



LAS CRUCES TRANSIT-MIX, INC.

183 IBLA 52

Decided September 28, 2012



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

LAS CRUCES TRANSIT-MIX, INC.

IBLA 2012-62

Decided September 28, 2012

Appeal from a decision by the District Manager, Las Cruces District (New Mexico), Bureau of Land Management, granting a right-of-way to the Las Cruces Public School District #2 Board of Education. NMNM 127590.

Affirmed; Petition for Stay Denied as Moot.

1. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Mining Claims: Possessory Right--Rights of
Way: Generally

Section 501(a) of the Federal Land Policy and Management Act of 1976 grants the Secretary of the Interior discretionary authority to issue rights-of-way. A claimant with a valid mining claim that was located prior to July 23, 1955, has an exclusive right of possession to mine the claim, and the claimant's express permission is required before the Department may grant a right-of-way over such a claim.

2. Federal Land Policy and Management Act of 1976:
Rights-of-Way--Mining Claims: Possessory Right--Rights of
Way: Generally

A claimant's possessory interest in a Federal mining claim is property in the fullest sense and may be condemned and taken in eminent domain proceedings for public purposes pursuant to State law. A decision granting a right-of-way over an unpatented mining claim located prior to July 23, 1955, will be affirmed where the claimant's exclusive possessory interest in the surface

where that right-of-way grant is located has been condemned in a State court proceeding and the record shows BLM considered all relevant factors.

APPEARANCES: Kathryn Brack Morrow, Esq., Cheyenne, Wyoming, for appellant; Benjamin Silva, Jr., Esq., and Robert L. Lucero, Esq., Albuquerque, New Mexico, for Intervenor Las Cruces Public Schools; and Theresa Copeland, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE JACKSON

Las Cruces Transit-Mix, Inc. (LCTM), has filed a consolidated notice of appeal, stay petition, and statement of reasons (SOR) challenging the December 5, 2011, decision by the District Manager, Las Cruces District (New Mexico), Bureau of Land Management (BLM), that granted a right-of-way (ROW) to the Las Cruces Public School District #2 Board of Education (LCPS).¹ BLM granted this ROW only after a New Mexico State court issued a permanent order of entry in favor of LCPS in an eminent domain proceeding to condemn LCTM's interest in less than 0.138 acres of its unpatented mining claim. For the reasons discussed below, we affirm BLM's decision on appeal and deny appellant's petition for a stay as moot.

Background

LCTM holds an unpatented placer mining claim that was located for common variety mineral materials on August 10, 1954 (NMNM 75318), in what are now Lots 17 and 18, NW $\frac{1}{4}$ N $\frac{1}{2}$ sec. 23, T. 23 S., R. 2 E., New Mexico Principal Meridian, Doña Ana County, New Mexico. The southeast corner of Lot 17 is overlain by Dripping Springs Road, a two lane paved road immediately west of its intersection with the Sonoma Ranch Road, which runs along that lot's eastern boundary.² While constructing Centennial High School, which is just north of LCTM's mining claim, LCPS sought to purchase LCTM's interest in nearly 0.14 acres (5,994 square feet) of its claim at the southeast corner of Lot 17. When they were unable to reach agreement on a price, LCPS filed a Petition for Condemnation and Application for Preliminary Order on October 11, 2011, Administrative Record (AR) Tab B (Condemnation Petition), in New Mexico State District Court pursuant to special procedures set forth in New Mexico Statutes Annotated 1978 (NMSA), §§ 42-2-1

¹ We granted LCPS' motion to intervene by Order dated Jan. 5, 2012. It then separately responded to the SOR (LCPS Answer) and to the stay petition.

² Sonoma Ranch Road also overlaps part of Lot 17 (1.81 acres) and is currently paved; appellant voluntarily relinquished its interest to that acreage in May of 2010.

through 42-2-24.³ See Condemnation Petition at ¶¶ 6-9, 12, 15 (citing Affidavit of Stan Rounds, LCPS Superintendent).⁴

The Condemnation Petition states that LCTM holds Federal mining claim NMNM 75318, and while BLM is the owner of the fee underlying that claim, LCPS represented that BLM was not opposed to LCPS condemning a portion of appellant's possessory interest in that claim. Condemnation Petition at ¶¶ 11-13. After LCPS posted a \$24,000 surety bond, which represented the appraised value of appellant's interest in those lands, the State court entered a Preliminary Order of Entry in favor of LCPS on October 11, 2011. AR Tab C; *see supra* note 3.

LCPS met with BLM to discuss intended improvements to Dripping Springs Road and the intersection with Sonoma Ranch Road on October 18, 2011, explaining that these improvements would be within the area sought in its condemnation action and would not extend beyond Doña Ana County's unadjudicated claim to a 60-foot wide ROW under R.S. 2477.⁵ AR Tab D. BLM responded that since this R.S. 2477

³ Under New Mexico law, "state" is defined as "any commission, department, institution, bureau or agency thereof as well as all political subdivisions of the state," which includes LCPS as it is a political subdivision of the State for the administration of its public schools and therefore authorized to acquire, "either temporarily or permanently, public or privately owned lands, real property *or any interests therein*, including water rights or any easements deemed necessary or desirable for present or future public road, street or highway purposes by gift, agreement, purchase, exchange, condemnation or otherwise." NMSA §§ 42-2-2, 42-2-3.A (emphasis added); *see* NMSA §§ 22-1-2.R, 22-5-4.F. In such a proceeding, the petitioner may enter into possession of the property to be condemned as soon as it files a condemnation lawsuit and posts an appropriate surety bond. *See* NMSA §§ 42-2-5.A, 42-2-6.A.

⁴ Specifically, LCPS sought to widen and make improvements to the intersection of Dripping Springs and Sonoma Ranch Roads for better access to Centennial High School, which was slated to open in August 2012. *See* Rounds Affidavit at ¶¶ 5, 7, 9, 11.

⁵ Section 8 of the Act of July 26, 1866, 43 U.S.C. § 932 (1970), commonly referred to as R.S. 2477, granted ROWs "for the construction of highways over public lands, not reserved for public uses," and while it was repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94-579, 90 Stat. 1786, 2793 (1976), valid existing rights established prior to FLPMA were preserved by section 701. *See* 43 U.S.C. § 1701 note (a) (2006). R.S. 2477 ROWs require "no administrative formalities," as there is "no entry, no application, no

(continued...)

ROW was unadjudicated, any improvements beyond the road's current footprint would require an ROW over its underlying Federal lands. *Id.* LCPS then applied for an ROW on October 20, 2011,⁶ which BLM serialized as NMNM 127590. AR Tab E.

BLM responded to the LCPS application by conducting a field examination, preparing a compliance report, and determining that this proposed ROW was subject to a categorical exclusion (CX) from environmental review pursuant to regulations and procedures implementing section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (2006).⁷ AR Tabs F, G; *see* 40 C.F.R. §§ 1501.4, 1507.3(b), 1508.9; Departmental Manual at 516 DM 2.3, 516 DM 11.9E(16); BLM NEPA Handbook (H-1790-1) at E(12); DOI-BLM-NM-L000-2012-0017-CX (undated); *see, e.g., Oregon Natural Desert Association*, 174 IBLA 26, 29-30 (2008). BLM deferred further action on this ROW application, pending the State court's issuance of a permanent order of entry in favor of LCPS.

LCPS moved the State court for a permanent order of entry, which was heard and granted over objection by LCTM on November 23, 2011. SOR Ex. 14. The court ruled it would enter a permanent order of entry and that “[a]ll subsequent proceedings in this matter will [a]ffect the amount of compensation and the just value issues that have been raised [by the parties].” *Id.* at 16. On November 23, 2011, the Permanent Order of Entry adjudged and decreed that LCPS “be and hereby is awarded an unpatented mining claim interest in and to the subject Corner Parcel

⁵ (...continued)

license, no patent, and no deed on the federal side [and] no formal act of public acceptance on the part of the states or localities in whom the right was vested.” *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 741 (10th Cir. 2005); *see, e.g., Doyon, Limited*, 181 IBLA 148, 153-54 (2011). Dripping Springs Road is apparently located on a route that has been used by the public for over 100 years, but there has yet to be an adjudication of that ROW claim under R.S. 2477. *See* LCPS Response to Stay Petition at 2.

⁶ LCPS filed its application pursuant to FLPMA section 501(a), 43 U.S.C. § 1761(a)(2), 6) (2006), and its implementing regulations, 43 C.F.R. Part 2800, which grants the Secretary, and BLM by Secretarial delegation, the discretionary authority to issue an ROW for roads and utilities over, upon, under, or through the public lands.

⁷ The action described in that determination was for the authorization of an ROW over roughly 0.14 acres in the southeast corner of Lot 17, which would “include paving 4 driving lanes, appropriate drainage, curb, gutter, guard rail, delineation, and lighting.” Tab G at 1. Although utilities would be placed under the road, a “ROW for these utilities would be applied for to BLM separately.” *Id.*

. . . in which [LCTM] claims an interest” and a “temporary licence to enter on such of [LCTM]’s remaining adjacent land as is necessary for the purpose of constructing the road project.” AR Tab H at 2. In addition, LCTM was “restrained from hindering or interfering with the removal of any and all encroachments upon the property involved, the occupancy and control of the premises, including any rights-of-way, by [LCPS], and from interfering with the work for school purposes described in the Petition.” *Id.* LCTM filed with the State court a Motion for Reconsideration and Stay of Permanent Order of Entry, wherein it claimed that court did not have the authority to condemn a Federal mining claim, but the State court denied its motion on February 16, 2012. *See* SOR Ex. 6 at 4-9.

BLM granted a 30-year ROW to LCPS by decision dated December 5, 2011, authorizing it “to construct, operate, maintain, and terminate a road improvement project at the intersection of Dripping Springs road, and Sonoma Ranch Blvd. needed to enhance the safety of this intersection on public lands described” in Lot 17. AR Tab 5 at 1. Recognizing that this grant was dependent on action in the State court eminent domain proceeding, BLM included a stipulation specifying that if the preliminary order of entry was “rescinded or not made permanent, then BLM ROW NMNM127590 will be vacated.” *Id.* at 8. Appellant timely appealed from BLM’s decision.

Discussion

[1] LCTM contends BLM erred in giving effect to the State court order condemning and taking a portion of its Federal mining claim so as to grant this ROW. As we have held on numerous occasions for mining claims located before July 23, 1955, the claimant has a right of exclusive possession to mine the claim, and its express permission is required before BLM may grant a ROW over such a claim. *See, e.g., Austin Shepard*, 178 IBLA 224, 235 (2009); *Nevada Pacific Mining Co.*, 164 IBLA 384, 390-92 (2005), and cases cited; *see also Silbrico Corp. v. Ortiz*, 878 F.2d 333, 335 (10th Cir. 1989). BLM and LCPS concede appellant has a property interest under its mining claim, but they contend that interest was condemned and taken pursuant to State law and authority, which enabled BLM to grant this ROW under FLPMA. BLM has broad discretion under FLPMA to grant or deny an ROW, and this Board will not disturb its action unless we find it exceeded its lawful authority or is clearly wrong. *See Union Telephone Company, Inc.*, 173 IBLA 313, 327 (2008). An appellant bears the burden of showing by a preponderance of the evidence that BLM erred in granting an ROW. *Wiley F. Beaux*, 171 IBLA 58, 66 (2007). As discussed below, appellant has not met its burden in this case.

[2] The only issue here presented is whether BLM may properly issue an ROW over an unpatented mining claim following a State court order of condemnation

taking that part of a Federal mining claim that will be subject to the ROW.⁸ The Supreme Court has long held that a Federal mining claim is property in the fullest sense, which may be mortgaged and foreclosed upon, taxed and sold for unpaid taxes, executed upon to enforce a judgment debt, sold, transferred, or inherited under State law without affecting any interest held by the United States. *See, e.g., Forbes v. Gracey*, 94 U.S. 762, 766-67 (1876); *Elder v. Wood*, 208 U.S. 226, 232 (1908); *Bradford v. Morrison*, 212 U.S. 389, 395-95 (1909); *Wilbur v. United States ex rel Krushnic*, 280 U.S. 306 (1930).⁹

It is equally clear that private property may be condemned and taken for public purposes by a State pursuant to its sovereign authority and that States have long asserted their right of eminent domain to condemn interests in Federal mining claims. *See Kelo v. City of New London*, 545 U.S. 469 (2005); *Jacobson v. Memmott*, 354 P.2d 569 (Utah 1960); *State v. Tracy*, 257 P.2d 860 (Ariz. 1953); *People v. Jones*, 155 P.2d 71 (Cal. App. 1945); *Las Vegas & Tonopah R.R. v. Summerfield*, 129 P. 303 (Nev. 1912); *People v. District Court of Pitkin County*, 17 P. 298 (Colo. 1888);

⁸ We here assume that LCTM's appeal involves a valid mining claim and make no finding on its validity, which may be challenged at any time until patent issues. *See, e.g., Cameron v. United States*, 252 U.S. 450, 460 (1920) ("the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until legal title has passed"); *Hall v. United States*, 84 Fed. Cl. 463, 470-71 (2008); *United States v. Fisher*, 115 IBLA 277, 284 (1990) (where title "remains in the United States, the Secretary of the Interior retains plenary authority to redetermine any issues relating to the validity of the claims").

⁹ As explained in *Wilbur*, 280 U.S. at 316-17:

The rule is established by innumerable decisions of this Court, and of state and lower federal courts, that, when the location of a mining claim is perfected under the law, it has the effect of a grant by the United States of the right of present and exclusive possession. The claim is property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited without infringing any right or title of the United States. The right of the owner is taxable by the state; and is "real property," subject to the lien of a judgment recovered against the owner in a state or territorial court. *Belk v. Meagher*, 104 U.S. 279, 283 [(1881)]; *Manuel v. Wulff*, 152 U.S. 505, 510-511 [(1894)]; *Elder v. Wood*, 208 U. S. 226, 232; *Bradford v. Morrison*, 212 U.S. 389. The owner is not required to purchase the claim or secure patent from the United States; but, so long as he complies with the provisions of the mining laws, his possessory right, for all practical purposes of ownership, is as good as though secured by patent.

Robertson v. Smith, 1 Mont. 410 (1871); see also *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963) (Federal mining claim); *United States v. Etcheverry*, 230 F.2d 193, 195 (10th Cir. 1956); *Hall v. United States*, 84 Fed.Cl. 463, 470-71 (2008); *Bush v. United States*, 58 Fed. Cl. 123, 125 (2003); *United States v. Friedland*, 152 F. Supp. 2d 1234, 1245-46 (D. Colo. 2001); *Clark County v. Nevada Pacific Co. Inc.*, 172 IBLA 316, 319 (2007); *United States v. Rodgers*, 32 IBLA 77, 87 (1977); *United States v. Rigg*, 16 IBLA 385, 395 (1974); see generally *American Law of Mining*, 2nd Ed., § 36.04.

Appellant has cited no case holding that a Federal mining claim cannot be condemned and taken by a State pursuant to State law.¹⁰ Nor has it identified a conflict between a State taking a part of its mining claim and Federal law (we are aware of none). See *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580 (1987) (state regulation of Federal land does not automatically conflict with the Property Clause and may be enforced so long as it does not conflict with Federal law); *Virgin v. County of San Luis Obispo*, 201 F.3d 1141, 1143 (9th Cir. 2000) (citing *Shulthis v. McDougal*, 225 U.S. 561, 569-70 (1912) (condemning a private right derived from Federal law does not arise under Federal law unless it “substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends”)); *Helmut Laue*, 59 IBLA 316, 318 (1981). Absent a showing that such a conflict exists, neither we nor BLM may properly ignore the effect of a State court Order of Permanent Entry and intrude upon its authority to decide that dispute between private parties under State law.¹¹ We therefore find appellant has not met its burden to show error in the granting of this ROW based on the State court order that condemned and took appellant’s possessory interest in part of its mining claim.¹²

¹⁰ Appellant correctly asserts that the State court cannot take the United States’ future reversionary interest in this mining claim, SOR at 7, but no such taking occurred in this case, as the record shows that court condemned and took only LCTM’s present possessory interest under its mining claim, not the United States’ future interest in its underlying lands, which remains intact regardless of that taking of appellant’s property interest. See Permanent Order of Entry at 2; *Reoforce, Inc.*, 176 IBLA 319, 323 (2009); *Frank E. Sieglitz*, 170 IBLA 286, 291 (2006).

¹¹ If, however, that order is rescinded, modified, or reversed on appeal, a different circumstance would be presented. Until such occurs, we defer to the State court’s application of State law and authority to that dispute.

¹² As appellant lacked an interest to that part of its claim taken by the State, wherein this ROW is located, we find BLM was under no duty to “consult” with LCTM before granting this ROW to LCPS under FLPMA. See SOR at 11.

We next address appellant's other errors identified in its SOR, and in doing so, recognize that BLM has broad discretionary authority to approve or disapprove an ROW application under FLPMA. A BLM decision, made in the exercise of its discretionary authority, will generally be overturned by the Board only when it is not supported on any rational basis. It is appellant's burden to demonstrate, by a preponderance of the evidence, that BLM committed a material error in its factual analysis or that the decision is not supported by a record showing it gave due consideration to all relevant factors and acted on the basis of a rational connection between the facts found and the choice made. *Graham Pass, LLC*, 182 IBLA 79, 87 (2012), and cases cited. We find this record amply shows BLM considered the factors set forth in 43 C.F.R. § 2804.25(d) before exercising its discretionary authority to grant this ROW and that there is a rational connection between the facts found and the choice it made.

LCTM contends it is impossible for it to know where this ROW is located and how it will affect its operations because the ROW grant refers to the County's unadjudicated claim to a 60-foot wide ROW under R.S. 2477, and the survey attached to the FLPMA grant does not identify the boundaries of its mining claim. SOR at 11-12. While this claim to an R.S. 2477 ROW is yet to be adjudicated, the survey attached to the ROW grant clearly identifies the extent of the County's claim, wherein this grant is located. Moreover, the State court order incorporates by reference a drawing and metes and bounds description of the lands condemned for the construction of road improvements to access the Centennial High School. Permanent Order of Entry at 2; see Condemnation Petition Ex. C. We are unpersuaded that appellant was inadequately informed of where BLM's ROW grant is located, and note LCTM is free to have its claim surveyed at its own expense at any time.

Appellant also asserts BLM did not comply with NEPA because its use of a CX "is not documented, nor [is] a particular categorical exclusion identified." SOR at 12. As above-discussed, BLM issued a written determination identifying the CX it relied on, which is in the record and unaddressed by LCTM. See AR Tab G. We reject appellant's NEPA claim as lacking a basis in fact.¹³ To the extent the parties made arguments not expressly addressed herein, we have considered and found them without merit in fact or law.

¹³ Appellant concedes this NEPA claim is "ultimately irrelevant," SOR at 12; we agree.

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 granting a ROW issued on December 5, 2011, is affirmed, and the petition for stay is denied as moot.

_____/s/_____
James K. Jackson
Administrative Judge

I concur:

_____/s/_____
T. Britt Price
Administrative Judge