

WILLIAM C. HAYES ET UX.

IBLA 89-403

Decided January 10, 1992

Appeal from a decision of the Colorado State Office, Bureau of Land Management, requiring mining claimant to secure surface protection bond. C MC 208388 through C MC 208393.

Affirmed as modified.

1. Act of December 29, 1916--Mineral Lands: Mineral Reservation--Mining Claims: Surface Uses--Stock-Raising Homesteads

In determining the appropriate amount of a bond for the protection of the owner of the surface estate of land patented under the Stock-Raising Homestead Act, as amended, 43 U.S.C. §§ 291-301 (1976), BLM properly considers possible damages from projected mining operations within the entirety of the mining claims sought to be re-entered and occupied, relying on the current value of tangible improvements and of the projected lost grazing use of that land from such operations and subsequent reclamation. However, where BLM improperly discounts the value of future lost grazing use, the Board will recompute that value and set the proper bond amount.

APPEARANCES: Gerald D. Sjaastad, Esq., Colorado Springs, Colorado, for appellants; James K. Aronstein, Esq., Denver, Colorado, for the Alma American Mining Corporation.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

William C. and Pearl R. Hayes have appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated March 22, 1989, requiring the Alma American Mining Corporation (Alma) to secure a \$1,500 bond for the protection of the surface of land owned by the Hayeses.

This case involves the Lone Chimney Nos. 1 through 6 lode mining claims, C MC 208388 through C MC 208393, which were located by Alma on

October 31, 1984, in secs. 16 and 21, T. 15 S., R. 73 W., sixth principal meridian, Park County, Colorado. 1/ Notices of location of such claims were filed for recordation with BLM on November 13, 1984.

The Hayeses are the current owners of the surface estate of the land in sec. 21 covered by the subject mining claims. Such land was patented to the Hayeses' predecessor-in-interest subject to a reservation of the mineral estate to the United States, pursuant to the Stock-Raising Homestead Act (SRHA), as amended, 43 U.S.C. §§ 291-301 (1976). 2/

On August 12, 1985, Alma filed with BLM a \$1,000 surface protection bond, which was designed to provide compensation to the Hayeses in the event of any uncompensated damage to crops, tangible improvements, or the value of the land for grazing caused by its mining operations on the land in sec. 21. In an August 5, 1985, letter which accompanied the bond, Alma stated that the amount of the bond was "more than sufficient," since Alma intended to conduct only "exploration operations, including hand sampling, mapping of surface features and diamond drilling," which would have a "minimal impact" on the surface of the land. Alma based its conclusion concerning the impact of its operations on the facts that it would disturb less than 0.6 acres of land and that there was no evidence the land had any valuable improvements or was being used for either grazing or farming. A copy of the bond was served on the Hayeses.

On September 3, 1985, the Hayeses objected to the bond on a number of grounds, including the sufficiency of the bond amount. After a lengthy review, the Colorado State Office issued two decisions on March 6, 1986, which dismissed the Hayeses' protest to the bond and approved the bond. In particular, the State Office dismissed the objection to the sufficiency of the bond amount because \$1,000 was deemed adequate to "protect the land which would be disturbed by [Alma's] exploration plan." (Emphasis added.) Accordingly, the State Office provided that: "[T]he bond will be approved as to the land which will be disturbed by the exploration operation plan. If other lands are to be explored at a future date, the mineral claimants

1/ The record indicates that Alma also located the Lone Chimney Nos. 7 through 9 lode mining claims, C MC 208394 through C MC 208396, in secs. 16 and 21 on Oct. 31, 1984. Notices of location of these claims were filed for recordation with BLM on Nov. 13, 1984. However, Alma notified BLM on Nov. 21, 1985, of its intention to abandon these claims. Thus, these claims were thereafter considered abandoned by BLM. Moreover, from that point on, there is no evidence that Alma filed either affidavits of annual assessment work or a notice of intention to hold the claims with BLM, as required by section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1988), and, thus, such claims must be deemed abandoned and void under FLPMA.

2/ With the exception of section 9 of SRHA, as amended, 43 U.S.C. § 299 (1988), that statute was repealed effective Oct. 21, 1976, by sections 702 and 704(a) of FLPMA, 90 Stat. 2743, 2787, 2792 (1976).

will have to post another surface protection bond to protect the additional lands." The Hayeses appealed from the State Office's March 1986 decisions.

By decision dated February 2, 1988, styled William & Pearl Hayes, 101 IBLA 110, the Board set aside the State Office's March 1986 decision dismissing the Hayeses' protest as to the sufficiency of the bond amount. The Board did so based solely on its conclusion that BLM had, in determining the adequacy of the bond amount, erroneously considered only the area which Alma proposed to disturb with its exploration operations. Rather, the Board held that, in determining whether the amount of the bond is adequate, BLM

must estimate possible damages to crops, permanent improvements, and the grazing value of the land within the boundaries of the mining claims located by the mineral claimant. Such an evaluation is properly based on the type or types of minerals located, the mining methods proposed or normally used to develop such mineral deposits, and the damage to crops, improvements, and grazing value that could be associated with the types of methods to be employed. [Emphasis added.]

Id. at 115. In so holding, the Board noted that it had not concluded that the \$1,000 bond was "per se insufficient." Id. at 115 n.5. Rather, the Board remanded the case to BLM for a "re-examination" of the sufficiency of the bond amount. Id. at 115.

The record indicates that the re-examination was conducted by the Canon City District Office. According to a January 23, 1989, memorandum from the District Manager to the Colorado State Director, BLM based its determination regarding the sufficiency of the bond amount on an analysis of the possible damages that would result if Alma mined either a "logical mining area" (50 acres) ^{3/} or the entire area of the subject mining claims (110 acres). The memorandum noted that:

The long term (twenty years or more) value of the lost grazing opportunity would be \$375 on the 50 acres logical mining area, or \$825 on the full 110 acres. One erosion control structure could be affected in both cases; its value is estimated to be \$600. Other erosion control structures and a fence are on the boundaries of the claims and are not expected to be affected.

In our opinion, use of the "logical mining area" approach is the most appropriate method. Using that approach, a \$1,000 bond is sufficient to protect the surface owner. If the second

^{3/} BLM determined that an area of 50 acres was the "logical mining area," i.e., the area of "probable disturbance" if Alma mined the subject mining claims, based on "topography, geology and existing access roads." That area was shown to be within the Lone Chimney Nos. 1, 2, and 4 through 6 lode mining claims.

approach is used, and long-term loss of grazing on the entire claimed area is assumed, then a bond of \$1,500 is appropriate.

In its March 1989 decision, the Colorado State Office, noting that a bond must be sufficient to compensate for possible damages within the boundaries of the subject mining claims, concluded that a bond in the amount of \$1,500 was "sufficient for reclamation of the land and to cover any damages to the erosion control structures." In arriving at that amount, the State Office relied on the work of the district office: "The [1988 field] examination determined that grazing appears to be the only potential use of the land. The long term value of lost grazing opportunity would be \$825, an erosion control structure on the claims could also be affected, its value is estimated to be \$600, for a total of \$1425." Therefore, the State Office required Alma to secure a surface protection bond in the amount of \$1,500. The Hayeses have appealed from the State Office's March 1989 decision.

[1] Section 9 of SRHA affords the holder of mineral rights in land patented under that Act the right to reenter and occupy the surface of such land for the purposes of mining and removing coal or other mineral deposits from the land provided that, in lieu of securing the consent of or paying damages to the surface owner, he obtains a "good and sufficient bond * * * to the United States for the use and benefit of the * * * owner of the land, to secure the payment of * * * damages to the crops or tangible improvements of the * * * owner." 43 U.S.C. § 299 (1988). In addition, section 5 of the Act of June 21, 1949, 30 U.S.C. § 54 (1988), makes the holder of mineral rights liable for "any damage that may be caused to the value of the land for grazing," thus requiring him to obtain a bond which will also secure the payment of such damages. See 43 CFR 3814.1. The purpose of these statutes is to assure compensatory protection to the surface owner. See A. J. Maurer, Jr., 15 IBLA 151, 155, 81 I.D. 139, 141 (1974).

In their statement of reasons for appeal (SOR), appellants contend first that BLM based its determination regarding the sufficiency of the bond amount on the type of "mining methods" which would be used to develop the subject mining claims, an approach which, appellants assert, is in direct conflict with the Board's earlier decision in the matter. It is clear that appellants have misconstrued the nature of our decision in Hayes.

We note that, in Hayes, while we held that BLM could not determine the proper bond merely by examining the actual operations proposed by the mineral claimant, especially when such operations would neither encompass actual development and production nor cover all of the land possibly impacted thereby, we also expressly directed BLM to consider the "mining methods proposed or normally used to develop such mineral deposits." 101 IBLA at 115. Since the amount of the bond required is dependent on the possible damages which may result from operations on the claims, it is necessary for BLM to gauge the extent of such damages. In order to do this, BLM must have some idea of what type of mining operations are likely to occur. Thus, BLM must ascertain the possible damages which could result from mining operations based on an assessment of the types of mining methods

which were either proposed or likely given the nature of the mineral deposit found on the claims. BLM's actions in this regard were both correct and fully in accord with our prior decision.

Turning to the specific aspects of BLM's determination of the bond amount, we must conclude that appellants have failed to demonstrate any error in the components considered relevant by BLM. Appellants have failed to establish that there are any crops or tangible improvements on the subject land, with the exception of the one erosion control structure. Accordingly, the amount of the required bond must be determined solely on the basis of the value of that structure and the value of the land for grazing. ^{4/}

Appellants assert that BLM failed to set forth its "underlying assumptions" and "calculations" in the record (SOR at 2). Appellants are mistaken in this assertion. While BLM did fail to provide appellants with the underlying assumptions and calculations, these do appear in the "Worksheet for Bond Evaluation" (Worksheet) attached to the District Manager's January 1989 memorandum.

BLM valued the erosion control structure at \$600, relying on its current replacement cost. Appellants were apprised of the valuation placed on this structure in the State Office's March decision. Appellants have not offered any evidence to refute BLM's valuation and have not submitted any alternative valuation of the structure. Thus, there is no basis for us to conclude that the structure should have a higher current value. See Robert M. Michael, 79 IBLA 255, 258 (1984).

^{4/} We note that appellants argue that BLM failed to consider the fact that Alma's mining operations would not only encompass the 110 acres covered by the Lone Chimney Nos. 1 through 6 mining claims, but would also embrace the approximately 125 acres covered by the Lone Chimney Nos. 10 through 16 mining claims, the surface estate of which is largely owned by appellants.

The record indicates that Alma is the owner of the additional Lone Chimney Nos. 10 through 16 mining claims, C MC 211959 through C MC 211963 and C MC 212002 and C MC 212003, located Aug. 27 and Sept. 12, 1985, and that such claims are contiguous with the Lone Chimney Nos. 1 through 6 mining claims. But, while it is possible that Alma's exploration and/or mining operations may one day encompass these other claims, Alma does not now propose to engage in any such operations on these claims. Therefore, it is not now required to include the land covered by these claims in the current bond or to secure a separate bond protecting the surface owner from possible damages caused by such future operations. Appellants are responsible now only for damages that may occur as a result of operations within the subject claims because these are the claims which Alma intends to "reenter and occupy." 43 U.S.C. § 299 (1988); see Brock Livestock Co., 101 IBLA 91, 98 (1988); Elmer Silvera, 42 IBLA 11, 15 (1979). Should Alma undertake operations on the Lone Chimney Nos. 10-16, an additional bond would then be required.

In the case of the value of the land for grazing, BLM determined that the subject land would support one animal unit month (AUM) 5/ for every 10 acres of land, and that the current value of one AUM was \$8.50 per year. 6/ An analysis of the Worksheet shows that BLM then derived what it referred to as "the long-term value" of an AUM by computing the present value of the loss of an AUM for a 20-year period. BLM used the resulting figure of \$75 to determine that the value of all of the 110 acres, which would support a total of 11 AUM's per year during that 20-year period, was \$825.

Appellants, however, not having been apprised of the basis of the computation, assail the value placed on the loss of grazing rights. 7/ It is clear, however, that BLM did assume that mining would continue for 20 years. Appellants also argue that BLM failed to take into account the fact that appellants may not be compensated until well into the future when Alma seeks release of the bond, even though the damages may occur immediately after issuance of the bond and initiation of mining operations. Thus, appellants assert that BLM failed to consider the "time value of money" (SOR at 3).

5/ An AUM is defined as the "amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month." 43 CFR 4100.0-5.

6/ The record indicates that the figure of 10 acres per AUM was based on the "historical use" of the subject land for grazing. See Memorandum from the Area Manager, Royal Gorge Resource Area, Colorado, BLM, to the District Manager, dated Oct. 11, 1985, at 2. In addition, in 1985, the going rate for AUM's in the case of private leases was reported to be from \$6 to \$7 per year. Id. That had increased to \$8.50 per year in 1989.

7/ Appellants argue that BLM's assessment represents a projection of a 2.88-year mining operation. Appellants' mistake in this regard is directly attributable to the failure of BLM to provide them with a copy of its calculations. While appellants did correctly recognize that BLM had determined that it took 10 acres to constitute one AUM, and that, therefore, there were 11 AUM's within the 110 acres involved in this appeal, appellants apparently assumed that, since the grazing season was 4-months long, this figure should be multiplied by 4. Therefore, appellants proceeded to multiply $4 \times 11 \times \$6.50$, obtaining a result of \$285 per year. They then divided this figure into the value BLM placed on the loss of grazing use (\$825) and arrived at a result of 2.88 years.

Determinations of the carrying capacity of lands, however, are made on an annualized basis in the first instance. Thus, BLM's determination that there were only 11 AUM's available on the subject lands is a determination that there were only 11 AUM's available for the entire grazing season, not that there were 11 AUM's available each month. Appellants' computations were, therefore, inherently erroneous by a factor of four. The difference between the correct computation based on appellants' figures (11.52 years) and the full 20-year period for which BLM was deriving the value is directly correlated to the fact that BLM discounted future use in its computation. The propriety of this facet of BLM's computation is examined subsequently in the text of this decision.

Appellants' argument, however, presumes that a surface owner cannot seek compensation for damages until the mining claimant concludes mining operations and seeks release of the bond. There is no such limitation on the surface owner in either section 9 of SRHA, or section 5 of the Act of June 21, 1949, or the relevant Departmental regulations. Ultimately, of course, the matter of liability, if disputed, is for the courts to determine. See Holbrook v. Continental Oil Co., 278 P.2d 798 (Wyo. 1955). However, we note that a cause of action for damages has been determined to arise upon each reentry and occupancy of SRHA-patented land which results in compensable damage. See Bourdieu v. Seaboard Oil Corp. of Delaware, 100 P.2d 528, 532 (Cal. Dist. Ct. App. 1940). We know of no restriction on when compensation may be sought, although the surface owner may be time-barred if he waits too long. Id. at 533-34. Thus, we must conclude that it may be sought immediately after damages are sustained.

In any event, the bond itself (Form 3814-1 (March 1983)) provides that, in order for the obligation under the bond to be discharged, the principal and surety are bound to provide "upon demand" compensation for all damages which the surface owner shall "suffer or sustain or a court of competent jurisdiction may determine and fix in an action brought on th[e] bond * * * by reason of the mining and removing by the principal(s) of the above-designated mineral deposits from said described land." There is no language limiting when demand for compensation may be made. Therefore, demand may be made immediately after damages are sustained. In the event that the demand is not satisfied, the principal and surety are considered to be "in default" and the surface owners may then proceed on the bond. See 12 Am. Jur. 2d Bonds § 34 (1964); Bourdieu v. Seaboard Oil Corp. of Delaware, supra at 535.

Accordingly, we conclude that there is no necessity for BLM, in setting the bond amount, to take into account any period of time that the surface owner may remain uncompensated for damages sustained on the SRHA-patented lands. He holds in his hands the ability to seek timely compensation and, thus, to avoid the future increase in the real cost of such uncompensated damages.

There is, however, a significant problem with BLM's computation of the proper bond amount, having to do with the discounting of the value of the land for grazing. As noted above, in determining the value of the lost use of the subject land for grazing purposes during the 20-year life of the subject mine, BLM took the present fair market rental value of the land for grazing (\$8.50 per AUM per year) and then calculated its discounted value for 20 years. BLM multiplied the resulting figure by the total number of AUM's that can be annually supported by the subject land (11), arriving at a total of \$825, which represents the present discounted value of the entire loss.

The discounting of future payments in order to obtain the present value of such future obligations is based on the recognition that \$100 today is worth more than \$100 a year from now, because an individual may invest or

otherwise use funds so received as an immediate matter and obtain the benefits therefrom prior to the time that the right to those benefits actually vests. Thus, in situations such as those involving communication site rights-of-way, where rentals are computed on an annual basis, redetermined at 5-year intervals, when an applicant pays the entire rental owing for a 5-year period, computation of the amount due requires the discounting of payments attributable to future years. See, e.g., Northwestern Colorado Broadcasting Co., 49 IBLA 23 (1980); Western Slope Gas Co., 21 IBLA 119 (1975).

The fundamental premise of this process, however, is the receipt of payments prior to the time they are due. In the instant case, if Alma were paying appellants at the present time for the damage expected to occur over the projected 20-year life of the project, discounting of the value of future payments would be appropriate. In point of fact, however, Alma is merely providing a bond to guarantee these future payments. In such a situation, no discounting is warranted, since appellants are not obtaining present use of future obligations. 8/ Thus, the correct procedure where a corporate bond is being provided is to simply multiply the annual loss by the projected 20-year period. This would require the tender of a bond for \$2,470 (comprised of \$1,870 for the annual loss of 11 AUM's over a 20-year period, and \$600 as replacement cost for the erosion control structure which may be damaged), which is properly rounded up to \$2,500.

Accordingly, we conclude that BLM should have provided for bond coverage in the amount of \$2,500. At this point, rather than setting aside the March 1989 BLM decision and remanding the case to BLM, having performed the necessary computation and so determined the proper bond amount, we will hereby instruct Alma to obtain a bond, in the required form, in the amount of \$2,500. See Burton O. Barber, 15 IBLA 372, 376 (1974).

Finally, appellants object to the failure of BLM to include an allowance to cover reclamation costs which may be necessary. Thus, they argue that "BLM erred by failing to include an allowance for reclamation of the land subsequent to mining operations" (SOR at 2-3).

To the extent that appellants contend that the amount of the bond should also reflect the amount of money it will take to fully reclaim the land, they are in error. That is not the purpose of a surface protection bond. Such a bond is only intended to compensate the surface owner for the costs of possible damages to crops, tangible improvements, and the value of the land for grazing purposes. See Elmer Silvera, supra at 15; see also United States v. Browne-Tankersley Trust, 98 IBLA 325, 341 (1987). It is not intended to provide for reclamation of the land in the event that the

8/ Similarly, in those situations where, owing to delays in the appraisal process, computation of the initial rental is delayed beyond the first year, a discount is permitted only for those payments which represent payments of future, rather than already accrued, obligations. See Northwestern Colorado Broadcasting Co., supra at 28.

mine operator fails to reclaim the land. Rather, as the record notes, reclamation is the subject of separate bonding requirements. 9/ Appellants' objection on this ground must be rejected.

Accordingly, 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, and Alma is instructed to substitute a bond in the amount of \$2,500 for the bond previously tendered.

James L. Burski
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

9/ Thus, we note that the record clearly indicates that "an additional \$1,500 bond is held by the Colorado Mined Land Reclamation Board to cover the costs of reclamation" and that that Board "will require additional reclamation bonding if the development proceeds past the exploration stage" (Memorandum from District Manager to State Director, dated Jan. 23, 1989, at 1). The reference in the decision of the State Office to reclamation costs must, therefore, be considered to be inadvertently misleading.