

Appeal from decisions of the Arizona State Office, Bureau of Land Management, rejecting in part applications for conveyance of Federal mineral interests.

Affirmed.

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

Under sec. 209(b) of FLPMA and implementing regulations, lands that do not have "known mineral values" may be conveyed to the owner of the surface estate. BLM's decision that the lands possess locatable and fluid leasable minerals that constitute "known mineral values" is properly affirmed on appeal where it is based on a thorough mineral report citing reliable sources, and where the applicants for conveyance fail to meet their burden of showing that it is inaccurate.

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

Under 43 CFR 2720.0-5, land may be properly found to possess "known mineral values" for locatable minerals even if there is no exposure of mineralization at the surface. The presence of minerals under the surface may be established, subject to being disproved by the applicant, by inference from geologic conditions. Where BLM prepares a mineral report relying on authorities that have so established, its finding will be affirmed.

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

An absence of proof of discoveries of valuable mineral deposits under the General Mining Law of 1872 in the vicinity of lands subject to applications for conveyance of Federal mineral interests is not relevant to whether those lands possess "known mineral values" for locatable minerals under 43 CFR 2720.0-5, which establishes an entirely different, and far less stringent, requirement than the "discovery" rule applicable to the validity of mining claims. Thus, the lack of valid claims in the area does not preclude a finding that the lands possess "known mineral values."

4. Federal Land Policy and Management Act of 1976: Reservation and Conveyance of Mineral Interests--Stock-Raising Homesteads

If lands possess "known mineral values," the mineral estate for such lands may nevertheless be conveyed to the record owner of the surface under sec. 209(b) of FLPMA if the reservation of mineral rights in the United States would interfere with appropriate "nonmineral development" of the land, provided that the nonmineral development is a more beneficial use of the land than mineral development. However, use of the surface of lands patented under the Stock-Raising Homestead Act for grazing is not "nonmineral development" under the meaning of the statute.

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

Where applicants for conveyance of retained mineral interest under sec. 209(b) of FLPMA merely assert that there is a chance that homes and businesses will be built on the lands applied for, but submit no proof of imminent development, they have failed to establish that there has been nonmineral development. Allegation, hypothesis, or speculation that appropriate nonmineral development might take place at some future time is not a sufficient basis for conveyance. 43 CFR 2720.0-6.

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

An applicant for conveyance of retained mineral interest is required to cover administrative costs of the application and to pay a deposit against which those costs

may be charged. 43 U.S.C. § 209(b)(3) (1988); 43 CFR 2720.1-3(b)(1). Where applicants do not show that BLM's charges have been excessive, they will not be disturbed on appeal.

Wayne D. Klump, 104 IBLA 164 (1988), modified in part.

APPEARANCES: Wayne D. Klump, Bowie, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Wayne D. Klump, et al. (the Klumps), have appealed from decisions of the Arizona State Office, Bureau of Land Management (BLM), rejecting in part their applications for conveyance of retained Federal mineral interests in lands to which they own the surface estate. ^{1/} The Klumps have sought to obtain the mineral estate to scattered lands located in southeastern Arizona, between Wilcox and the Arizona-New Mexico border.

The Klumps' applications date back to March 17, 1986, when they were filed pursuant to section 209(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1719(b) (1988). Under section 209(b)(1) and (2) of FLPMA, as implemented by Departmental regulations at 43 CFR Part 2720, the Department may convey mineral interests owned by the United States to the record owner of the surface where the surface is in non-Federal ownership if (1) there are no known mineral values in the land,

^{1/} This case involves the following five appeals, concerning the applications indicated in parentheses: Wayne D. Klump, IBLA 91-128 (AZA-21817); John D. Klump, IBLA 91-129 (AZA-21818); John L. Klump, IBLA 91-130 (AZA- 21820); Karry K. Klump, IBLA 91-131 (AZA-21821); and Luther W. Klump IBLA 91-132 (AZA-21822).

or (2) the reservation of 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. 43 U.S.C. §§ 1719(b)(1) and (2) (1988); 43 CFR 2720.0-6.

BLM initially rejected the Klumps' applications, ruling that the lands applied for were "prospectively valuable for mineral deposits," based on a brief memorandum from BLM's Division of Resource Management. The Klumps appealed that rejection, and, by decision dated September 6, 1988, we set it aside and remanded the matter to BLM for readjudication, ruling that the record was inadequate to support a conclusion that the lands possessed "known mineral values" as defined by 43 CFR 2720.0-5(b). Wayne D. Klump, 104 IBLA 164 (1988).

After that decision, BLM met with Wayne Klump to estimate the costs of processing the Klumps' applications. On December 27, 1988, BLM notified them that it would conduct a preliminary field examination prior to estimating the total cost of processing the application. After that examination, BLM would determine which of the lands had obvious "known mineral values" and should be withdrawn from their applications and then provide the Klumps with an estimate of processing the remaining parcels. BLM prepared an estimate of the administrative costs up to that time and billed the Klumps those costs.

Following a delay, BLM published notice of receipt of the Klumps' applications in the Federal Register. 54 FR 49364 (Nov. 20, 1989). 2/ On June 27, 1990, BLM approved a thorough mineral report concerning the lands applied for. BLM detailed the mineralization, including locatable, saleable, solid leasable, and fluid leasable minerals, as well as geothermal energy, both in the vicinity of the lands and on the specific lands applied for by the Klumps. The mineral report recommended that the U.S. Government should (1) retain the locatable mineral estate in most of the lands applied for; (2) convey the saleable mineral estate for all but one parcel; (3) retain the fluid leasable mineral estate only for those lands identified as prospectively valuable for petroleum; and (4) convey all geothermal interests. On December 13, 1990, BLM issued its decisions implementing the recommendations of the mineral report and the Klumps (appellants) appealed.

[1] Under the statute and implementing regulation, lands that do not have "known mineral values" may be conveyed to the owner of the surface estate. 43 U.S.C. § 1719(b)(1) (1988); 43 CFR 2720.0-6 and 2720.1-1(a)(2). BLM concluded that most of the lands applied for by the Klumps do have "known mineral values."

2/ Part of the delay resulted from the Klumps' failure to submit part of the deposit. It appears that BLM's letter to John L. Klump requesting payment may have been misplaced or destroyed in a house fire. The deposit for administrative costs for his application was filed on June 19, 1989. The remainder of the delay seems to have resulted from personnel changes at BLM.

The lands that BLM's mineral report marked for retention of the locatable mineral estate make up most of the lands applied for by appellants and thus are at the center of the dispute here. Those lands are situated around the Dos Cabezas Mountains, and most of them lie to the northwest of the mountains.

BLM's decision that certain of the lands possess locatable minerals that constitute "known mineral values" is based on its mineral report, which states as follows concerning those locatable minerals:

Mineralization and Mining History

Dos Cabezas Mountains

The Dos Cabezas Mountains have traditionally been divided into two mining districts, the Teviston district along the northeast flank of the mountains and the Dos Cabezas district along the southwest flank * * *. Keith, et al. * * * divided the Dos Cabezas into four districts, the Teviston, Silver Camp, Mascot, and Apache Pass; and the U.S. Bureau of Mines (USBM) * * * treated the Dos Cabezas as a single district, the Mascot district. This report will treat the Dos Cabezas as two districts, the Teviston and Dos Cabezas as defined above. Both of these districts were known to contain gold as early as the 1860's although no significant mining activity began until the late 1870's because of Indian hostilities.

The Teviston district is characterized by numerous relatively small mines whereas the Dos Cabezas district is characterized by fewer, somewhat larger mines. Most of the production from these two districts occurred between 1910 through 1955. Mining activity virtually came to a halt in 1970 with the exception of the Gold Prince mine, located in the Dos Cabezas district, which is currently an active mine that has been the main source of gold in the two districts as well as a source of silica flux for copper smelters.

Production records for the two districts is incomplete and generally cover only a few mines during their last decades

of activity. Combined production totals are approximately: 2,000 tons of copper, 700 tons of lead, 19 tons of zinc, 430,000 ounces of silver, 10,000 ounces of gold, and an unknown but probably small amount of [tungsten] and beryllium * * *.

The chief mines in the Dos Cabezas district are the Ivanhoe, Mascot, Dives, Gold Prince, Leroy, Elma, and Mineral Park. Those in the Teviston district are the Buckeye and Silverstrike. As mentioned, most of the workings in the Teviston district are small, unnamed, and long abandoned. These workings were developed primarily in the 1930's, during the depression, and most have been abandoned since the early 1940's. Keith * * * provides descriptions of the mines and prospects around the Dos Cabezas Mountains.

Keith * * * noted, "The known ore deposits of the Dos Cabezas and Teviston mining districts appear to be relatively small, spotty, and low grade veins and contact metamorphic bodies. However, the widely scattered and varied mineralization, and favorable geologic formations and structures [suggest] the possibilities still exist in the area for large, low grade, disseminated copper deposits." It was this second sentence on copper deposits that Loomis originally used to reject the Klumps' conveyance applications * * *. Zelton * * *, however, reported that the U.S. Borax and Chemical Corporation pursued an exploration program for such buried porphyry copper deposits from 1973 through 1975. The corporation drilled in the areas of the Dos Cabezas Peaks, the Mascot Mine, Cooper Peak, and the Elma Mine. No such copper deposits were found and exploration was discontinued.

According to the USBM [Bureau of Mines, U.S. Department of the Interior] * * *, the entire region around the Dos Cabezas Mountains is "moderately favorable" for mineral potential and two relatively small areas within the mountains themselves have "high" mineral favorability. * * * McColly and Anderson * * * noted that these favorable areas "represent known deposits, occurrences, prospects, and areas with geologic features similar to those of known deposits. A report by the U.S. Geological Survey (USGS) * * * concluded that the only area in the region of the Dos Cabezas with a high mineral potential is in the central portion of the Dos Cabezas, in the area of the volcano-plutonic complex * * *. Drewes, et al. * * * said that this complex "is interpreted to be the remnants of a stratovolcano, part of which collapsed to form a brecciated and permeable mass that is known to have acquired moderate concentrations of metals and is interpreted to be a potential target for more extensive mineralization at depth." [Emphasis supplied; references omitted.]

(Mineral Report at 6-7).

BLM delineated lands with mineral potential for locatable minerals as a band approximately 6 to 7 miles wide running from northwest to southeast across the Dos Cabezas Mountains (Mineral Report at 9 and at Fig. 1). That delineation is taken directly from a special report prepared by USBM, Robert A. McColly & Neal B. Anderson, Availability of Federally Owned Minerals for Exploration and Development in Western States: Arizona, 1986, Plate 1 (1987) (McColly & Anderson) (Mineral Report at 8). The lands applied for are within an area described by McColly & Anderson as "moderately favorable," that is, an area "with selected sub-marginal resources, mineral occurrences, and productive areas or deposits. * * * Moderately favorable areas were plotted from mine and prospect locations listed in the [USBM] MILS [Mineral Industry Location System] for selected metallic mineral commodities." Id. at 6.

McColly & Anderson states as follows concerning the methodology they used in reaching the conclusions announced in their report and later adopted by BLM: 3/

Assessment of Mineral Favorability

Those portions of Arizona considered favorable for mineral occurrences are identified and shown on plates 1 and 2. Favorable areas represent known deposits, occurrences, prospects, and areas with geologic features similar to those of known deposits. Criteria used for rating favorability include production data, geologic features, mining information, and professional judgment. Data sources include mining and geologic literature, mineral resource and mining district maps, the Bureau of Mines Mineral Industry Location System (MILS) and Mineral Availability System (MAS), various geologic maps, and input from the mineral industry.

3/ Although McColly & Anderson is not in the record, we have taken official notice of its contents, as provided in 43 CFR 4.24(b).

The classification of areas as less favorable or unknown, moderately favorable, or highly favorable for the presence of mineral deposits, used in this report, is necessarily both generalized and subjective. However, every attempt was made to be as consistent and accurate as possible in defining these areas.

(McColly & Anderson at 3). The report also indicates as follows:

Designation of favorable areas is a subjective process, limited to the availability of data at the time of preparation. Boundaries are not exact and ratings may change with availability of new information. The map must not be construed as an appraisal of the mineral resources on a particular tract of land. Rather, the ratings are an indication of the likelihood that valuable or prospectively valuable mineral deposits may occur in the area.

Id. at Plate 1.

Based on the sources cited in its mineral report, particularly McColly & Anderson, quoted above, BLM found that most of the lands applied for by appellants have known mineral values for locatable minerals. The Department has defined "known mineral values" as "mineral values in lands with underlying geologic formations which are valuable for prospecting for, developing[,] or producing natural mineral deposits. The presence of such mineral deposits in the lands may be known, or geologic conditions may be such as to make the lands prospectively valuable for mineral occurrence." 43 CFR 2720.0-5. In considering whether this standard has been met, BLM is not required to do a mineral examination of the lands in question. See Kenneth C. Pixley, 88 IBLA 300, 301 (1985). A thorough mineral report that

is made part of the record is sufficient. Jerry R. Schuster, 83 IBLA 326 (1984); Denman Investment Corp., 78 IBLA 311 (1984).

Although not unequivocal, BLM's thorough mineral report adequately establishes that the lands here possess "known mineral values" for locatable minerals within the meaning of the regulations. The burden of proving that this finding is inaccurate rests with appellants. Jean Hubbard Waters, 89 IBLA 179, 182 (1985); Robert Gattis, 73 IBLA 92, 96 (1983); Dean A. Clark, 53 IBLA 362, 364 (1981), and cases cited. Although they state their disagreement with the finding that the lands possess known mineral values, appellants have not met that burden.

[2] Appellants point out that they accompanied a BLM geologist on a 2-day site visit and that no evidence of mineralization was seen at the surface of the lands examined. Under the governing regulation, it is not necessary that there be an exposure of mineralization at the surface. Instead, the presence of minerals under the surface may be established, subject to being disproved by the applicant, by inference from geologic conditions. That is what McColly & Anderson's report did, and BLM properly relied on that document.

[3] A mineral report prepared on appellants' behalf and submitted on appeal does not persuade us to reverse BLM. That report appears to rely on the absence of proof of discoveries of valuable mineral deposits in the area

under the General Mining Law of 1872, as amended, 30 U.S.C. § 22 (1988). 4/ It is enough to point out that the regulation in question, 43 CFR 2720.0-5, establishes an entirely different, and far less stringent, requirement than the "discovery" rule applicable to the validity of mining claims. Thus, the lack of valid claims in the area does not preclude a finding that the lands possess "known mineral values." 5/

It remains to determine whether BLM properly determined that some of the lands applied for possess "known mineral values" for fluid leasable minerals. BLM's determination was based on its Oil and Gas Prospectively Valuable Map, which had been revised in December 1987. Appellants made no effort to disprove BLM's determination, and it is therefore properly affirmed.

[4] BLM's determination that the lands possess "known mineral values" does not end the inquiry, as the mineral estate for such lands may nevertheless be conveyed to the record owner of the surface if the reservation of mineral rights in the United States would "interfere with appropriate nonmineral development of the land," provided that the "nonmineral development is a more beneficial use of the land than mineral development." 43 U.S.C. § 1719(b)(1) (1988); 43 CFR 2720.0-6.

4/ Appellants cite only to 30 U.S.C. § 22 (1988).

5/ Although BLM's mineral report refers to mining claims in the area in question that were actively mined, the report does not rely on the presence or absence of a valid discovery under the General Mining Law of 1872, supra. Instead, the report refers to data collected from those mines as the basis for the geologic inference that the area has known mineral values. It is permissible for BLM to use geologic inference to establish known mineral values. See 43 CFR 2720.0-5(b).

BLM's decision states simply that grazing is not in the category of nonmineral development that may be interfered with by mining, and refers to 43 CFR 3814.1, providing that a mineral entryman on a stock-raising homestead is properly held liable for any damage caused to the value of the land for grazing by prospecting for or removal of minerals. Although it cited no authority for that conclusion, we hold that it is supported by the provisions of the statute as viewed in historical perspective and is therefore properly affirmed. 6/

A review of the Act of December 29, 1916, as amended (the Stock-Raising Homestead Act), 43 U.S.C. § 299 (1988), along with the section 5 of the Act of June 21, 1949 (the Open Pit Mining Act), 30 U.S.C. § 54 (1988), compels the conclusion that conflicts between grazing and mineral development have been fully considered by Congress, that these Acts were intended to provide relief for grazers whose grazing operations were negatively affected by mining, and that section 209 of FLPMA does not cover conflicts between mining and grazing.

In section 9 of the Stock-Raising Homestead Act, 43 U.S.C. § 299 (1988), Congress set out the terms of a compromise between development of the mineral estate and protection of the surface estate for grazing

6/ To the extent that our earlier decision in Wayne D. Klump, supra at 167, provided that appellants should be provided an opportunity to show "possible interference with existing uses," and to the extent that "existing uses" could be read to include grazing, it is hereby expressly modified.

purposes. Under that compromise, lands believed to be suitable for mineral development were also opened to homesteading for grazing with the express proviso that the mineral interest would be retained and would remain subject to disposal by the United States. See generally Watt v. Western Nuclear, Inc., 462 U.S. 36, 47-50 (1983). The right to develop the mineral estate was preserved, with an express proviso requiring any mineral developer to compensate the surface owner for "such damages to crops or tangible improvements of the entryman or owner." These damages were limited, and did not cover loss of use of the land.

In 1949, Congress, in the Open Pit Mining Act, 30 U.S.C. § 54 (1988), extended the liability of the mineral developer to include "any damage that may be caused to the value of the land for grazing by * * * prospecting for, mining, or removal of minerals." Damage to use for other purposes was not covered, however. The law has not been subsequently amended. ^{7/} Thus, where nonmineral use of the surface estate is no longer restricted to grazing, but entails (for example) development of lands for suburban housing, the owner of the surface estate is vulnerable, as his right to collect damages under the Stock-Raising Homestead Act and the Open Pit Mining Act is limited to damages to the value of the lands for grazing, which may be substantially less than its value for the nonmineral development. See United States v. Browne-Tankersley Trust, 98 IBLA 325, 337-41 (1987).

^{7/} It is significant that neither 43 U.S.C. § 299 (1988) nor 30 U.S.C. § 54 (1988) were repealed by FLPMA, thus indicating that Congress did not intend to upset the multiple-use concept established by the Stock-Raising Homestead Act.

Passage of section 209(b) of FLPMA is reasonably viewed as providing the surface owner a means to protect himself by allowing him to purchase the mineral estate, where his nonmineral interest has developed beyond grazing. As the Supreme Court observed, "Congress' purpose [in the Stock-Raising Homestead Act] in severing the surface estate from the mineral estate was to encourage the concurrent development of both the surface and the subsurface of the [Stock-Raising Homestead Act] lands." Watt v. Western Nuclear, Inc., *supra* at 50, citing H.R. Rep. No. 35, 64th Cong., 1st Sess., 4, 18 (1916). To allow a homesteader to acquire a mineral interest under section 209 of FLPMA simply because it conflicts with grazing would defeat the demonstrated congressional desire to allow multiple use of the stock-raising homestead lands.

We do not see that section 209(b) of FLPMA changed the balance between grazing and mineral development struck in the Stock-Raising Homestead Act. The critical phrase in FLPMA is "nonmineral development," which necessarily connotes a nonmineral use that is different than the use for which the surface of the lands were originally conveyed. Otherwise, the lands could not be rightly said to have been "developed." This interpretation is tacitly recognized in the regulations, which require that there must be some change in conditions for there to be qualifying nonmineral development. See 43 CFR 2720.0-6. §/

§/ FLPMA preserves to the United States the option of allowing mineral development even where there has been nonmineral development of the surface by allowing disposition of the mineral estate only if the nonmineral development is "more beneficial" than mineral development. Thus, the Government retains the authority to refuse to sell its mineral estate even where there

[5] There has been no nonmineral development of the lands for which appellants seek the mineral estate. Although appellants assert that "[t]here is an 85-90 [percent] chance that homes and businesses will be built on this property," no proof of imminent development has been submitted. Allegation, hypothesis, or speculation that appropriate nonmineral development might take place at some future time is not a sufficient basis for conveyance. 43 CFR 2720.0-6. Thus, it is insufficient to rely on a mere possibility of qualifying nonmineral development.

Appellants present no persuasive argument that BLM's decision should be reversed. They assert that they have paid property taxes on the lands for over 50 years and that it is unreasonable to reserve the mineral estate forever, and they condemn the fact that permits granted by BLM to exploit the mineral estate would put clouds on their title. As discussed above, that decision was not made by BLM, but by the Congress of the United States. In the absence of a legislative amendment, the Department is without authority to alter the current ownership of the mineral estate, except as provided in section 209 of FLPMA. Appellants have not established that they are entitled to purchase the mineral estate under that authority.

Appellants argue that BLM has unduly delayed their application, and that its requests for money from them are "unreasonable, unnecessary, _____"
fn. 8 (continued)
is nonmineral development, if doing so would be in the public interest. It is thus apparent that Congress intended that caution be observed in disposing of the mineral estates in lands such as those partially patented under the Stock-Raising Homestead Act.

unjustified, excessive, and uncalled for." Even assuming that BLM's handling of their application was unreasonably delayed, it is established that the authority of the United States to enforce the public land laws is not lost by delays by its officers in performing their duties. 43 CFR 1810.3(c). Thus, both BLM and this Board are required to enforce the requirement of FLPMA even though appellants' application might have been more promptly adjudicated.

[6] As to BLM's demands for money from appellants, the statute and regulations expressly require that an applicant must cover administrative costs of the application and require payment of a deposit against which those costs may be charged. 43 U.S.C. § 209(b)(3) (1988); 43 CFR 2720.1-3(b)(1). Appellants have not shown that BLM's charges have been excessive.

Appellants point out that they have had experience with mineral exploration companies on their lands that left the land "in a mess," and that they could not stop them or collect damages either. BLM is required to take steps necessary to protect the interests of surface holders, including requiring developers to post adequate bond. See, e.g., Soderberg Rawhide Ranch Co., 63 IBLA 260 (1982). However, mineral development of lands to which surface interests are held under the Stock-Raising Homestead Act is not illegal and may not be prevented simply because it may damage the surface estate.

Appellants request an evidentiary hearing, asserting that they are entitled to such under the due process protections of the Fifth Amendment. Appellants' right to due process is protected by their right to appeal to this Board, which is not a part of BLM, and which therefore provides full, objective review of the legality of its decision. Although the Board has the authority to refer a case to an Administrative Law Judge for an evidentiary hearing in cases where controlling questions of fact are in dispute (43 CFR 4.415), the present case is not appropriate for such action. Although appellants challenge the accuracy of BLM's factual determination that the lands have known mineral values, they have failed to present either any hard evidence or offer of proof on which we can base a holding that the accuracy of BLM's determination is substantially in question.

To the extent not expressly considered herein, appellants' arguments have been considered and 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.

David L. Hughes
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

IBLA 91-128 through 91-132