



United States
Department of
Agriculture

Forest
Service

Chugach
National
Forest

3301 C Street
Suite 300
Anchorage, AK 99503

Reply to: 1570

Date: March 22, 1999

Mr. Sherman Smith
P.O. Box 770
Cooper Landing, AK 99572

CERTIFIED MAIL #P

Dear Mr. Smith:

In accordance with my designation as Deciding Officer for Appeal #99-10-04-001, I have reached a decision regarding your December 10, 1998 (received December 14) appeal of the Seward District Ranger's decision to return your plan of operations for the RS&S #2 unpatented mining claim submitted September 8, 1998.

It is my decision that the mining plan of operations for RS&S #2, (AA 080754) was appropriately returned to you for two reasons.

- 1). Current regulations at Title 36 Code of Federal Regulations, Subpart C, Disposal of Mineral Materials, as amended on January 16, 1991 identify your travertine limestone on the RS&S #2 unpatented mining claim to be a common variety mineral material subject to disposal only under these regulations.
- 2) You are prohibited from mining on the land known as REC #2, until the U.S. District Court Judgment in Civil Case Number A85-021-CV(HRH)(D. Alaska), dated December 23, 1992, is reversed or otherwise modified on appeal. This judgment enjoins you from conducting any mining operations on the land known as the REC #2 and applies to the RS&S #2 mining claim in so far as it is located on the same land.

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Background

The travertine limestone (a calcium carbonate stone) occurrence now located under the RS&S #2 mining claim, was originally located by you as the REC No. 2 mining claims in 1975. The REC No. 2 claim no longer exists, since it was declared abandoned and void on February 26, 1986. You then located the REC #2 mining claim on the same ground. The REC #2 has been relocated and subsequently declared abandoned and void by the Bureau of Land Management (BLM) for a total of three times. On September 4, 1990, the first RS&S #2 (AA 073707) mining claim was located on the same ground as the former REC #2 claim. Since then, two additional RS&S #2 mining claims have been located on the same ground. The RS&S #2 (AA 080754) which is the subject of this appeal is the seventh filing and is still current. The previous six mining claims located on the same ground are all abandoned and void (no longer exist).

On December 3, 1996, you submitted a proposed mining plan of operations, under the locatable minerals regulations, 36 CFR 228 Subpart A, to extract, process, and remove travertine limestone from the RS&S #2 mining claim (AA079287). Proposed access was a road which includes a "bypass" of a muskeg area. Heavy equipment included a dozer and loader, and trucks for hauling processed and unprocessed limestone would be used on this road. The RS&S #2 claim was located on National Forest System lands in the Russian River drainage in section 9, T. 4N, R. 4W.. The proposed use of the limestone was for direct application to the soil as a soil amendment or conditioner.

Duane Harp, Seward District Ranger, made a decision on December 19, 1996 to return your plan. This decision was based on 36 CFR 228.41(c)(1) and (d)(1) which define the material you proposed to mine under the locatable regulations, 36 CFR 228 Subpart A, as a common variety subject to disposal under 36 CFR 228 Subpart C, mineral materials regulations. You were also reminded that the judgment which prohibits you from mining on the REC #2, United States v Sherman Smith, No. A85-021-CV (HRH) (D. Alaska), is still in effect. You subsequently appealed the December 19, 1996, decision and the District Ranger's decision was upheld.

On September 8, 1998, you once again filed a proposed mining plan of operations, under the locatable minerals regulations, 36 CFR 228 Subpart A, to extract, process, and remove ore from the RS&S #2 mining claim (AA080754). Proposed access is a road which includes a "bypass" of a muskeg area. Heavy equipment including a dozer and loader, and trucks for hauling ore would be used on this road. The RS&S #2 claim is located on National Forest System lands in the Russian River drainage in section 9, T. 4N, R. 4W.. The ore and proposed utilization was not identified in the plan. Subsequently on September 18, the District Ranger requested additional information. He asked what mineral would be mined; if travertine (limestone) then what use, and for what use would any other valuable minerals be marketed. The October 6, 1998 response from you indicated that limestone would be mined and that the proposed use was for agriculture lime (aglime). The District Ranger returned the plan to you on November 3, 1998, declining to process further because regulations at 36 CFR 228 identify limestone used for agricultural purposes to be common variety. You appealed this decision on December 14, 1998.

Sherman Smith's Issues

Issue 1. *"USFS assumes unto itself the authority to removal all the vast array of calcareous mineral deposits from being "LOCATABLE" if any of it is used as AG-LIME."*

Forest Supervisor's Discussion

You are proposing that travertine limestone, a calcium carbonate stone, be processed for aglime, to be directly applied to the soil as a soil amendment or conditioner.

In 1955, Congress enacted the Surface Resources Act which removed "common varieties" of stone from the meaning of "valuable mineral deposit" under the mining laws. 30 U.S.C. 611 (1982). The discovery of a "common variety" of stone cannot support the validity of any mining claims located after July 23, 1955.

The Code of Federal Regulations (CFR) is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510). Judicial notice is the recognition of certain facts which judges and jurors may properly take and act upon without proof. (Blacks Law Dictionary, 4th Ed.)

The Code of Federal Regulations for the Forest Service (36 CFR) defines limestone that is used for agricultural purposes to be a common variety and therefore not locatable.

According to 36 CFR 228.41 (c) Minerals to which this subpart applies:

"Such mineral materials include deposits which, although they have economic value, are used for agriculture,...."

The RS&S #2 limestone is proposed for use in agriculture, and 228.41(c) defines that use as common variety.

And in 228.41(c)(1),

"This category includes but is not limited to, minerals and vegetative material used as or for: Soil conditioners or amendments applied to physically alter soil properties such as direct applications to the soil of carbonate rocks..."

Aglime is a crushed carbonate rock, the proposed use is as a soil conditioner or amendment applied directly to the soil; therefore 228.41(c)(1) identifies the RS&S #2 limestone as common variety.

In 228.41 (d) Minerals not covered by this subpart, we find,

"(1) Mineral suitable and used as soil amendment because of a constituent element other than calcium or magnesium carbonate that chemically alters the soil,"

This excludes calcium or magnesium carbonate, and therefore excludes limestone. The RS&S #2 limestone is not classed as a mineral which is excluded from subpart C, the mineral material regulations.

Issue 2. *"The Ore on the subject mining claim is locatable by 9th CCA decision."*

Forest Supervisor's Discussion

The Interior Board of Land Appeals (89-443) made a decision on August 22, 1990, that the limestone covered by the REC #2 mining claim (AA058441) is not locatable. You appealed that decision to the Ninth Circuit Court of Appeals (9th CCA). The 89-443 IBLA decision was reversed by the 9th CCA and remanded back to IBLA. It appears that you believe that the limestone occurrence on REC #2, now under the mining claim RS&S #2, is locatable, based on the 9th CCA decision.

The IBLA decision was reversed. Reversal, in a legal context, does not mean making the opposite decision, but merely nullifies (does away with) the decision that was reversed. Since the case was remanded (sent back) to IBLA, the marketability of the REC #2 limestone had yet to be determined. The 9th CCA did not make a decision of locatability for the REC #2 ore.

Here is some discussion excerpted from the Ninth Circuit Court of Appeals Decision:

"That is to say IBLA did not reach the question upon which the result turned before the administrative law judge whether Mr. Smith could exploit the mineral deposit profitably. Instead, the IBLA held that the limestone was a common variety. This decision required rejection of the stipulation to the contrary, a stipulation which the United States had made and the administrative law judge had accepted. The IBLA held that "there is no foundation for the stipulation." and found it ambiguous, and then held that the limestone had no unusual properties taking it out of the common varieties statute."

..."IBLA could not properly review the record and decide the facts contrary to the stipulation which had been accepted and which had shaped the hearing before the AJ."

"An agency finding of fact is set aside if "unsupported by substantial evidence." 5 U.S.C. 706(2)(E). We conclude that it was arbitrary for the IBLA to reject the stipulation and decide the case on a basis contrary to the stipulation."

The 9th CCA did not decide the issue of marketability of the REC #2 travertine deposit or validity of the REC #2 unpatented mining claim. Instead the 9th CCA stated as follows:

"Accordingly the district court's order affirming the IBLA is reversed and the IBLA decision is reversed. The case is remanded to IBLA..... the IBLA is directed to remand for an additional hearing so that Mr. Smith can submit additional evidence of marketability, This panel retains jurisdiction for any subsequent review of the IBLA decision."

The case was remanded so that IBLA could address whether the limestone was marketable. The IBLA set a hearing as required by the 9th CCA and the case was heard by Administrative Law Judge Harvey Sweitzer on March 9 and 10, 1998. A decision was reached on August 28, 1998. Judge Sweitzer dismissed the contest for mootness and lack of jurisdiction because the REC #2 (AA 058441) mining claim was abandoned and void by BLM decision dated March 10, 1992,

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therefore it no longer existed. The REC #2 had become abandoned and void because the required annual filing with the Bureau of Land Management had not been done. You did not appeal that decision. Instead you located another claim.

The most recent claim located on the same ground as the REC #2 (AA 058441) is the RS&S #2 (AA 080754). Even though located on the same ground and for the same mineral occurrence, the RS&S #2 is a "new claim". The case heard by the 9th CCA, and their decision in that case did not deal with the RS&S #2 (AA 080754) mining claim, but only the REC #2 (AA 058441) mining claim. The two claims have different BLM numbers, and different location dates. The REC #2 is abandoned and void (no longer exists) and the RS&S #2 is "recorded". (Current claims are no longer termed "active" but instead are called "recorded".) Current Forest Service regulations at Title 36 Code of Federal Regulations 228, Subpart C, as amended on January 16, 1991 apply to any claim located after that date. These regulations apply to the RS&S #2 claim, located on November 21, 1997, and identify the limestone on the RS&S #2 as common variety.

Issue 3. "The approval of a properly submitted Plan of Operations for accessing, developing, and transporting locatable minerals out of a national forest is not, we repeat "is not" a discretionary decision available to the Forest Service with which to nullify the 1872 Mining Law."

Forest Supervisor's Discussion

I agree that the approval of a plan of operations submitted for a locatable mineral(s) is not discretionary. However, the plan of operations submitted for the RS&S #2 (AA 080754) is not for a locatable mineral. Approval of a plan of operations submitted for a common variety mineral, a salable commodity, is discretionary. As discussed in detail in the response to Issue 1, the Code of Federal Regulations defines limestone used as aglime, as a common variety material. Common variety material is not locatable.

The Forest Service does not prevent individuals from exercising rights covered under the U.S. Mining Laws, of which the 1872 Mining Law is a part. The Seward Ranger District of the Chugach National Forest has approximately 80 approved plans of operations for locatable mineral operations.

The Code of Federal Regulations in no way nullifies the U.S. Mining Law. The U.S. Mining Law is a collection of laws, one of which is the 1872 Mining Law. The 1872 Mining Law has been amended many times by such laws as the 1947 Materials Act, 1955 Surface Resources Act, and others. The U.S. Mining Law has been further defined by case law. The Federal Regulations clarify and provide for the administration of the existing laws.

Additionally, as you are aware, you have been prohibited from mining on the ground known as the REC #2. It has been well established and never disputed by you that the REC #2 (AA 058441) and the RS&S #2 (AA 080754) are located on the same ground. You were required to cease mining and reclaim the REC #2 by the District Court decision dated October 13, 1987. This decision was pursuant to a stipulation that you made July 3, 1985, whereby:

"(6) The defendant agrees to remove all equipment from REC 2 claim, cease mining and reclaim the REC 2 claim as specified...if the Validity Examination determines that the

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claim is not valid for mining of travertine ore for "agricultural lime" or soil conditioner."

And on September 8, 1992, the District Court (Case No. A85-021 Civil) stated and ordered:

"In light of the IBLA decision declaring the REC #2 claim null and void and the court's affirmation of the decision, the defendant is entitled to have Smith enjoined from any further efforts to mine travertine from the land known as REC #2."

"#(2) ...Sherman C. Smith is herewith enjoined from undertaking any further mining activity upon REC #2."

U.S. District Court Judgment in a Civil Case, Case Number A85-021-Civil, dated December 23, 1992 declares as follows:

"That Sherman C. Smith and any person acting in privity with Mr. Smith or acting on behalf of or at the direction of Mr. Smith be enjoined from undertaking any further mining activities on the land known as REC #2 unpatented mining claim and delineated on United States Mineral Survey No. 2489, approved by the Bureau of Land Management on December 22, 1987". (Emphasis added.)

Finally, the 9th CCA, in its May 20, 1996 Memorandum (Case No. 93-35085 DC No., CV-85-00021-HRH) stated:

"It was incumbent upon Mr. Smith to obey the district court order not to mine, even if the administrative decision denying his mining claim was wrong."

"The district court contempt order is AFFIRMED"

There is no disagreement between you and me that the former REC #2 (AA 058441) mining claim, and the RS&S #2 (AA 080754) mining claim were physically located on the same piece of land.

In your March 21, 1997 reply to the District Ranger's responsive statement you indicated that:

"We changed the name from REC #2 to RS & S #2."

You further stated that:

"The locatable ore is the same. The boundaries are the same for they were fixed for all time by the mineral survey --MS2489 AK."

In your plan of operations dated 12/3/96 for the RS&S#2:

"A. Name of Mine/Project RS&S #2 (Relocation of the Rec 2)"

During your oral presentation (previous appeal) on April 30, 1997, you confirmed that the RS&S #2 (AA 080754) and the REC #2 (AA 058441) were the same claim, even though they had different BLM numbers indicating a break in the chain of title. We are both in agreement that the RS & S #2 and the REC #2 were located on the same land, according to the location notices filed with the BLM and your own statements.

You are enjoined from mining on the former REC #2 (AA 058441) mining claim. That court order applies to the land as delineated by the mineral survey. Since the order applies to the land,

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it applies to the RS&S #2 (AA 080754) claim, in so far as it is located on the same land. You have indicated that the RS&S #2(AA 080754) is intended to cover that same land as the REC #2 (AA 058441).

I have enclosed a list of cases that have dealt with the prohibition against mining, including pertinent quotes from each.

Issue 4. "The District Ranger (USFS) Decision of November 3, 1998 which contradicts the findings of the 9th CCA expressed in the "opinion" of May 20, 1996 is clearly in error and should be: Reversed"

Forest Supervisor's Discussion

The USFS did not contradict a 9th CCA decision. The District Ranger made a decision to return the RS&S #2 (AA 080754) plan of operations, and the 9th Circuit reached a decision on the REC #2 (AA 058441), on appeal from the IBLA decision. The 9th CCA made no decision other than to do away with the IBLA decision and remand the case back to IBLA to hear on the grounds of marketability and changed circumstances. The District Ranger made a decision consistent with the Code of Federal Regulations as discussed in Issue 1.

The 9th CCA responded to an appeal from IBLA that dealt with the REC #2 mining claim. The REC #2 no longer exists since it has been declared abandoned and void in a BLM decision dated March 10, 1992. You did not appeal that decision. When you relocated the REC #2 area as the RS&S #2, you were not making an "amended location" which would relate back to the date of the filing of the original notice of location. No amendment is possible if the original location is void (43 CFR 3833.0-5). A "relocation" does not relate back to the original filing.

Current Forest Service regulations at Title 36 Code of Federal Regulations 228, Subpart C, Disposal of Mineral Materials, as amended on January 16, 1991 apply to any claim located after that date. These regulations were not in existence when the REC #2 was located, but were in existence when the RS&S #2 was located. These regulations apply to the current RS&S #2 claim, located on November 21, 1997.

Issue 5. Access to mining claim, RS&S #2

Forest Supervisor's Discussion

The Forest Service is not denying that a valid mining claim has the right to reasonable access. The Forest Service does not recognize any access rights for mining claims that are located for common variety materials, such as aglime. Common variety materials are not locatable according to law, and aglime is clearly defined as common variety under the 36 CFR 228 Subpart C regulations.

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Appeal Record and Decision

The cassette tape that you provided to me, December 14, 1998, containing your recording of the conversation between yourself, Forest Service personnel and State of Alaska personnel was not included in the appeal record. You did not present this tape at the time you submitted your "Notice of Appeal" nor did you request an oral presentation as a part of your appeal. Therefore it is not appropriate to include it in the record.

I affirm the Seward District Ranger's decision to return to you the mining plan of operations for RS&S #2 (AA080754) unpatented mining claim.

This decision is subject to appeal with the Regional Forester as provided for in 36 CFR 251.87(c)(2), and must be filed within 15 days of this decision. The Regional Forester's review shall be conducted on the existing record and no additional information shall be added to the file. You may appeal this decision to James Caplan, Acting Regional Forester, USDA Forest Service, P.O. Box 21628, Juneau, Alaska 99802-1628.

A copy of the appeal regulations are enclosed. If you have any questions or require clarification concerning the appeal regulations contact Chuck Frey, appeals coordinator, otherwise contact Susan Rutherford (271-2500).

Sincerely,

DAVE R. GIBBONS
Forest Supervisor

cc:
Ron Freeman, Acting Seward District Ranger
Maria Lisowski, Region 10, OGC
John Kato, Regional Office

enclosures