

Editor's note: Reconsideration denied by Order dated April 15, 1988

FAR WEST EXPLORATION, INC.

IBLA 85-798

Decided December 28, 1987

Appeal from a decision of the California Desert District, Bureau of Land Management, dated May 23, 1985, rescinding approval of Keynot Plan of Operations No. 2, CAMC-71547, and Keynot Plan of Operations No. 3, CAMC-44683.

Affirmed as modified.

1. Mining Claims: Plan of Operations--Federal Land Policy and Management Act: Plan of Operations--Administrative Practice: Hearings

Where a hearing into the availability for use of a water supply for a mining operation located within a wilderness study area has previously been held and a final decision rendered on the question, and such determination is dispositive of the question of the feasibility of the plans of mining operations under review, no further factfinding is required.

2. Mining Claims: Plan of Operations--Federal Land Policy and Management Act: Plan of Operations

Approval of mining plans of operations for a cyanide leaching operation may be properly rescinded where the plans are shown to have been approved in error because an assumption was made that an adequate supply of water was available which did not in fact exist.

APPEARANCES: Jack M. Merritts, Esq., Denver, Colorado, for Far West Exploration, Inc., and Keynot Mining, Inc., William F. Alderman, Esq., and W. Douglas Kari, San Francisco, California for intervenor, Desert Survivors. 1/

1/ Far West Exploration, Inc. has objected to the standing of Desert Survivors to intervene in this appeal, and has moved to strike the briefs filed by Desert Survivors. The motion is denied. Desert Survivors has been permitted by BLM to participate at all prior stages of the planning for the development and use of the Keynot Canyon minesite. This matter has previously been resolved by this Board to permit Desert Survivors to participate as a party to this appeal. See Desert Survivors, 80 IBLA 111 (1984).

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Far West Exploration, Inc. has appealed from a May 23, 1985, decision of the California Desert District, Bureau of Land Management (BLM), which rescinded approval of two mining plans of operations numbered CAMC-44683 (third plan) and CAMC-71547 (second plan). Both plans outlined a proposal by Far West to construct a cyanide leaching operation to extract gold and silver from a dump at the Keynot mine, consisting of unpatented mining claims located in Keynot Canyon in Inyo County, California. ^{2/}

The second plan, although characterized by Far West as for a "testing facility" appears to be substantially similar to the third plan, since both plans propose similar placement and use of what are essentially the same facilities, including a crusher, leaching vats, tanks, and ore bins. Both plans proposed to mine the same dump by washing crushed ore with a cyanide solution to extract gold and silver. Details of the third plan, however, vary from the second. Of special importance to this appeal, the third plan describes the source of water needed for making the chemical solution required by the leaching process, a detail omitted by the second plan. For purposes of discussion of Far West's arguments on appeal, it is assumed that the two plans are distinguishable.

It was the fact that the third plan included a more detailed description of the method of use and procurement of a source of water that caused the third plan to become the subject of an evidentiary hearing in 1984. Far West's assertion in the third plan that sufficient water was available for the proposed use was challenged by Desert Survivors, a California nonprofit organization. In Desert Survivors, 80 IBLA 111 (1984), this Board set aside a denial of Desert Survivors' protest and referred the case to the Hearings Division. Administrative Law Judge E. Kendall Clarke, who was assigned to hold the hearing, concluded in a decision issued August 28, 1984, that there was not enough water available to permit implementation of the third plan. Following this decision BLM issued the May 23, 1985, decision, now under review, in part to implement the Judge's decision. Far West challenged BLM's decision on the ground that it incorrectly applies the Clarke decision. To consider this argument, we must examine Judge Clarke's opinion.

In our decision in Desert Survivors, 80 IBLA 111 (1984), which had ordered the hearing ultimately held by Judge Clarke, we had before us a protest against implementation of the third plan of operations directed against the use proposed to be made a well or spring located above the Keynot mine.

^{2/} Far West's first plan of operations was the subject of Board review in Douglas G. McFarland, 65 IBLA 380 (1982). That plan, like the second and third plans of operations, also proposed chemical refining of the ore at the Keynot Mine dump, but required the construction of a road to give access to the operation. The proposal to construct a road into the minesite, which is located within a wilderness study area, was not repeated in either the second or third plans.

Referring to a report by geologist Robert R. Curry, we had ordered evidence to be taken concerning "all factual issues relating to approval of the mining plan and the use of the water source in connection with the mining plan." Id. at 118. The Curry report, quoted in footnote 3 of the Desert Survivors opinion, concluded that approval of the third plan was given in error, because it was predicated upon an environmental assessment which had neglected to consider whether there was enough water to support a leaching operation, and also failed to examine the effects that using whatever water might exist would have upon the desert ecology of the minesite vicinity. Id. at 114. The Clarke hearing was therefore directed toward a resolution of the issue raised by the Curry report concerning the availability of water at Keynot Canyon.

Judge Clarke held the hearing on this matter on August 21, 1984. Far West was given notice of the hearing, but did not appear. The protestant, Desert Survivors, appeared and presented evidence concerning the water in the vicinity of the minesite. On August 28, 1984, Judge Clarke issued the decision which Far West contends has been misinterpreted by BLM's decision now under review. ^{3/} Far West now argues that the 1984 decision by Judge Clarke merely referred the water question back to BLM for further factfinding. This argument is mistaken for several reasons.

[1] Most importantly, the terms of Judge Clarke's decision do not allow an interpretation such as Far West proposes. The decision finds, first of all, that the water described in the third plan of operations as a "flooded mine shaft" is in fact a well yielding 2.3 gallons of water daily (Clarke decision at 2). Following this finding, the Judge makes this conclusion:

The mining claimant in its application for approval of a mining plan of operation has not submitted sufficient data concerning the availability of water or the right to use the water in connection with the mining operations of his claim at the Keynot Mine to permit the Bureau of Land Management to approve a plan of operation for the Keynot Mine.

Therefore, the Bureau of Land Management's approval of Plan Number 3 for the operation of the Keynot Mine is hereby set aside and the matter remanded to the Bureau of Land Management for such action as necessary consistent with this decision.

Clarke decision at 3. Preliminary to making this finding, the Judge observed concerning the use of the Keynot well that:

^{3/} The Clarke decision became the final Departmental decision concerning this matter when it was not timely appealed. See generally Village of South Naknek, 85 IBLA 74 (1985) for a discussion of the doctrine of administrative finality as applied by this Department. Far West filed a belated appeal from Clarke's decision which was dismissed in Far West Exploration, Inc., IBLA 85-163, unpublished order dated Jan. 9, 1985.

It is abundantly clear from the evidence received during this hearing that the mining claimant, who filed a Plan of Operation which was approved by the Bureau of Land Management and gave rise to this appeal, did not have a source of water sufficient to carry out the plan of operation as outlined in the application for the Mining Plan of Operation to the Bureau of Land Management.

An issue has arisen in this proceeding concerning the means by which the mining claimant diverted the water from the water source; a well in Keynot Canyon at the 8,500 foot elevation to the Keynot Mine at the 8,000 foot elevation for use in the mining operation.

Whether this diversion must be authorized by the Bureau of Land Management under the act known as FLPMA or whether it may be authorized under Secretary's Regulations concerning the diversion of water for mining purposes is a question which is not properly before me at this time and is not necessary to the decision which I will reach concerning the matters which I consider to be properly a part of the issues in this hearing.

Clarke decision at 3.

A reading of this entire decision resolves the issue Far West seeks to raise concerning the continued viability of the third plan. The Judge found that the 2-gallon-a-day well was not a sufficient source of water to enable Far West to conduct a mining operation requiring the daily leaching by cyanide solution of 50 or more tons of crushed ore. Judge Clarke also questioned whether Far West might use any of the water at all, since the company had not obtained a right-of-way for that purpose pursuant to Title V of FLPMA, 43 U.S.C. § 1761-1771 (1982). ^{4/} The decision by Judge Clarke establishes that Far West had failed to establish that it had appropriated a water right sufficient to accomplish the mining use described by the third plan. Under the circumstances found, there was no choice for BLM but to reverse itself and rescind the approval of Far West's third mining plan. The decision of May 23, 1985, so far as it rescinded approval of the third plan for failure to provide a practicable plan of mining operations, must therefore be affirmed for this reason.

[2] Since the decision by Judge Clarke found that there was no source of water at the minesite available for the Far West operation, this of necessity means that the second plan also must be without any source of water, contrary to the assumption stated in that plan that there is a water source. Both plans are now before us for decision. A comparison of the two reveals

^{4/} Concerning this question, see generally Desert Survivors, 96 IBLA 193 (1987), holding that such a right-of-way must be obtained prior to transportation of water across Federal lands for mining.

that the primary difference between them is the fact that the third plan would use vat leaching rather than a heap leaching process. Otherwise, the location of the two plans and the method of recovery is identical. In either case, a solution of sodium cyanide in water is required in order to wash the ore available at the mine dump. The inquiry conducted by Judge Clarke revealed that there is no water at all available at the site for this project. The second plan proposed is therefore also not feasible, and was only approved because of a mistaken belief that there was water for the plan as proposed. The second plan also, therefore, must be rescinded for this reason. Even though the matter was initially referred to hearing in contemplation of the third plan (since a provision of that plan had called attention to the water question) this Board is not free to disregard information which comes to it in the course of an appeal, but must consider all relevant information from whatever source in reaching its decision. See Carolyn J. McCutchin, 99 IBLA 29 (1987). Since it is now apparent neither plan was feasible because of the lack of a water source, approval of both plans must be rescinded.

Far West also contends that prior to issuance of its May 23, 1985, decision, BLM was initially disposed to permit Far West to treat the Clarke decision as an invitation for further amendment to the two plans of operations then pending before the Department, and that considerations of consistency should oblige BLM to continue with this more favorable treatment of Far West's mining proposals. This argument however puts an impossible strain on Judge Clarke's findings concerning the absence of available water on or near the minesite, a circumstance which is not denied by Far West. It is obviously the nature of mining plans of operations that they may be successively amended and changed, as this case demonstrates. See 43 CFR 3802.1-4, 3802.1-6. Despite this fact, however, there is nothing in BLM's conduct of this proceeding that can allow us to ignore the fact that there is no known source of water for this mining operation, which apparently requires a good deal of water (although just how much is never stated anywhere in the record before this Board).

In any future plan, Far West must answer the questions concerning a water supply asked by the Curry report and deal with the facts presented by Judge Clarke's decision if it is to propose a feasible plan of operations which BLM may properly approve. See 43 CFR 3802.1-5(d). Additionally, it must assure that there will be reclamation of any project for which it is able to obtain approval from BLM. See 43 CFR 3802.1-5(e). Most importantly, it must reveal how much water the chemical recovery process eventually proposed to be used will take, and describe in detail how the water will be obtained and where it will come from, and what effect this usage will have on the environment. See 43 CFR 3802.3-2(b). It is now clear that the availability of water is crucial to any plan of operations which Far West may propose for the Keynot project.

While this issue is dispositive of this appeal, it does not consider the effect of BLM's determination that Far West plans of operations were subject to rescission for failure to comply with provisions of State law requiring the furnishing of 2 reclamation bonds. This issue, which Far West argues is raised by BLM's decision of May 23, 1985, has been extensively briefed by Far West.

On appeal to this Board, Far West argues that failure to post two reclamation bonds required by California agencies does not violate the terms of stipulations attached by BLM to the plans of operations. BLM had required in both plans that Far West conform to requirements of state law. Far West, in obedience to this provision of the mining plans, obtained permits from Inyo County and the state. Both State agencies required Far West to provide reclamation bonds, which it appears were never furnished. In response to this allegation, Far West contends that Federal law and regulation have pre-empted the requirements of any non-Federal authority to regulate the Keynot mine operation, citing Ventura County v. Gulf Oil Corp., 601 F.2d 1080 (9th Cir. 1979), aff'd without opinion, 445 U.S. 947 (1980), and Granite Rock Co. v. California Coastal Commission, 768 F.2d 1077 (9th Cir. 1985).

Since the briefing in this case was completed, the Granite Rock case relied upon by Far West has been decided on further appeal to the Supreme Court in California Coastal Commission v. Granite Rock Co., ___ U.S. ___, 107 S. Ct. 1419 (1987). The Supreme Court reversed the Court of Appeals decision, and concluded that, in cases such as this, one must "apply the traditional pre-emption analysis which requires an actual conflict between state and federal law, or a Congressional expression of intent to preempt, before * * * state regulation is preempted." Id. at 1432. Because of our finding concerning the lack of water to implement both the second and third plans, we do not reach this issue; indeed any attempt to apply the principles established by the Granite Rock case is pointless in the context of this appeal, where the lack of available water wholly disposes of the appeal before us. To the extent, therefore, that BLM's decision to rescind approval of the mining plans rests upon state action respecting state permitting, we find that such finding was unnecessary to the BLM's decision respecting Far West's plans of operations.

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 by this decision.

Franklin D. Arness
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

I concur in all parts of the majority decision except the discussion of Far West's second plan of operations (POO). As the majority notes, the only distinguishing factor between the second and third POO is that the second POO envisioned ore recovery by means of heap leaching whereas the third POO was premised on a vat leaching process. Both of these POO's involved the same land (though different mining claims), the same ore deposit, the same source of water, and the same operator. It seems clear that, when Far West sought and obtained approval of its third POO, it necessarily abandoned, both as a matter of fact and of law, its second POO, since it would not be possible to simultaneously pursue recovery of these ore values by both vat leaching and heap leaching. 1/

I do not disagree with the majority's conclusion that, to the extent lack of adequate water supplies requires rejection of the third POO, the second POO must be deemed equally vulnerable. My view, however, is simply that the second POO is no longer a matter which must concern us, as it was superseded and abandoned when the Bureau of Land Management approved, albeit erroneously, the third POO.

James L. Burski
Administrative Judge

1/ Indeed, appellant justified the switch from heap leaching to vat leaching on the ground that vat leaching was more easily adjusted to the corresponding water supply. See Desert Survivors, 80 IBLA 111, 119 (1984) (concurring opinion).

