



ALDER GULCH, LLC

184 IBLA 48

Decided July 3, 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

ALDER GULCH, LLC

IBLA 2012-84

Decided July 3, 2013

Appeal from three decisions of the Montana State Office, Bureau of Land Management, declaring three notices of intent to locate mining claims (NOITLs) void due to an existing statutory effect triggered by the earlier filing of notices for the same land by another person. MTM Nos. 103187–103189.

Decisions reversed and remanded; intervenor status granted to Garnet USA, LLC *sua sponte*; motions for reconsideration and consolidation denied.

1. Administrative Procedure: Generally--Intervention: Generally

A person who is not named as an adverse party in a BLM decision must petition to intervene in order to participate in an appeal of that decision.

2. Stock Raising Homesteads: Notice of Intent to Locate Mining Claims

When a person files a Notice of Intent to Locate mining claims under the Stock Raising Homestead Act that satisfies statutory requirements, the statutory effects are triggered by operation of law and BLM has no authority to suspend or change those statutory effects.

3. Stock Raising Homesteads: Notice of Intent to Locate Mining Claims

Filing a Notice of Intent to Locate mining claims on certain lands triggers a statutory 90-day period during which no other person may file such a notice or explore for minerals on any portion of those lands. The 90-day period is not a personal right, afforded to the person filing the notice, that is a property interest that can be modified, sold or relinquished. A person filing a notice may later notify BLM that he chooses not to explore for minerals on the lands covered by his notice during the 90-day period,

effectively relinquishing his authorization to explore pursuant to the notice. However, neither such a relinquishment, nor BLM's acceptance of it, can alter the other statutory effects of the 90-day period triggered by the filing of the notice.

APPEARANCES: Steven R. Milch, Esq., Christopher C. Stoneback, Esq., Billings, Montana, for Appellant; William K. VanCanagan, Esq., Trent N. Baker, Esq., Missoula, Montana, and Steven G. Barringer, Esq., Andrew A. Irvine, Esq., Jackson, Wyoming, for Garnet USA, LLC.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HOLT

Alder Gulch, LLC (Alder Gulch) has appealed three decisions (Decisions) issued on December 14, 2011, by the Montana State Office, Bureau of Land Management (BLM), rejecting three Notices of Intent to Locate mining claims (NOITLs) serialized as MTM 103187 - 103189. Alder Gulch also requested a stay of those decisions, which the Board granted by order dated March 6, 2012 (Stay Order), finding a likelihood that Alder Gulch would succeed on the merits of the appeal. Garnet USA, LLC (Garnet) has since filed an answer in which it asserts that the Board should grant Garnet status as a full party to the appeal. Garnet's Answer to Alder Gulch's Appeal (Answer) at 3-4. Garnet has also filed a Motion for Reconsideration or Consolidation, requesting that the Board reverse its Stay Order or, alternatively, consolidate this appeal with one filed by Garnet on March 28, 2012, from a different set of BLM decisions. See Garnet's Motion for Reconsideration or Consolidation (Recon. Motion) at 2.

Based on the following analysis, the Board grants intervenor status to Garnet *sua sponte*, denies the motion to consolidate, reverses and remands BLM's Decisions, and denies the motion for reconsideration of our Stay Order as moot.

Background

On September 2, 2011, Russell Lampert filed with BLM three NOITLs, serialized by BLM as MTM 102822-24, on a total of 560 acres in section 30, T. 6 S., R. 3 W., Montana Principal Meridian.¹ The surface estate for most of this section was previously patented under the Stock Raising Homestead Act (SRHA). See

¹ The NOITLs identified the affected land as the NW $\frac{1}{4}$ (MTM 102822), E $\frac{1}{2}$ (MTM 102823), and N $\frac{1}{2}$ SW $\frac{1}{4}$ (MTM 10284) of sec. 30.

43 U.S.C. §§ 291-301 (1970). BLM confirmed to Lampert in writing that, under the SRHA, for 90 days after the NOITLs were filed, no person could submit a conflicting NOITL and no person other than Lampert could explore for minerals on that land. 43 C.F.R. § 3838.15(b).

The 90-day period triggered by the filing of Lampert's NOITLs was scheduled to expire on December 2, 2011.² However, Lampert submitted letters to BLM at 9:19 a.m., November 4, 2011, purporting to relinquish his exclusive right to locate claims under the NOITLs.³ One minute later, at 9:20 a.m. that same day, BLM date-stamped three other NOITLs delivered by Lampert. Answer, Ex. A, para. 8. These new NOITLs, executed by Garnet, were virtually identical to those previously submitted by Lampert.⁴ BLM serialized Garnet's NOITLs as MTM 103099-101.⁵ BLM then issued a notice to Garnet stating that a 90-day period of exclusive exploration rights began on November 4, 2011, to last until February 2, 2012.

On December 13, 2011, Alder Gulch filed NOITLs covering virtually the same land as the previously-filed NOITLs, serialized by BLM as MTM 103187-89, on a total

² Based on the administrative record, BLM apparently did not note Lampert's NOITLs on the public lands records. Although BLM generated serial register pages for the NOITLs, and those serial register pages include entries showing commencement of the 90-day period and Lampert's purported relinquishment of the NOITLs, serial register pages are not and have never been part of the public lands records for purposes of public notice or determining the applicability of the notation rule. See 43 C.F.R. § 2091.0-5(e) (definition of *public lands records*); *David Cavanagh*, 89 IBLA 285, 305-06, 92 I.D. 564, 575-76 (1985) (Burski, A.J., concurring), *aff'd*, Civ. No. A86-041 (D. Alaska Mar. 18, 1988).

³ BLM acknowledged Lampert's relinquishments by letters dated Nov. 7, 2011.

⁴ Garnet asserts that our Stay Order "wrongly states that Garnet's NOITLs were 'identical to those previously submitted by Lampert.'" Recon. Motion at 10. The Board corrects itself here by adding the caveat "virtually." Garnet's NOITLs contain additional surface owners' names and addresses, a different name and address for the person filing the notice, and different dates of anticipated exploration activity. However, apropos of the Board's discussion of the merits below, the legal descriptions are for the same 560 acres of land.

⁵ According to Garnet's NOITLs, the affected lands included the N $\frac{1}{2}$ SW $\frac{1}{4}$ (MTM 103099), E $\frac{1}{2}$ (MTM 103100), and NW $\frac{1}{4}$ (MTM 103101) of sec. 30, comprising a total of 560 acres.

of 554.2 acres.⁶ On December 14, 2011, BLM issued the Decisions rejecting Alder Gulch's NOITLs as barred by the 90-day period triggered by Garnet's NOITLs. Alder Gulch timely appealed.

Procedural Issues

The Board must address several procedural issues and motions before proceeding to the merits of the appeal. These issues are: Garnet's assertion that it is a party to the appeal; Garnet's assertion that Alder Gulch's appeal is untimely; and Garnet's motion to consolidate this appeal with IBLA 2012-145, another pending appeal by Garnet from BLM decisions not directly at issue here. The Board addresses each of these matters below.

Garnet's Status as a Party to the Appeal

As a preliminary matter, Garnet asserts that it "is, and must be, a party to this Appeal" under 43 C.F.R. Part 4. Recon. Motion at 9. Therefore, Garnet asserts that contrary to the Stay Order, it had no need to file a motion to intervene and had a right to file an answer to Alder Gulch's Statement of Reasons (SOR). *Id.*

[1] Under 43 C.F.R. § 4.414(a), any person served with a notice of appeal may file "an answer or appropriate motion" with the Board within 30 days after service of the statement of reasons. Garnet cites *Beard Oil Co.*, 105 IBLA 285, 287 (1988), for the proposition that an appellant must serve each "adverse party" to a decision and that these parties should be named by BLM in the decision. Recon. Motion at 14. BLM did not name Garnet as an "adverse party" in its Decisions, nor do the Decisions indicate that they were sent to Garnet.⁷ Garnet asserts that BLM's failure to do so violated BLM's obligations, but that this alleged malfeasance does not (indeed, *can not*) affect Garnet's objective status as an adverse party and its right to file an answer. Recon. Motion at 14-15. Garnet, however, overlooks the fact that *Beard* cites regulatory language that is no longer in effect. The current regulation no

⁶ The Alder Gulch NOITLs described the affected lands as "Lot 3, NE $\frac{1}{4}$ SW $\frac{1}{4}$ (essentially N $\frac{1}{2}$ SW $\frac{1}{4}$)" (MTM 103187), "Lots 1 and 2, E $\frac{1}{2}$ NW $\frac{1}{4}$ (essentially NW $\frac{1}{4}$)" (MTM 103188), and the NE $\frac{1}{4}$ and SE $\frac{1}{4}$ (MTM 103189) of sec. 30.

⁷ Garnet asserts that it was a party to the Decisions because the Decisions mentioned Garnet's NOITLs. Recon. Motion at 14. The regulation addressing the filing of an answer by a party, 43 C.F.R. § 4.414(a), presupposes that a person served with a NOA will be a "person named in the decision." See 43 C.F.R. § 4.413(a). In this case, BLM did not name Garnet in the Decisions, but merely referenced NOITL serial numbers and starting dates.

longer includes the “adverse party” language and requires an appellant to serve a copy of the notice of appeal only “on each person named in the [BLM] decision.” *Compare* 43 C.F.R. § 4.403(a) (2011) *with* 43 C.F.R. § 4.403(a) (2010).

Despite receiving courtesy copies of Alder Gulch’s notices of appeal, we find that Garnet was not named in the Decisions and was not a party to Alder Gulch’s appeal. To hold otherwise would vest an inappropriate overriding power in putative appellants to determine other persons’ status as parties simply by transmitting to them courtesy copies of notices of appeal. We also note that, curiously, Garnet fails to recognize that even in *Beard*, the Board held that “[s]ince BLM failed to name [the adverse party] as an adverse party [in the decision], [the adverse party] was compelled to petition this Board to be allowed to intervene in these appeals as a respondent.” 105 IBLA at 287 (emphasis added).

Notwithstanding the persistent reluctance of counsel for Garnet to request leave to intervene, Garnet’s interest in this case as a person that could be adversely affected by its outcome is manifest. *See* 43 C.F.R. § 4.406(b)(1). A motion to intervene filed on behalf of Garnet would have been more than justified based on the facts in this case. In the interests of Garnet and judicial economy, the Board will grant Garnet intervenor status *sua sponte* and hereby accepts all of Garnet’s filings.

Timeliness of Alder Gulch’s Appeal

Garnet asserts that Alder Gulch’s appeal is untimely because “the acts of the BLM actually being challenged by Alder Gulch are the BLM’s acceptance of the Lampert termination letters, termination of the segregation periods and acceptance of the Garnet NOITLs.” Garnet Answer at 4. The Board patently rejects this characterization of Alder Gulch’s appeal. BLM issued the Decisions to Alder Gulch on December 14, 2011, and we find that Alder Gulch timely appealed them. The legal effect of the earlier action by BLM may have affected BLM’s later Decisions and may weigh upon the outcome of this appeal of those Decisions, but does not foreclose Alder Gulch’s right to timely appeal the later Decisions.

Garnet’s Motion to Consolidate

Garnet has moved the Board to consolidate Alder Gulch’s appeal with another appeal Garnet filed from two other BLM decisions. Those decisions rejected Garnet’s NOITLs and declared null and void *ab inito* multiple certificates of location that Garnet filed pursuant to its NOITLs. Although the instant appeal may be relevant to the later appeal, we decline to address the later appeal here. Garnet’s motion to consolidate is denied.

Analysis of the Merits

Under the SRHA, mineral deposits underlying patented surface are reserved to the United States and are available for mineral entry by applicants to explore for minerals. *See* 43 C.F.R. § 3838.2; *see generally*, *Watt v. Western Nuclear*, 462 U.S. 36 (1983). An applicant to explore for minerals underlying SHRA-patented surface must submit a NOITL to BLM and serve a copy on the surface owner. Filing a NOITL with BLM begins a 90-day period during which no person other than the applicant may explore for minerals or locate a mining claim, or submit a NOITL, or otherwise file an application to acquire an interest in the lands covered by the NOITL. 43 U.S.C. § 299(b) (2006); 43 C.F.R. § 3838.11–.15.

The essential issues in this case are: (1) the effect of Lampert’s NOITLs, filed September 2, 2011; (2) the effect of Lampert’s purported relinquishment of his NOITLs on November 4, 2011; and (3) the effect of Alder Gulch’s NOITLs, filed December 14, 2011. We address each of these below.

Effect of Lampert’s September 2, 2011, NOITLs

Lampert filed and BLM date-stamped three NOITLs on September 2, 2011. Garnet argues that Lampert’s NOITLs did not trigger the 90-day exclusive exploration period under the statute because they suffered from incurable defects. Recon. Motion at 28. The record corroborates that Lampert paid only \$25 per NOITL, instead of the required \$30 service charge, and he did not include all of the information required by BLM’s regulations. *See* 43 C.F.R. §§ 3000.12, 3838.11, 3838.12.

NOITL Requirements

To “file” a NOITL, the statute requires that the NOITL contain “the name and mailing address of the person filing the notice and a legal description of the lands to which the notice applies.” 43 U.S.C. § 299(b)(2) (2006). The NOITL must also “be in such form as the Secretary shall prescribe.” *Id.* In this case, the Secretary prescribes that the information required by statute be submitted on a “notice of intent to locate mining claims form (NOITL) which you may obtain from BLM.” 43 C.F.R. § 3838.11(a)(1). These are the statutory requirements for filing a NOITL. Once a NOITL satisfying those statutory requirements is filed for particular lands, statutory consequences are triggered and no other NOITL can be filed with respect to any portion of those lands during the 90-day period after filing occurred, and no other person may explore for minerals or locate a mining claim on any portion of those lands during that same period. 43 U.S.C. § 299(b)(2) (2006).

BLM imposes additional regulatory requirements to “submit” a NOITL, including, *inter alia*, service charges, additional information about the surface owners and evidence of surface ownership, and a description of the proposed mining activities. 43 C.F.R. §§ 3838.11(a)(1), 3838.12(b). BLM states that a NOITL that fails to comply with these requirements “is void.” *Id.* § 3838.91. Additionally, BLM’s regulations state that unless BLM receives payment of the required service charges, BLM will not accept the NOITL. *Id.* § 3830.97. However, if there is a defect in compliance with one or more of these regulatory requirements, the person submitting the defective NOITL may cure the defect after BLM notifies the person of the defect. *See* 43 C.F.R. § 3830.93(b).

Lampert’s NOITLs

[2] Because Lampert included his own name and mailing address, and a legal description of the lands, on the BLM-provided NOITL form, he complied with all statutory requirements to file a NOITL. When each NOITL was received by BLM, the NOITL was “filed” and the statutory consequences were triggered: no other person could file a NOITL during the subsequent 90-day period and no other person could explore for minerals or locate a mining claim on the lands described in Lampert’s NOITL.⁸ 43 U.S.C. § 299(b)(2) (2006); *see* 43 C.F.R. § 3830.5 (defining a document as *filed* when received by BLM or postmarked by any applicable due date and timely received thereafter). BLM may impose additional regulatory requirements on the filer of a NOITL which, if not fulfilled, may result in claims located under that NOITL being determined null and void. 43 C.F.R. § 3838.91. But, BLM has no authority to change the statutory consequences imposed by operation of law when a NOITL is filed. Furthermore, the Board has held previously that BLM cannot transform a curable regulatory defect into an incurable one through regulatory language without a corresponding statutory requirement. *Debra Smith (On Reconsideration)*, 180 IBLA 107, 111 (2010).

In this case, Lampert filed NOITLs that complied with the statutory requirements and BLM accepted them. By separate notices to Lampert dated September 9, 2011, BLM acknowledged receipt of his three NOITLs, and confirmed that the statutory period began on September 2 and would end on

⁸ Neither BLM nor this Board has the authority to deny a legal effect that occurs by operation of law upon compliance with a statute, regardless of unsatisfied regulatory requirements. *See Randy Roberts*, 175 IBLA at 164 n.8, and cases cited.

December 2, 2011.⁹ The notices then gave Lampert an opportunity to cure the NOITLs' regulatory defects. The regulatory defects in the NOITLs had no effect on the triggering or the vitality of their statutory consequences.

Effect of Lampert's Attempted NOITL Relinquishments and Garnet's Filed NOITLs

Garnet argues, in the alternative, that BLM's receipt of Lampert's NOITL relinquishments and acceptance of Garnet's NOITLs on November 4, 2011, constitute an agency interpretation of what Garnet calls the "segregation period" under the statute. Garnet Answer at 6. Under this argument, Garnet could file new NOITLs prior to the expiration of the statutory period and other consequences triggered by the earlier filing of NOITLs by Lampert. *See id.* Furthermore, Garnet argues that Congress intended the 90-day period primarily to grant an exclusive right of exploration to locators, not to protect surface owners, and that locators "should be allowed to terminate that [right]." Answer at 9.

By contrast, Alder Gulch vehemently asserts that what it calls the "exploration period" cannot prematurely terminate under any circumstances. *See* Alder Gulch's Statement of Reasons (SOR) at 5-6; Alder Gulch's Reply (Reply) at 4. Alder Gulch asserts that uncertainty created by premature termination would prejudice third parties, including surface owners, the "intended beneficiaries of the NOITL process." SOR at 9. Alder Gulch's interpretation is supported by the 1993 amendment to the SRHA, which clearly reflects Congress' intent to resolve the historic problems of mineral development on split estate lands and protect surface owners by imposing additional burdens on locators:

By rendering the rights of the surface owner subordinate to the rights of individuals seeking to develop the hard rock minerals reserved by the United States, a number of ranching and farming operations have been disrupted, if not outright destroyed.

H.R. 239, as amended, addresses the need for better coordination between ranchers and miners by imposing notice, planning, reclamation and compensation requirements upon mineral activity.

⁹ The notices listed the regulatory information required by BLM to be included on NOITLs. *See* 43 C.F.R. § 3838.12(b). Check marks identified the information missing from the subject NOITL. The notices also stated that the applicant could not enter the lands for exploration until all of that information was received, but incorrectly characterized that information as "statutory" rather than regulatory.

H.R. REP. NO. 103-44, at 5 (1993), *reprinted in* 1993 U.S.C.C.A.N. 92, 93.

In our earlier Stay Order, we interpreted the effect of the 90-day period in the context of 43 C.F.R. § 3830.5 (definition of *Segregate or segregation*).¹⁰ However, Garnet correctly asserts that this definition is of limited usefulness in the instant appeal. *See* Recon. Motion at 20-22. Upon further review, we find that the definition of *segregation* in 43 C.F.R. § 3830.5 does not accurately describe the legal effect of the SHRA 90-day period.¹¹

[3] The statute does not establish a “segregation period,” but rather, an “authorized exploration period” for the person filing a NOITL in the “90-day period following the date of [filing a NOITL].” 43 U.S.C. § 299(b)(1)(B), (1)(C), (2). That 90-day period is not a personal right afforded to the person filing the NOITL,¹² *e.g.*, it is not “Lampert’s segregation period” akin to a property interest that can be modified, sold or relinquished, as suggested by Lampert. *See* Answer at Ex. A, ¶¶ 6-8 (indicating that Lampert agreed to “relinquish his rights in his NOITLs on the foregoing property in exchange for valuable consideration, to enable Garnet USA to file its own NOITLs on that property”). Rather, the statute refers to “*the* 90-day period following the date of [filing the NOITL].” 43 U.S.C. § 299(2) (2006) (emphasis added). The 90-day period is intended to provide notice to and predictability in the mineral exploration process *for the surface owner*, to ensure that surface owners of SRHA lands “have a say in the conduct of mining activities which may occur on their property.” *See* H.R. REP. NO. 103-44, at 5.

Of course, nothing prevents a person who has submitted a NOITL from later notifying BLM that he chooses not to explore for minerals during the 90-day period on the lands covered by his NOITL, effectively relinquishing his authorization to

¹⁰ In one regulation, BLM characterizes the SRHA 90-day period as a “segregation period.” *See* 43 C.F.R. § 3838.14.

¹¹ In addition, the definition of *segregation* in § 3830.5 attempts to broadly define all land segregations, including “administrative segregations” which BLM may have discretion to commence and end by its own actions. 68 Fed. Reg. 61050 (Oct. 23, 2003). The 90-day period at issue here is not an administrative segregation, but a statutory period triggered by the filing of a NOITL. It commences and ends by operation of law, and BLM lacks authority to otherwise commence or extinguish it.

¹² Although during the 90-day period no other person may file a NOITL or explore for minerals, 43 U.S.C. § 299(b)(2) (2006), the exploration period for the person filing a NOITL is also subject to a statutorily-required 30-day notice to surface owners, *id.* § 299(b)(1)(C), and the failure to adhere to BLM’s regulatory requirements will render null and void any located claims, 43 C.F.R. § 3838.91.

explore and locate claims under the NOITL. However, neither such a relinquishment, nor BLM's acceptance of it, can alter the running of the 90-day period triggered by the filing of his NOITL or the statutory consequences it affords.

The Board has previously held that "BLM cannot by its own actions extend the statutory 90-day exploratory period or establish a triggering event different from, or in addition to, that specified in the statute." *Randy Roberts*, 175 IBLA at 164-65. Garnet asserts that this statement "is not technically correct" because BLM can extend the 90-day period by accepting a plan of operations. See 43 C.F.R. § 3838.15(c) ("If you file a plan of operations . . . BLM will extend the effects of the 90-day period until BLM approves or denies [it]"). Garnet, however, misreads the statute. Extension of the 90-day period due to the filing of a plan of operations is not an extension initiated by BLM at its discretion, but one triggered under the statute by submission to BLM of a plan of operations. 43 U.S.C. § 299(b)(2) (2006) ("If, within such 90-day period, the person who filed a notice under this paragraph files a plan of operations with the Secretary . . . such 90-day period *shall be extended* until the approval or disapproval of the plan . . .") (emphasis added). The statute provides no discretion for BLM to refuse to implement such an extension for the duration (until approval or disapproval of the plan) specified by statute.¹³ 43 U.S.C. § 299(b)(2) (2006). Similarly, BLM has no discretion to terminate prematurely the 90-day period.

Effect of Alder Gulch's December 13, 2011 NOITLs

After the December 2, 2011, expiration of the 90-day period initiated by Lampert's filing of his NOITLs on September 2, 2011, anyone could file a NOITL for the same lands. As a result, there was no impediment to Alder Gulch filing its NOITLs on December 13, 2011, which, if compliant with the statutory requirements, would have triggered the 90-day period during which no other person could file a NOITL or explore for minerals or locate a mining claim on the identified lands.

Conclusion

¹³ We note that although BLM's regulations provide that upon acceptance of a NOITL BLM will make a notation on the public land records, 43 C.F.R. § 3838.14, such a notation could not be used to invoke the notation rule and extend the 90-day period. Under the SRHA, Congress provided for the automatic triggering of a period of definite duration that cannot be truncated and cannot be extended except under specific circumstances. As a result, BLM's failure to remove such a notation could not extend the SRHA 90-day period, because any such extension would impermissibly thwart the will of Congress. See *Casey E. Folks, Jr.*, 183 IBLA 24, 44 (2012); see also *Casey E. Folks, Jr. (On Reconsideration)*, 183 IBLA 359, 381 (2013).

Based on the above analysis, we hold that: (1) BLM correctly recognized that Lampert's NOITLs filed September 2, 2011, triggered a 90-day period under the SRHA during which no other person could file NOITLs or explore or locate mining claims; (2) BLM erred in determining that Lampert's purported relinquishment of his NOITLs terminated the SRHA 90-day period during which no other person could file NOITLs; (3) BLM erred by accepting Garnet's NOITLs, because on the date they were filed, November 4, 2011, no other person could file such a notice during the continuing 90-day period triggered by Lampert's NOITLs; and (4) BLM erred by declaring Alder Gulch's NOITLs invalid on December 13, 2011, because the 90-day period for Lampert's NOITLs ended on December 2, 2011. *See* 43 U.S.C. § 299(b) (2006).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Garnet is granted intervenor status in this appeal *sua sponte*, BLM's decision is reversed and remanded for action in accordance with this ruling, Garnet's motion for reconsideration of our Stay Order is denied as moot, and Garnet's alternative motion for consolidation is denied.

_____/s/_____
H. Barry Holt
Chief Administrative Judge

I concur:

_____/s/_____
James F. Roberts
Administrative Judge