



SHAMROCK METALS, LLC

184 IBLA 1

Decided May 20, 2013



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

SHAMROCK METALS, LLC

IBLA 2012-147

Decided May 20, 2013

Appeal from a decision of the Taos Field Office, Bureau of Land Management, finding a mining notice extension insufficient and requiring the filing of a plan of operations.

Motion to Vacate and Remand Granted.

1. Administrative Appeals--Administrative Authority: Generally--Administrative Procedure: Adjudication--Appeals: Generally--Board of Land Appeals--Federal Employees and Officers: Authority to Bind Government--Regulations: Generally

The Board of Land Appeals has the authority to review agency decisions with a *de novo* standard of review. In exercising that authority, the Board is not required to accept as precedent erroneous decisions made by the Secretary's subordinates.

2. Estoppel--Federal Employees and Officers: Authority to Bind Government

Estoppel is an extraordinary remedy, especially when it involves the public lands. And, an assertion of estoppel fails where the asserting party claims a right not authorized by law.

3. Administrative Review: Generally--Appeals: Generally--Rules of Practice: Appeals: Generally

There is no particular form to a decision. But, where a BLM letter both prohibits certain actions and requires other actions, such a letter is a final decision subject to appeal.

4. Mining Claims: Operations Conducted Under Notices--Mining Claims: Plan of Operations--Regulations: Applicability

BLM's pre-2001 surface management regulations continue to apply only to notice-level mine operators identified in a notice on file with BLM on January 20, 2001, who have met all applicable requirements. Such "grandfathered" status is not transferrable, as any operator who was not so identified, even a direct successor-in-interest conducting the same operations, is a "new operator" and is subject to the current surface management regulations in 43 C.F.R. Subpart 3809.

APPEARANCES: Joseph E. Manges, Esq., Santa Fe, New Mexico, for appellant; Frank Lupo, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Bureau of Land Management.

OPINION BY CHIEF ADMINISTRATIVE JUDGE H. BARRY HOLT

Shamrock Metals, LLC (Shamrock), has appealed from and petitioned for a stay of a March 9, 2012, decision of the Taos (New Mexico) Field Office, Bureau of Land Management (BLM), regarding a notice extension for Shamrock's operations at the Northstar Mine, NMNM 98045. In response to our order requiring supplemental briefing, BLM filed an Agency Brief in which it requested that the Board vacate and remand its decision. Because we conclude that Shamrock's operation of the mine is subject to current surface management regulations, not the pre-2001 regulations applied by BLM, we vacate BLM's decision and remand the case for further action.

Background

Shamrock is a successor-in-interest to Northstar 1991 Family Living Trust (Northstar), whose notice-level mining operations at the Northstar Mine purportedly continued operations commenced by other parties in the 1970's. Statement of Reasons (SOR) at 1-2. Northstar operated through 2001, when BLM's surface management regulations were amended. IBLA Order dated Aug. 21, 2006, at 3 (Northstar Stay Order); *see* 43 C.F.R. Subpart 3809; 65 Fed. Reg. 69997 (Nov. 21, 2000). Prior to the amendment, notice-level operations could proceed without authorization by BLM if the surface disturbance was less than 5 acres in 1 calendar year, whereas after the amendment, only exploration activities, and *not* mechanized mining operations, could proceed without BLM approval. Northstar Stay Order at 3; 43 C.F.R. § 3809.21(a).

An entity such as Northstar, operating under a notice filed prior to January 20, 2001, could continue notice-level operations under the pre-2001 regulations (including operations beyond mere exploration) without BLM approval for 2 years following that date, and could extend the notice every subsequent 2 years. 43 C.F.R. § 3809.300(a). In this case, Northstar was "grandfathered" into compliance under

the pre-2001 regulations, so long as it met the requirements at § 3809.300(a). Northstar continued its operations and continued to file notice extensions through 2005.

In this appeal, Shamrock asserts that it and its predecessors (successors to Northstar) filed further notice extensions in 2007 and 2009. SOR at 4. Indeed, Shamrock has submitted to the Board copies of notice extensions filed by North American Metal LLC (dated September 26, 2007) and Shamrock Metals, LLC (dated October 1, 2009). SOR Exs. 13, 14.

On September 28, 2011, Shamrock filed another notice extension, to which BLM responded by letter dated October 11, 2011, determining that the notice extension was incomplete. Following further correspondence, BLM sent Shamrock a letter dated March 9, 2012 (March Letter), in which it deemed Shamrock's notice extension insufficient in the absence of certain improvements. March Letter at unpag. 1-3. BLM applied its pre-2001 regulations, but also indicated that the required improvements would result in Shamrock's operations disturbing more than 5 acres, which thus would terminate the "grandfathered" notice-level operations and require submission and approval of a mining plan of operations. *Id.* at unpag. 2. Shamrock timely appealed and requested a stay of the decision.

By Order dated March 20, 2013, the Board requested briefing from the parties on the issue of whether Shamrock's operations were subject to the pre-2001 regulations or the current surface management regulations under 43 C.F.R. Subpart 3809.

Analysis

Whether the Board is Bound by BLM's "Admissions"

As a preliminary matter, Shamrock argues that BLM has consistently admitted that Shamrock's notice-level operations are subject to the pre-2001 surface management regulations, that these admissions are binding on BLM, and that this issue "has been resolved by virtue of the admission." Shamrock's Brief at 1-3. Shamrock implies that, regardless of the Board's interpretation of the applicable regulations, BLM's previous interpretation of them is binding and controlling on the Department in this matter. *See id.* at 3. We disagree.

[1] The Board exercises *de novo* review authority in administrative appeals.

[T]he law fairly establishes that the "IBLA has *de novo* review authority over [the] decisions" of subordinate decision-makers. *IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1009 (10th Cir. 2000). Particularly instructive is 43 C.F.R. § 4.1, which provides

that the IBLA, as a component of DOI's Office of Hearings and Appeals, "is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary." . . . Because the IBLA can authorize independent fact-finding by an ALJ and thereby assume the power of de novo review, the IBLA has no obligation to defer to the . . . [Bureau decision maker].

Aera Energy LLC v. Salazar, 691 F. Supp. 2d 25, 35-36 (D.D.C. 2010), *aff'd*, 642 F.3d 212 (D.C. Cir.), *cert. denied*, 132 S. Ct. 252 (2011). Further, IBLA, "in exercising the Secretary's review authority, is not required to accept as precedent erroneous decisions made by the Secretary's subordinates." *Pathfinder Mines Corp.*, 70 IBLA 264, 278, 90 I.D. 10, 18 (1983), *aff'd*, 620 F. Supp. 336 (D. Ariz. 1985), *aff'd*, 811 F.2d 1288 (9th Cir. 1987). Therefore, Shamrock's proposed limitation on the Board's authority – that the Board must rule in each case based on the agency's interpretation of applicable regulations, whatever they may be – is rejected.

[2] To the extent Shamrock suggests that the Department and the Board are estopped from taking action contrary to BLM's "admission," that suggestion also is rejected. The Board has long held that "[e]stoppel is an extraordinary remedy when applied against the United States, especially when what is at issue is the proper use and management of the public lands." *Atchee CBM, LLC*, 183 IBLA 389, 409 (2013) (citing *Jack C. Scales*, 182 IBLA 174, 180 (2012)). In addition, "it is well established that estoppel is not appropriate where it would afford the party claiming estoppel a right not authorized by law." *Id.* (citing 43 C.F.R. § 1810.3(b) and (c));¹ *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 60-63 (1984), and other cases).

In this case, as discussed below, Shamrock was not legally entitled to "grandfathered" status with respect to Northstar's mining notice. Therefore, any assertion of estoppel fails.

BLM's March Letter was an Appealable Decision

[3] BLM has filed a motion to dismiss Shamrock's appeal on the ground that it is not an appeal of a final decision. BLM correctly states, "[a] 'decision' authorizes or

¹ This regulation states: "The United States is not bound or estopped by the acts of its officers or agents when they enter into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." 43 C.F.R. § 1810.3(b). And: "Reliance upon information or opinion of any officer, agent or employee . . . cannot operate to vest any right not authorized by law." *Id.* § 1810.3(c).

prohibits some action on public lands. *Geo-Energy Partners-LTD*, 170 IBLA 90 (2006); *Joe Trow*, 119 IBLA 388 (1991).” Agency Response to Stay Request at 6. BLM characterizes the March Letter as merely “indicating disagreement with the amount of disturbance,” but not taking or prohibiting action, as might approving or denying a submitted plan of operations or issuing a notice of incident of noncompliance. *Id.* at 6-7.

The Board has long held that there is no particular form to a decision. *See, e.g., Uranium Watch & Living Rivers*, 182 IBLA 311, 314 (2012). But in this case, contrary to BLM’s argument, BLM’s letter: 1) deems Shamrock’s notice extension to be insufficient, 2) requires the filing of a plan of operations prior to continued operations, and 3) prohibits Shamrock from engaging in further operations. *See* BLM Letter dated October 11, 2011 (“While your notice is incomplete, you may not begin operations until access concerns are resolved.”); *see generally* March Letter. Because the March Letter both prohibits certain actions and requires other actions, we reject BLM’s argument that it is not a final decision and proceed to the merits of the appeal.

Northstar Mine’s “Grandfathered” Status Terminated Upon Transfer of the Mine

[4] BLM’s pre-2001 regulations continue to apply only to notice-level mine operators specifically identified in a notice on file with BLM on January 20, 2001, who have met all applicable requirements. *See* 43 C.F.R. § 3809.301(a). Any operator who was not so identified is a “new operator” subject to the current surface management regulations in Subpart 3809. *Id.* § 3809.301(b); 65 Fed. Reg. 70035-36 (“New operators will have to conduct operations under subpart 3809.”). Thus, the issue is not whether an “operation predates the current regulations,” BLM’s Answer at 1, or a question of whether the regulations intend “to allow all existing *notice-level operations* to continue.” Shamrock’s Brief at 7 (emphasis added). The grandfathered status is tied to a particular operator, not to the operation *per se*. That status is not transferable and does not run with the operation to successors-in-interest, but ends with the introduction of any other operator, even if the new operator is conducting the same operations as its grandfathered predecessor. This is one of the ways in which BLM intended that notice-level operations would be brought “under the performance standards of [§ 3809.320] within a reasonable time frame.” 65 Fed. Reg. 70036.

Shamrock asserts that the applicable BLM Handbook provides for a “new operator” to assume operations under a grandfathered mining notice without having to file a plan of operations. Shamrock’s Brief at 6-7; *see* BLM Manual, Surface Management Handbook H-3809-1, § 3.1.3 (Rel. 3-336 (09/17/2012)). However, “BLM Manual provisions do not have the force and effect of law and are not binding on either this Board or the public at large.” *Pamela S. Crocker-Davis*, 94 IBLA 328, 332 (1986). Nor may the provisions of the BLM Manual amend existing regulations. *Black Rock City*, 173 IBLA 49, 65 n.10 (2007). Even BLM has acknowledged that

“[w]hile BLM is generally obligated to follow its manual, BLM should not have to do so when the manual conflicts with BLM’s regulations.” *Nat’l Org. for River Sports*, 140 IBLA 377, 383 (1997) (quoting BLM Response at 2).² To the extent these Manual provisions conflict with the regulations by purporting to allow a new operator to conduct notice-level operations that do not comply with the current surface management regulations under Subpart 3809, they are inoperable.

BLM has provided a copy of a Notification of Change of Operator and Assumption of Past Liability dated October 12, 2005, transferring the interest in notice NM-98045 from Northstar to North American. Agency Brief Ex. 4. Documents submitted by Shamrock indicate that North American Metal LLC filed a notice extension in 2007. SOR at Exs. 1, 13. Shamrock admits that the operations at issue were transferred from Northstar to North American, from North American back to Northstar, and later from Northstar to Shamrock. Shamrock’s Brief at 8. Shamrock asserts, however, that because Kathleen Gabriella, trustee of Northstar, was “an” operator when Northstar was the operator identified on the notice on file with BLM on January 20, 2001, and Gabriella currently is a member of Shamrock, this is not a circumstance of a new operator taking over operations from a former operator. *Id.* at 4-5. We are unpersuaded. Northstar, not Shamrock or Gabriella, was the operator identified in the notice on file on January 20, 2001. Therefore, Shamrock is a new operator and BLM erred by applying the pre-2001 regulations in this matter.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, BLM’s motion is granted, the decision is vacated, and the case is remanded to BLM for further action.

_____/s/
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge

² BLM correctly points out that its Handbook “is silent on the direct question of whether a new operator assumes the ability of the previous operator to continue subsequent activities under the pre-2001 regulations.” Agency Brief at 8. BLM also suggests that the Handbook intends that a new operator would be allowed to assume the role of the previous operator only until the existing notice expired. *Id.* at 9. Unfortunately, the language of the Handbook is not a model of clarity.