



NATURAL MINERALS PROCESSING CO.

173 IBLA 278

Decided January 16, 2008



United States Department of the Interior  
Office of Hearings and Appeals  
Interior Board of Land Appeals  
801 N. Quincy St., Suite 300  
Arlington, VA 22203

NATURAL MINERALS PROCESSING CO.

IBLA 2006-224

Decided January 16, 2008

Appeal from a decision of the Las Vegas Field Office, Bureau of Land Management, holding a plan of operations in abeyance pending completion of a mineral examination. N-81469.

Affirmed.

1. Mining Claims: Plan of Operations

Under 43 C.F.R. § 3809.101, consideration of a mining plan of operations may be suspended pending a mining claim validity examination where the materials to be extracted may be common variety minerals.

APPEARANCES: Rick Lawton, Esq., Las Vegas, Nevada, for Natural Minerals Processing Company; Emily Roosevelt, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE M<sup>C</sup>DANIEL

Natural Minerals Processing Company (Natural Minerals) has appealed an April 21, 2006, decision of the Las Vegas Field Office, Bureau of Land Management (BLM), following receipt of a decision of the State Director, Nevada State Office, BLM, denying Natural Minerals' request for State Director Review (SDR) of the April 21, 2006, decision. The Field Office, citing 43 C.F.R. § 3809.101(a), had ruled that it would hold Natural Minerals' plan of operations, N-81469, in abeyance pending completion of a mineral examination, grounding its action on an assessment that the alluvial material Natural Minerals proposed to mine might constitute a common variety mineral. The State Director declined to review the decision, noting that a Solicitor's Opinion cited by Natural Minerals in its request clearly

provides for the action taken by the Field Office. Natural Minerals has appealed pursuant to 43 C.F.R. § 3809.801(a)(2).<sup>1</sup>

### *Background*

On February 9, 2006, Natural Minerals submitted a plan of operations for proposed activities on 10 mining claims located near Jean, Nevada.<sup>2</sup> On March 3, 2006, BLM acknowledged receipt of the plan and requested additional information required by regulation. Natural Minerals provided the requested information on March 17, 2006, in the form of a revised plan. On April 6, 2006, BLM acknowledged receipt of that plan and announced that it satisfied the requirements of the surface management regulations at 43 C.F.R. § 3809.401. BLM also stated it would commence the environmental review process, advising Natural Minerals that it was not yet authorized to commence action on the public land under the plan. Soon thereafter, on April 21, 2006, BLM issued the decision at issue here, stating: “As part of the [environmental] review, the BLM has determined that material mined for [use in a commercial fertilizer product] may constitute a common variety material.” BLM cited surface management regulation 43 C.F.R. § 3809.101(a), which states: “On mining claims located on or after July 23, 1955, you must not initiate operations for minerals that may be ‘common variety’ minerals, as defined in § 3711.1(b) of this title, until BLM has prepared a mineral examination report . . . .” BLM concluded that Natural Minerals’ plan would be held in abeyance pending the outcome of the mineral examination.<sup>3</sup>

### *Denial of SDR*

On May 23, 2006, Natural Minerals filed a request for SDR, arguing that the decision to hold the plan in abeyance is contrary to existing law as explained in Solicitor’s Opinion M-37012, *Legal Requirements for Determining Mining Claim*

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<sup>1</sup> Under 43 C.F.R. § 3809.801(a)(2), if the State Director decides not to provide SDR, the party requesting SDR may appeal the original BLM decision to the Board “within 30 calendar days of the date you receive the State Director’s decision not to review.” See *Ferrell Anderson*, 171 IBLA 289, 290-91 (2007).

<sup>2</sup> The 10 claims, NMC 849210, NMC 851467, NMC 869883, NMC 869884, NMC 869885, NMC 869886, NMC 869946, NMC 869947, NMC 869954, and NMC 869955 are located within the following townships: T. 24 S., R. 59 E.; T. 25 S., R. 59 E.; and T. 24 S., R. 60 E., Mount Diablo Meridian.

<sup>3</sup> BLM further advised Natural Minerals that BLM would apply 43 C.F.R. § 3800.5(b), which provides for the collection of fees to perform the mineral examination, and would soon prepare an estimate of such costs. Upon receipt of the requested fees, BLM would schedule the exam.

*Validity Before Approving a Mining Plan of Operations* (Nov. 14, 2005). Natural Minerals expressed concern that “it was not until after [it] submitted all requested information and was notified that the plan was complete[, that it was] faced with a ‘Common Variety’ challenge.” Request at 4-5. Natural Minerals asserted that it had invested substantial money and time to research and document this plan of operations and argued that such information was readily available to BLM to use in satisfying its concerns. Natural Minerals asked that BLM continue to review the plan. *Id.* at 5.

In the decision denying SDR, the State Director set forth the following explanation without further elaboration: “The Solicitor opinion you cite clearly states in the footnote found on the third page: ‘The Department regulations also disallow mining claimants from beginning mining operations for minerals that may be “common variety” minerals until after [BLM] has determined that the minerals are an uncommon variety 43 C.F.R. 3809.101.’”

#### *Issue on Appeal*

In its statement of reasons for appeal (SOR), Natural Minerals argues that, contrary to existing law, BLM arbitrarily decided to suspend processing of the plan of operations until the common variety examination is completed. Appellant asserts that its valid mining claims confer the right to pursue mining operations under the mining law. Appellant contends that the Department has concluded that consideration of a plan of operations should not be suspended, even where a validity examination is warranted. SOR at 5. In addition, Natural Minerals argues that BLM must continue processing the submitted plan if the claimant is willing to establish an escrow account as described in 43 C.F.R. § 3809.101(b). *Id.* at 5-8.

In its answer BLM argues that 43 C.F.R. § 3809.101(a) specifically applies to materials that may be common variety in nature, and thus authorizes the suspension of consideration of the plan of operations. BLM argues that appellant has not established that any of the exceptions to the suspension of plan consideration under subpart (b) of the regulation apply here. BLM further contends that the Solicitor’s Opinion and Board decisions cited by appellant do not pertain to common variety materials and therefore do not undermine BLM’s decision to hold the plan in abeyance pending a common variety determination. Answer at 3. *Id.*

BLM based its decision to hold in abeyance consideration of the mining plan of operations upon 43 C.F.R. 3809.101(a), which states that an operator “must not initiate operations for minerals that may be ‘common variety’ minerals until BLM has prepared a mineral examination report.” Appellant has not shown error in BLM’s application of this regulation to Natural Minerals’ plan of operations.

*Solicitor's Opinion and Related Cases*

Natural Minerals cites a Solicitor's Opinion and two Board decisions in support of its contention that BLM may not hold consideration in abeyance. In Solicitor's Opinion M-37012, issued November 14, 2005, Solicitor Wooldridge states that the "Decisions of the Department . . . recognize that no law requires that the Secretary determine mining claim or mill site validity before approving a plan of operations on lands open to entry under the Mining Law." M-37012 at 3. *Id.* at 5. Appellant interprets this conclusion to mean that a plan of operations should not be suspended to await a validity examination. However, as noted by the State Director, the Solicitor recognized that the regulations "also disallow mining claimants from beginning mining operations for minerals that may be 'common variety' until after BLM has determined that the minerals are an uncommon variety." *Id.* at 3 n.2.

As to the cases cited by appellant to support its contention that BLM may not hold the plan of operations in abeyance, the Board held in *Pass Minerals, Inc.*, 151 IBLA 78, 87 (1999), that the pendency of a validity examination is not a proper basis for suspending consideration of a mining plan of operations, and in *Mount Royal Joint Venture*, 153 IBLA 90, 96 (2000), that the pendency of a mining claim validity examination, without more, is not a proper basis for suspending consideration of a mining plan of operations. However, both cases predated the promulgation of 43 C.F.R. § 3809.101, 65 Fed. Reg. 70112 (2000), and neither presented a common variety issue. Subsequent cases citing *Pass Minerals* and *Mount Royal* have not involved the application of this regulation. *See, e.g., United States v. Pass Minerals, Inc.*, 168 IBLA 115, 121 (2006) (a mining contest where the issue was suspension of operations under the plan, not the consideration of the plan); *Western Shoshone Defense Project*, 160 IBLA 32, 57 (2000) (the presence of a discovery was in issue, but the plan of operations did not involve a common variety material). We find that the two cases cited by Natural Minerals provide no guidance as to the applicability of section 3809.101 to consideration of a mining plan of operations where common variety minerals may be involved.

*Applicability of 43 C.F.R. § 3809.101(a)*

[1] The regulation 43 C.F.R. § 3809.101 asks the question, "What special provisions apply to minerals that may be common variety minerals, such as sand, gravel, and building stone?" It answers the question:

(a) *Mineral examination report.* On mining claims located on or after July 23, 1955, you must not initiate operations for minerals that may be "common variety" minerals, as defined in § 3711.1(b) of this title, until BLM has prepared a mineral examination report, except as provided in paragraph (b) of this section.

It is therefore quite clear, as the Solicitor stated, that a mining claimant is precluded, except under certain options in section 3809.101(b), from beginning mining operations for minerals that may be common variety until after BLM has determined that the minerals are an uncommon variety. Thus, BLM may, under the express authority of the regulation, delay consideration of the plan of operations until an examination is made. 65 Fed. Reg. 70027 (Nov. 21, 2000). Moreover, even if BLM determines that the mineral in question is an uncommon variety, it may not approve the plan of operations if it also concludes, as a result of its mineral examination, that there is no discovery of a valuable mineral deposit.

*Applicability of 43 C.F.R. § 3809.101(b)(3)*

After the State Director denied review, Natural Minerals submitted a request on June 21, 2006, that BLM continue to process the plan of operations subject to establishment of an escrow account under 43 C.F.R. § 3809.101(b)(3).<sup>4</sup> This subsection enumerates the circumstances under which limited operations may be authorized on an interim basis while waiting for a mineral examination report.

(b) *Interim authorization.* Until the mineral examination report described in paragraph (a) of this section is prepared, BLM will . . . approve a plan of operations for the disputed mining claim for —

. . . .

(3) Operations to remove possible common variety minerals if you establish an escrow account in a form acceptable to BLM.

43 C.F.R. § 3809.101(b).

Natural Minerals asserts in its SOR that the process in subsection (b)(3) requires BLM to allow further processing of the plan of operations. We find that for purposes of this appeal an escrow account was neither requested nor established by Natural Minerals at the time of BLM's initial determination and the State Director's denial. Thus, BLM was acting in accordance with 43 C.F.R. § 3809.101(a) when it decided to hold the plan of operations in abeyance pending the examination report. As BLM's action concerning the escrow account was not appealed, we have no jurisdiction to determine whether BLM applied the regulation correctly. We therefore affirm the Field Office decision.<sup>5</sup>

<sup>4</sup> Natural Minerals made this request in conjunction with a request that the State Director reconsider his denial of review to apply this section.

<sup>5</sup> With respect to subsection (b), we note that the opportunity remains available to  
(continued...)

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
R. Bryan McDaniel  
Administrative Judge

I concur:

\_\_\_\_\_/s/\_\_\_\_\_  
Lisa Hemmer  
Administrative Judge

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<sup>5</sup> (...continued)  
appellant to pursue this option with BLM, as subsection (b) directs that “BLM *will . . . approve* a plan of operations for the disputed mining claim for . . . [o]perations to remove possible common variety minerals if [the claimant/operator] establish[es] an escrow account in a form acceptable to BLM.” (Emphasis added.)