Editors' note: 90 I.D. 382

MOSCH MINING CO.

IBLA 83-369 Decided August 18, 1983

Appeal from decision of the Canon City District Office, Colorado Bureau of Land Management, offering right-of-way grant and requiring payment of fair market value. C-34657.

Set aside and remanded.

1. Federal Land Policy and Management Act of 1976: Generally--Federal Land Policy and Management Act of 1976: Surface Management

   Sec. 302 of the Federal Land Policy and Management Act of 1976 vests in the Secretary the responsibility to prevent unnecessary or undue degradation of the public lands. It also preserves a mining claimant's right of ingress and egress. Consequently, the grant of a right-of-way, which is directionary under the Act, is not the proper method of regulating a mining claimant's access in conjunction with surface management to prevent undue degradation. Rather, questions of access to mining claims are properly resolved under the surface management regulations at 43 CFR Subpart 3809 which were promulgated pursuant to sec. 302 and specifically address mineral entry, access, and operations.

APPEARANCES: Alvin Mosch for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Mosch Mining Company (Mosch) has appealed from a decision dated January 4, 1983, by the Canon City District Office, Colorado, Bureau of Land Management (BLM), offering right-of-way grant C-34657 and requiring payment of fair market value therefor.

In response to a trespass action filed by BLM, on December 17, 1981, appellant Mosch filed an application requesting a right-of-way for an access road 26.5 feet wide and 1,100 feet long across unpatented lode mining claims owned by it, approximately 6 miles west of Idaho Springs, Colorado: T. 3 S., R. 73 W., sixth principal meridian, sec. 31, SW 1/4 SW 1/4. The surface area disturbed by the road comprises 0.67 acre.

In its letter of application, appellant explained its purposes as follows:

> The project consists of repairing a pre-existing dead-end road located in the West 1/2 of Section 31, T3S, R73W of the 6th P.M. in Clear Creek County. The road provides access to the Poorman and Brazil mines, owned by the applicant. These mines are currently being worked by the applicant, and valuable equipment is being stored at these sites. The pre-existing road was graded for passage of service vehicles to and from the mine. The road was not and is not maintained by the county. The applicant provides road maintenance.
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> A gate was installed at the junction of the mine access road with the county maintained road. The gate was erected to provide protection for the mine and equipment. Clear Creek County has had a rash of mine theft and vandalism in the past years. An example, a $10,000 slusher engine was riddled with

bullets from a high powered rifle while located on the mine site, where the only access was through the pre-existing road located on BLM land. The gate site was chosen as the best possible location for security functions. The Clear Creek County Sheriff's department and the BLM have keys to the gate.

The roadway provides additional benefits to the area (Sec. 2803.1-2 c3). The clearing around the road serves as a firebreak and the rehabilitation of the road provides fire fighting vehicles access to an area they were not able to reach before. The applicant has also provided a 30 foot deep water hole at the crossing of the creek at the county road, to serve as a reservoir for fire fighting vehicles. The roadway also provides vehicle access for forest maintenance by the U.S. Department of Agriculture and the Bureau of Land Management.

BLM's environmental assessment explains the application as follows:

The proposed right-of-way joins an existing road which provides access to the Poorman and Brazil mines owned by the applicant. There is a road approximately 75 feet to the north, on public land, which in the past provided access to the county road (See Map B). This road is fairly steep making it impassable to trucks and other equipment. Mr. Mosch bulldozed this road closed during construction of the new road. The road was constructed in 1980 without BLM authorization constituting an unauthorized use of public land. In addition, at the junction with the county road, Mr. Mosch installed two metal posts set in concrete and cabled-off the road, thereby denying access to the public.

A Notice of Trespass was served on October 8, 1981 to which Mr. Mosch responded and subsequently filed the right-of-way application. The purpose of this right-of-way is, therefore, twofold: To resolve the existing unauthorized use and to ensure continued access to both the applicant's claims and the public lands. [Emphasis added.]

The report also states that the only environmental problem resulting from road construction was one of inadequate drainage, that water runoff was eroding the centerline of the road.

On January 4, 1983, the Canon City District Manager issued his decision entitled "Right-of-Way Grant Offered, Payment of Fair Market Value Required."

In the statement of reasons, appellant takes exception to several conditions in the proposed grant, including fair market rental value and an assessment of $87 as back rent for previous unauthorized use. Appellant further objects to an assessment of $40 for removed timber. In addition, appellant objects to several special stipulations, including nonexclusivity of use, attached to the proposed grant. Appellant contends that an exclusive right-of-way is needed to prevent vandalism. In order to reduce vandalism appellant had previously installed a cable gate on its own patented land some 900 feet west of the boundary with BLM land. Appellant had also installed a cable gate on the unpatented claims where the road for which the right-of-way was sought joins a county road. See Statement of Reasons at 2 and map (Exh. A).

This case raises an issue concerning the extent to which BLM may regulate or authorize access to mining claims. In Alfred E. Koenig, 4 IBLA 19 (1971), the appellant contended that an existing road afforded the only access to his mining claim. In reaching the conclusion that no authorization from BLM was required where such a road was not exclusive of the general public, the Board quoted from Solicitor's Opinion, M-36584, 66 I.D. 361 (1959), which reads in part:

> The Department has recognized that roads were necessary and complementary to mining activities. It early adopted the policy of recognizing work done in the construction of roads to carry ore from mining claims as legitimate development work accreditable to the claims as assessment and patent work. Emily Lode, 6 L.D. 220 (1887). In Douglas and Other Lodes, 34 L.D. 556 (1906), it held that such roadways were not applicable. But in Tacoma and Roche Harbor Lime Co., 43 L.D. 128 (1914), after discussing a number of pertinent court and departmental decisions, the Department adopted the rule as stated in Lindley on Mines and allowed credit toward patent expenditures to a trail subject only to proof of the applicability of the trail work to specific locations. The principle was applied on an aerial tramway in United States v. El Portal Mining Co., 55 I.D. 348 (1935), citing in Tacoma case,

> supra. These cases obviously recognize the right of a mining claimant to construct roads across public lands for necessary use in mining operations even to the point of crediting expenditures made in that connection toward meeting the requirements of the statute. And, as already indicated, it has preserved that right in express terms in at least two general laws providing for Federal use of public lands.
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> We may reasonably apply here a principle that the courts have frequently applied in cases measuring the powers of the United States to legislate in relation to matters within the exclusive jurisdiction of a State, and the reverse. Executive action along the line proposed could be used to completely destroy the rights granted by Congress under the mining laws. It is true that where a tramway right-of-way is granted under the 1895 act, supra, [43 U.S.C. § 956 (1952)] the Department, for more than 20 years, has charged an annual rental. But that charge is made under the discretionary power granted by Congress to the Secretary under the act. Such rights when granted in the past have vested an exclusive right of user in the mining claimant. A road constructed by a mining claimant for purposes connected with his claim, without the benefit of such a grant is not exclusive and there is no specific law giving the Secretary discretionary authority to grant that right-of-way "under general regulations" as under the 1895 act.

66 I.D. 364-65.

In the case before us, the facts show that the claimant constructed and/or maintained an access road, restricted access to that road, and requested an exclusive right-of-way to approve the status quo. Although the necessity for the road appears to be clear and appellant's right to construct an access road is also clear, the exclusive access requested is difficult to reconcile with the policies expressed in the various statutes and regulations which vest surface management, including multiple use, as well as the responsibility to prevent undue degradation and to assure reclamation of disturbed areas in the BLM. 1/ For example, 30 U.S.C. § 612(b) (1976) deals specifically with the use of the surface area of unpatented mining claims. In

1/ Where national forest lands are involved, the Forest Service of the Department of Agriculture has these responsibilities.

United States v. Curtis-Nevada Mines, Inc., 415 F. Supp. 1373 (E.D. Cal. 1976), the court construed that section and held that any member of the public who possesses a license or permit from any state or agency allowing that person to engage in any form of recreation on public land, including national forest land, can enter onto the surface of unpatented mining claims in order to engage in that recreation or to gain access to another area to engage in that recreation so long as there is no interference with ongoing mining operations. The court further held that holders of unpatented mining claims could not erect unmanned gates or barricades which would effectively block entrance to the land or access to adjoining land. 2/

[1] Responsibility for surface management in those cases where claims have been located under the Mining Law of 1872 is specifically recognized in section 302 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1976). The last portion of section 1732(b) provides:

> Except as provided in section 1744, section 1782, and subsection (f) of section 1781 of this title and in the last sentence of this paragraph, no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act, including, but not limited to, rights of ingress or egress. In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.

2/ The United States Court of Appeals for the Ninth Circuit subsequently reversed the portion of the district court's opinion that required a member of the public to have a license or permit to use the surface resources of unpatented mining claims. United States v. Curtis-Nevada Mines, Inc., 611 F.2d 1277 (9th Cir. 1980). With respect to unpatented mining claims located on national forest lands, the district court held that claimants were required to file plans of operations pursuant to 36 CFR 252 (1981) prior to commencing operations. See United States v. Weiss, 642 F.2d 296 (9th Cir. 1981). At the time of the decision, no such regulations had yet been promulgated for BLM administered lands. Those regulations now appear at 43 CFR Part 3800.

The following policy statements can be found in 43 CFR Subpart 3809, promulgated under the authority of FLPMA with respect to surface management of claims located under the 1872 mining law:

> § 3809.0-1 Purpose.
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> The purpose of this subpart is to establish procedures to prevent unnecessary or undue degradation of federal lands which may result from operations authorized by the mining laws.
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> § 3809.0-2 Objectives.
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> The objectives of this regulation are to:
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> (a) Provide for mineral entry, exploration, location, operations, and purchase pursuant to the mining laws in a manner that will not unduly hinder such activities but will assure that these activities are conducted in a manner that will prevent unnecessary or undue degradation and provide protection of nonmineral resources of the federal lands;
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> (b) Provide for reclamation of disturbed areas; and
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> (c) Coordinate, to the greatest extent possible, with appropriate State agencies, procedures for prevention of unnecessary or undue degradation with respect to mineral operations.

These regulations also restate an operator's right of access to his operations consistent with provisions of the mining laws and reasonable reclamation. See 43 CFR 3809.0-6 and 3809.3-3.

43 CFR 3809.1-3 would appear to be applicable to this case. 3/ It provides, in pertinent part:

3/ The basis for this assumption is the provision of the proposed right-of-way showing 0.67 acre having been disturbed. We assume that the disturbance of the land subject to the BLM jurisdiction did not exceed 5 acres.

§ 3809.1-3 Notice -- disturbance of 5 acres or less.

(a) All operators on project areas whose operations, including access across federal lands to the project area, cause a cumulative surface disturbance of 5 acres or less during any calendar year shall notify the authorized officer in the District office of the Bureau of Land Management having jurisdiction over the land in which the claim(s) or project area is located. Prior to conducting additional operations under a subsequent notice, the operator shall have completed reclamation of operations which were conducted under any previous notice. Notification of such activities, by the operator, shall be made at least 15 calendar days before commencing operations under this subpart by a written notice or letter.

(b) Approval of a notice, by the authorized officer, is not required. Consultation with the authorized officer may be required under § 3809.1-3(c)(3) of this title when the construction of access routes are involved.

(c) The notice or letter shall include:

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(3) A statement describing the activities proposed and their location in sufficient detail to locate the activities on the ground, and giving the approximate date when operations will start. The statement shall include a description and location of access routes to be constructed and the type of equipment to be used in their construction. Access routes shall be planned for only the minimum width needed for operations and shall follow natural contours, where practicable, to minimize cut and fill. When the construction of access routes involves slopes which require cuts on the inside edge in excess of 3 feet, the operator may be required to consult with the authorized officer concerning the most appropriate location of the access route prior to commencing operations;

(4) A statement that reclamation of all areas disturbed will be completed to the standard described in § 3809.1-3(d) of this title and that reasonable measures will be taken to prevent unnecessary or undue degradation of the federal lands during operations.

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[45 FR 78909, Nov. 26, 1980; 45 FR 82934, Dec. 17, 1980]

Subparagraphs (d) through (f) describe the standards and conditions applicable to activities conducted under a notice.

These regulations should have been utilized to resolve the question of appellant's access. Accordingly, it would have been incumbent on appellant to communicate with an authorized officer prior to closing one road, constructing another, and restricting access over the public land. Appellant would have been required to file with BLM a notice or letter describing his proposed road work. 43 CFR 3809.3-2 provides that where no notice is filed, the authorized officer may either issue a notice of noncompliance or obtain a court order enjoining ongoing operations until the operator files a notice.

In light of the foregoing discussion, we conclude that appellant is not entitled to exclusivity of access. 4/ We conclude further that grant of right-of-way was not the appropriate means of resolving the question of appellant's access over and to his mining claims. 5/ BLM has no discretion to abridge such access and the matter should have been resolved under the surface management regulations of 43 CFR 3809. If appellant's construction disturbed less than 5 acres, appellant can now comply with the Act by filing appropriate notice, explaining steps appellant will take to provide adequate drainage and mitigate the centerline erosion. 6/ Our disposition of the appeal dispels the

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4/ See also 45 FR 78908 (Nov. 26, 1980). We note that the procedure for barring public access while affording access to a claimant by installing a gate with multiple locks is proper in those cases where BLM determines that the public interest is best served by road closure. This practice is often invoked in cases where surface management is best served by limiting vehicular access.

5/ The comments on the regulations promulgated in 43 CFR Part 3800 include the following: "Another comment was concerned whether rights-of-way for access to mining claims would require approval under Title V of the Federal Land Policy and Management Act. Access for all purposes of ingress and egress to unpatented mining claims will not be regulated under the provisions of Title V." 45 FR 78908 (Nov. 26, 1980).

6/ In the environmental assessment prepared by BLM with respect to the right-of-way application, under the heading "Environmental Consequences," the following determination was noted: "The only problem encountered as a result of road construction is one of inadequate drainage. Water is presently flowing down the centerline, creating an erosion problem. This will be mitigated by

necessity for considering the individual objections to the right-of-way in the statement of reasons.

Therefore, 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 set aside and the case file is remanded to the Canon City District Office for further processing consistent with this opinion.

R. W. Mullen
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

fn. 6 (continued)
placing water diversion structures, where needed, along the right-of-way." Based upon this report we find no other "unnecessary or undue degradation" caused by the construction of the road.