proposed mining operation will come from the flooded mineshaft. Appellant contends, however, that the water source is actually a well or spring used by backpackers and is the property of the United States. Appellant asserts that the water source at issue is not a part of the claims group of the Keynot mine or the mine operator's project. According to appellant the water source is located one-half mile from the area of proposed operations. Appellant suggests that the operator may have located the claim which encompasses the water source solely to acquire the water and not to mine the claim. Appellant asserts that BLM erred in not investigating whether this particular claim is bona fide, and in concluding that the water belongs to the operator. Appellant also contends that BLM failed to utilize the right-of-way procedures of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1976), for diversion of water across public land.

Appellant's president has submitted a narrative describing his knowledge of the water source as a well or a spring (Exh. U). He states that the water source lies one-half mile above the Keynot mine dump in the floor of the canyon. He describes it as a "narrow deep pool which lies between several huge rock slabs." He acknowledges that another water source exists for hikers in the area but asserts that the other source is not nearby and entails a more difficult hike and great likelihood of encountering rattlesnakes. Other members of appellant's association have submitted similar statements.

Appellant has also advanced arguments concerning its standing to appeal. Appellant filed comments, recommendations, and proposed stipulations in connection with plan 3. Appellant states that it is a bona fide representative of recreational users of the Inyo Mountains and has used and relies on the water source at issue.

Finally, appellant has filed a request for expedited consideration of the appeal alleging that the mine operator is already making some use of the water source in question and will soon begin using large amounts of water. Although this Board assumes that pending disposition of this appeal, the operator's mining plan of operations is suspended, the request for expedited consideration is granted. See 43 CFR 4.21(a).

In response to inquiries, made of BLM prior to the protest and decision, BLM had advised appellant as follows with respect to the water source:

Comment I(1) - undeveloped water on public land is used by the public for drinking at their own risk of contracting an illness. If it is known that public waters are unsafe for drinking, measures are taken to warn the public. The quality of water from the "well" to be used by the Keynot mining operation is not known. We do not advise the public to use the water from the "well" for drinking nor is it under the purview of 43 CFR 3802 to require the Far West Explorations to develop potable water from the "well."

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Stipulation IV(2) - The public may visit the "well" as long as they do not interfere with the mining operations. We cannot require the miner to provide potable water if it was not determined that potable water existed at the water source before the water was proposed for mining use. (Refer to comment I(1). [1/])

[1] We turn first to appellant's concern about its standing to bring the appeal. As one adversely affected by a BLM decision on a protest, appellant is a party to the case. 43 CFR 4.410; 43 CFR 3802.5. Moreover, appellant uses the lands in question and is an active participant in the planning of the WSA as well as the development of plan 3. Appellant's capacity to bring the appeal is unchallenged by BLM and we perceive no impediment to it. We conclude that appellant has standing to bring the appeal. See Headwaters, 33 IBLA 91, 94 (1977).

[2, 3] This case raises substantive issues which we are unable to resolve on the present state of the record. The foremost of these is the nature and location of the water source. Mining plan 3 speaks simply of obtaining the water necessary for the operation "from the flooded mine shaft located west of the mine on the claim group." This proposal was considered by Robert R. Curry, a geologist and specialist in hydrology who appears on behalf of appellant by affidavit. In Curry's opinion the water in the mineshaft is

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1/ BLM letter to appellant dated Mar. 25, 1983. BLM's comments were in response to a recommended additional stipulation by appellant that backpackers and other members of the public be assured access to the well and the availability of clean water.

not a spring <sup>2/</sup> but is associated with the local water table. Curry estimated the volume of water available from the mine shaft and concluded that it was insufficient by far to meet the needs of the proposed operation. He also felt that BLM's consideration of the water question was inadequate. <sup>3/</sup>

Referring to appropriate case citations, appellant points out that ground water is assumed to be percolating and that in California, the rights to percolating ground water belong to the overlying landowner. The BLM Manual for the California State Office (June 6, 1982) states that "[u]nderground water not flowing in a subterranean stream is not subject to jurisdiction by the State." <sup>4/</sup> See also Howard C. Brown, 73 I.D. 172 (1966). A tentative fact sheet of the California Regional Water Quality Control Board states that the water resource for the Keynot mine project is ground water of the Saline Subunit of the Saline Hydrologic Unit. It states further in paragraph 10:

The depth of groundwater at the site is not known, but reportedly varies considerably depending on the location. Water reportedly daylights on the ground surface near the mine's water supply and about 300 feet (91 m) below the mill site. The quality of this water is believed to be excellent. Water from this area will ultimately flow into Saline Valley.

Further reference to the BLM state office manual tends to support Curry's charge that BLM's consideration of the water question may have been inadequate. For example, the manual states at paragraph .21:

.21 Notification of Proposed Water Use. All proposed private water projects including water used for mining, on the

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<sup>2/</sup> The record also contains a letter from the executive officer, California Regional Water Control Board dated May 13, 1983, to BLM (cc to appellant) which indicates that this State agency had inspected the site and found "no springs or surface water within half a mile down gradient."

<sup>3/</sup> Curry's report states in part:

"16. I simply cannot see any conceivable source or sources of water in the Keynot area which could possibly meet the domestic and ore-processing water needs of a mining operation such as that proposed here. Certainly the mine shaft referenced by the Mineral Report cannot supply the necessary water.

"17. I am disturbed by the absence of any mention in the Environmental Assessment of the potential impacts of the proposed mining operation on the water resources of this area. I see two possible significant impacts. One would be the effect of consumptive use the water in the mine shaft, the catchment above the mine, and/or the catchment of Keynot Canyon west of the mine site. In each case, utilization of the water will result in diminished water flows downslope. In a desert area such as this, wildlife and some plants have developed a very high degree of reliance on the meager water supplies of the area. To varying extents, use of any of these three water sources will have considerable impacts on water supplies downslope which could be critical to plant and animal life of the region. BLM's E.A. should have first identified the water sources to be utilized for the Keynot mining operation (if indeed they exist) and then analyzed these potential impacts."

<sup>4/</sup> Appellant's Exh. R #7.

public lands must have a Notification of Proposed Water Use on Public Lands (Form 7250-2, Illustration I) completed and submitted by the applicant to the District Office having jurisdiction over the proposed project site. In addition, a Right-of-Way application or other applicable permit, shall be filed with the BLM. The notification will then be used to determine if the water is available for use, and if it has previously been reserved or appropriated by the BLM. [5/] [Emphasis supplied.]

It is apparent that the manual envisions same decisionmaking on the part of BLM to determine if the water proposed to be used is available and reserved or unreserved. If the water is available and reserved and the proposed use is compatible with the reservation, BLM would manage the appropriation of the water through the right-of-way procedure. If the water is available but not reserved, appellant must obtain permission to use the water from the State of California. 6/

Assuming that the water is a spring and is on public land it would be subject to the Executive order of April 17, 1926, establishing Public Water Reserve No. 107. The Executive order withdrew all springs and water holes on public lands and the surrounding acreage. It was designed to preserve for the general public lands containing water holes and other bodies of water needed or used by the public for water purposes. Concerning such water sources, the Solicitor states:

It is therefore my opinion that the quantity of water reserved at each public water hole or spring is the total yield of each source. To claim less than that quantity would allow private rights to interfere with the public uses in derogation of the clear intent of the withdrawal. This is not to say, however, that the BLM may not make such reserved water available to private users of the public land under permits or licenses; rather it means only that the BLM must decide whether and the extent of which such private use is compatible with the purposes of the withdrawal, and federal land management policies generally.

86 I.D. 553, 582 (1979). 7/ A supplemental opinion (M-36914 (Supp. II)), 90 I.D. 81 (1983), opines the right to use water from reserved springs or water holes for any purpose other than human and animal consumption must be obtained pursuant to applicable state law.

Assuming, on the other hand, that the water source is a spring on private land, the Department would have no authority to determine questions of control and appropriation of water rights between private parties, because such questions are exclusively matters of state law. Georgene Rieck, 76 IBLA 45 (1983); Broken H. Ranch Co., 33 IBLA 386 (1977).

5/ Appellant's Exh. R #9.

6/ Appellant's Exh. R #9.

7/ The opinion is styled Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management.

We have quoted from BLM's decision on the protest and from its response to appellant's earlier inquiries concerning the water source. The decision appealed from gives no rationale for the conclusion that the disputed water source is not the property of the United States. In any event, this conclusion would appear to be at odds with BLM's earlier statements to appellant that members of the public could use the water. If the mine operator exercises control over the water, this decision would rest with him, not BLM. The rationale of the court in Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 615-16 (1978), is relevant here. In deciding that Congress did not intend water to be a locatable mineral, the court rationalized its decision in part as follows:

A federal claimant could \* \* \* utilize all of the water extracted from a well [on the claim] without regard for settled prior appropriation rights of another user of the same water. Or he might not use the water at all and yet prevent another from using it, thereby defeating the necessary Western policy in favor of actual use of scarce water resources. [Citations omitted.]

[4] Appellant's assertion that the operator may have located the claim which encompasses the water source without the appropriate bona fides is accompanied by the statement that there is no evidence in the record indicating that the operator intends to mine this claim. Appellant does not identify such a claim nor can we determine from the record whether one exists which specifically encompasses the water source. Though plan 3 speaks of four unpatented claims (claim Nos. CAMC44683 (Keystone #1), CAMC 44685 (Keystone #2), CAMC 44684 (Tom Hancock), CAMC 64188 (Mallard Duck #5)) it does not specifically apportion the proposed operation among those claims by area.

On February 11, 1983, the operator filed a notice of application to appropriate water with the California State Water Resources Control Board. In it, he proposed to obtain 0.6 cubic feet per second of water from Beveridge Canyon via a 6-inch pipeline. BLM filed a protest against this application on the ground that this water source was reserved under the Executive order of April 17, 1926, and the proposed diversion would deplete the source causing adverse effects on local wildlife populations. The operator's attempt to obtain water from Beveridge Canyon failed.

[5] Nonetheless, the identification of the water in dispute as a spring, or as ground water, as either a public or private source, brings with it various legal and jurisdictional consequences. BLM has not considered the water question even though specific guidelines are set out for this purpose in the BLM state office manual. What BLM has done, however, is effectively to accord the water rights to an undetermined water source to the mine operator without an adequate foundation in demonstrated fact for the action taken.

An evidentiary hearing is properly ordered where there is an unresolved issue of material fact. Accordingly, pursuant to 43 CFR 4.415 the decision is set aside and referred to the Hearings Division, Office of Hearings and Appeals, for assignment of an Administrative Law Judge to conduct an evidentiary hearing thereon. The scope of the hearing shall extend to all factual issues relating to approval of the mining plan and the use of the water source in connection with the mining plan. The decision of the Administrative Law

Judge shall be final for the Department absent a timely appeal. §/ The mine operator, Far West Exploration, Inc., Douglas G. McFarland, president, shall be served with all documents pertinent to the scheduling of a hearing and be accorded an opportunity to participate.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior 43 CFR 4.1, the decision on the protest is set aside and the case is referred to the Hearings Division.

Franklin D. Arness  
Administrative Judge

I concur:

Gail M. Frazier  
Administrative Judge

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§/ The scope of the hearing is described in detail by the concurring opinion. Any factual issue related to approval of the mining plan of operations raised by the evidence at the hearing should properly be explored.

## ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While in agreement with the decision of the majority to remand this case for a fact-finding hearing on the question of the availability of a water source, I think that the mere fact that such a course of action is necessary underlines a substantial deficiency in the environmental analysis undertaken with respect to the "Keynot" mining plan of operations, filed by Douglas G. McFarland. As was noted in the statement of Dr. Robert R. Curry, professor of environmental geology at the University of California, Santa Cruz, the environmental assessment which was prepared by the Ridgecrest Resource Area Office is virtually silent on any aspect of hydrology. While the depth of analysis on this point will properly vary dependent upon the nature of the mining operations and the relative availability of water, where, as here, water is a scarce commodity and the proposed method of mining presupposes water use in substantial amounts, analysis of the effects of such water usage is absolutely essential to determine proper mitigation safeguards.

The majority rejects BLM's assertion that the mining claimant owns the water in the abandoned shaft as a necessary incident to ownership of the mining claim. I think that the majority's ruling on this point is clearly compelled by applicable case law. There is no question that the claim on which the abandoned shaft is located can not be validated on the basis of a discovery of water, as the Supreme Court has clearly established that water is not a locatable mineral. Andrus v. Charlestone Stone Products Co., 436 U.S. 604 (1978). Moreover, even if a discovery of a valuable mineral deposit which is subject to location exists on the claim, that discovery does not, ipso facto, give the claimant an absolute right to use the water located therein. On the contrary, the claimant's right to appropriate such water for mining uses will be dependent upon the availability of such water under state law. Without a determination that the mining claimant had an appropriative right under state law to the water in the abandoned shaft, it was error to approve the mining plan of operations.

The majority decision, however, implies that the water source is presently situated on one of the four "Keynot" claims which compose the Keynot Mine, i.e., the Keystone Nos. 1 and 2, the Tom Hancock, and the Mallard Duck No. 5. I do not think this is the case. Appellant has alleged, and this allegation is uncontroverted in the record, that the water source is actually located on a group of claims one-half mile to the west of the Keynot Mine, referenced by the mining claimant in a letter submitted by appellant as exhibit T-1. Further support for this conclusion can be gleaned from the mineral report which BLM prepared in reference to the four "Keynot" claims. Thus, the report noted that "the operator proposes to get his water from an abandoned mine shaft up slope from the Keynot Mine." This statement is consistent not only with appellant's assertions, but also with a map of other claims submitted by McFarland to BLM which, while it refers to Keynot claims, clearly describes claims which are not among the four claims which make up the Keynot Mine. See Exh. C-2.

If such is the case, appellant's objections to the failure of BLM to consider the impacts of a water diversion system, as well as its failure to authorize the construction of such a system, are well taken. I think that this issue should be explored in the context of the hearing being ordered.

I note that appellant has characterized McFarland's actions, particularly his subsequent application for an appropriation from Cove Springs, as in bad faith. Without going into an analysis of McFarland's subjective state of mind, I think that the application for water from Cove Springs does bring into question specific elements of the analysis which BLM has conducted. One of appellant's main objections throughout this proceeding has been that, even if it is assumed that McFarland has an appropriative right to the water in the "abandoned shaft," there is simply insufficient water to work the claim under the present plan of operation. Indeed, Curry estimated that, dependent upon the permeability of the mine shaft, it would provide enough water for from 1-1/2 days of processing and domestic needs up to 12 percent of the total needed on an annual basis.

McFarland's mining plan of operations, however, clearly called for use only of this water supply. Thus, his mining plan of operation stated that "[w]ater for the project will come from the flooded mine shaft located west of the mine on the claim group." By letter of January 6, 1983, he informed the Area Manager that he had determined to switch from heap leaching to a vat leaching process. McFarland noted that among the advantages of this change was the fact that "the production, using tanks, can be adjusted to correspond with the available water supply." It was on these assumptions that the mining plan of operations was approved. McFarland's subsequent application for additional water rights at Cove Springs must be seen as inconsistent with these statements.

This raises two discrete problems in the instant case. First of all, if water is required from a source other than the abandoned mine shaft, it will also be necessary to provide a method of delivering it to the mine. No provision for such delivery was made in any of the plans nor has any environmental assessment of such activities even been contemplated. Secondly, and of equal importance, the application for additional water from Cove Springs raises, in my mind, substantial questions as to the existence of a discovery on the "Keynot Mine" claims.

There is no question that the assays taken of the Keystone Nos. 1 and 2 show substantial mineral values. This, however, is insufficient by itself to show the existence of a discovery. Beyond a mere showing of values, there must also be a showing that the mining claimant has a reasonable prospect of success in mining and removing the mineral at a profit. See In re Pacific Coast Molybdenum Co., 75 IBLA 16, 90 I.D. 352 (1983). For example, if water is absolutely essential to the mining and milling processes, such that without it there is no possibility of successfully mining the claim, the presence or absence of water will be determinative of the existence of a discovery, quite apart from the values disclosed by sampling. See United States v. Osborne, 28 IBLA 13, 33-35 (1976), aff'd sub nom. Bradford Mining Corp. v. Andrus, Civ. No. LV-77-218 (D. Nev. Mar. 15, 1979). It is clear that the mineral examination which BLM conducted presupposed the existence of a sufficient amount of water to conduct heap leaching operations. Admittedly, the mineral claimant has altered the method of extraction to vat leaching which will require less water consumption. But it has not been shown that sufficient water is available for appropriation to meet even these lessened needs. Absent such a showing, I do not see how the finding of validity can be sustained, at least not to the extent that the beneficiation process is presumed to be vat leaching. This, too, I think needs to be explored at the hearing.

Ultimately, of course, I recognize that the mining claimant has expended considerable effort in attempting to mitigate adverse environmental consequences which would be associated with mining the deposit at the Keynot Mine. Nevertheless, I can not say that appellant's concerns are groundless. I agree with the majority that this matter is best set for hearing where a final resolution might be forthcoming as to the acceptability of the mining plan of operations for the instant claims.

James L. Burski  
Administrative Judge

