

Appeal from a decision of the Phoenix Resource Area Manager, Bureau of Land Management, denying approval of Mining Plan of Operations 89-P-001.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--Mining Claims: Plan of Operations--Public Lands: Administration

An appellant bears the burden of showing error in a BLM decision denying approval of mining plan of operations. Unsubstantiated allegations of error do not satisfy this burden.

2. Federal Land Policy and Management Act of 1976: Plan of Operations--Mining Claims: Plan of Operations--Public Lands: Administration

The fact that BLM does not intend to propose a WSA for inclusion in the wilderness system does not alter BLM's obligation to manage lands within the WSA in a manner that will not impair the land's suitability for preservation as wilderness. BLM must continue to manage the land under the nonimpairment standard established by statute until the lands are removed from the WSA.

3. Federal Land Policy and Management Act of 1976: Plan of Operations--Mining Claims: Plan of Operations--Public Lands: Administration

A BLM determination that a proposed plan of operations for mining activities on unpatented mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system is sufficient reason for denying approval of the proposed mining plan.

APPEARANCES: W. Scott Donaldson, Esq., Phoenix, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Robert L. Baldwin, Sr., and E. Rose Baldwin (appellants) have appealed from a March 1, 1989, decision of the Phoenix Resource Area Manager, Bureau

of Land Management (BLM), denying approval of Mining Plan of Operations 89-P-001.

Appellants filed their proposed mining plan of operations with the Phoenix District Office, BLM, on January 9, 1989. Their plan outlined planned placer mining operations on the Last Chance Nos. 10 through 14 and Last Chance No. 29 unpatented placer claims, situated in sec. 11, T. 9 N., R. 3 W., Youapai County, Arizona, and in the Hassayampa River Canyon Wilderness Study Area (WSA) (No. AZ-020-083). The proposed mining activities were described as:

Material first dug and sorted by D-9. Put over grizzly with 977 Loader. Fed to Trommels with 555 John Deere - then into jigs and bowl. Oversize from Trommel stacked conveyors - then re-landscaped for reclamation.

There will also be 2 settling ponds and 1 fresh-water pond for recycling water.

(Plan of Operations 89-P-001 at F).

The portion of appellants' plan addressing reclamation measures undertaken to prevent unnecessary and undue degradation states:

Large boulders will be separated by the D-9 and left in place. Boulders over 5 inches from grizzly will be put back to prevent erosion. As settling ponds fill with silt, they will be cleaned out and dirt put back over boulders and pre-pared for reseeding.

Excavation will begin on North end of Claim # 11 and proceed toward plant set up. After that area is reclaimed, the same will be done from the South end of Claim # 11.

(Plan of Operations 89-P-001 at G).

Appellants listed a D-9 Cat dozer, 100-yard per hour trommel, 30-yard per hour trommel, 555 John Deere Loader with backhoe, a 977 Truck Loader, rougher jig, cleaner jig, CenTri Fugal Bowl, one 30-foot Feed Conveyor, two 30-foot stacked conveyors, 12- by 20-foot Grizzly, one 6-inch pump, one 2-inch pump, one 1963 Willys Jeep 4 x 4, one 1983 Chevy 4 x 4 P-U, one 1974 Chevy 4 x 4 Blazer, one 1,000-gallon fuel tank, and one 24-foot self-contained trailer as the equipment to be used in the mining operations.

Appellants claims lie within a WSA, and BLM must manage the lands within this WSA in accordance with BLM's Interim Management Policy and Guidelines for Lands under Wilderness Review (IMP), 1/ and 43 CFR Sub-part 3802. In its decision, BLM initially stated that special techniques

1/ Appellants erroneously cite 43 CFR 3802 as containing the IMP. The IMP was originally published at 44 FR 72014 (Dec. 12, 1979), and was thereafter amended at 48 FR 31854 (July 12, 1983). Oregon Natural Resources Council, 114 IBLA 163, 167 n.7 (1990).

and equipment would be required to assure successful removal and preservation of existing vegetation (Decision at 1) and that the mining plan of operations and supplemental information provided by appellants did not sufficiently address reclamation issues. BLM noted that completion of rehabilitation of disturbed areas to the point of being substantially unnoticeable was to be accomplished on all Arizona WSA's by December 31, 1989, and that BLM does not believe that the proposed operations would permit reclaiming of those areas to meet the required standard before that date. BLM specifically bases its decision on the following five factors:

1. There will be less than nine months within which to provide vegetative cover to a point of being substantially unnoticeable where natural succession is occurring.

2. The proposed area(s) to be mined (placered) by either of the described alternatives followed by the reclamation measures described in the [mining plan of operations] and revision will not appear natural but will be substantially noticeable for six to eight years.

3. The proposed reclamation does not lend itself to assuring the success of providing a vegetative cover at least to the point of being substantially unnoticeable and where natural succession is occurring by December 31, 1989.

4. Three previously mined areas (outside the WSA boundary) within one mile and up to seven miles distance from the proposed operation with the same characteristics have not exhibited any substantive reclamation over a several year period.

5. The alternative proposal of mining 100 feet by 50 feet by approximately 30 feet slots or strips followed by the replanting of transplanted vegetation by the operator will not assure success. The sparcity of rainfall (approximately 9 inches per year), the lack of proper bedding material (soil) and the poor success rate of transplanting mature vegetation does not lend itself to successful reclamation by this mining alternative.

A June 20, 1986, memorandum in the record states that Arizona "proposes to complete Statewide reclamation of WSAs by December 31, 1989." 2/

[1] Appellants assert two bases for their claim that BLM's decision is in error. First, they contend that the December 31, 1989, reclamation date is arbitrary and capricious (Statement of Reasons (SOR) at 2). Appellants have, however, failed to identify the basis of this assertion. The law is well settled that appellant bears the burden to prove error in

2/ Excepted from this reclamation date is the Picacho Mountains WSA, not at issue herein.

BLM's decision. Unsubstantiated allegations do not meet this burden of proof.

[2] Appellants allege that BLM's proposed action for the WSA encompassing the Baldwin claims is to exclude the area from wilderness designation and that consequently "BLM's requirement that all reclamation be completed by December 31, 1989, is arbitrary and capricious because BLM does not intend to include the area in the Wilderness system." Id.

The question of whether the subject WSA has the requisite wilderness characteristics to be included in a WSA was settled at the time the WSA designation was made, and that question is no longer open to challenge. Manville Sales Corp., 102 IBLA 385, 391 (1988); Keith R. Kummerfeld, 74 IBLA 106, 109 (1983).

This Board has consistently held that in managing WSA's pending review of their suitability or unsuitability for inclusion in the permanent wilderness system BLM must follow the guidelines established by the IMP. Oregon Natural Resources Council, supra at 167; The Wilderness Society, 106 IBLA 46 (1988); L.C. Artman, 98 IBLA 164 (1987). "No variance therefrom may be authorized absent an express justification in the record for such action." Oregon Natural Resources Council, supra.

Under section 603(c) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1982) (FLPMA), the Secretary must manage lands within WSA's in a manner that will not impair their suitability for inclusion in the wilderness system (nonimpairment standard). When considering approval of a proposed plan of operation for mining claims within a WSA the Secretary (or his delegatee) must consider whether the proposed action will comply with that section.

Section 603(c) provides an exception to the impairment standard. Existing mining and grazing uses may continue in "the same manner and degree in which the same was being conducted on October 21, 1976" (43 U.S.C. § 1782(c) (1982)), even though that activity might cause impairment of wilderness characteristics. The preservation of preexisting use is limited to restrictions necessary to prevent any unnecessary and undue degradation. Oregon Natural Resources Council, supra at 167 n.6; State of Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979); Havlah Group, 60 IBLA 349, 88 I.D. 1115 (1981); H-550-1 at 4.

It is thus obvious that, if the proposed use is not grandfathered, any BLM discretionary action which impairs suitability is forbidden. Appellants do not contend that on the date of enactment of FLPMA they were conducting mining operations on the claims in the same manner and degree as was described in its proposed mining plan of operations, and there is no evidence in the record to suggest that the proposed activities are grandfathered.

[3] After conducting a detailed study of the anticipated impact of the proposed operations, BLM determined that the proposed activity would impair the Hassayampa River Canyon WSA's suitability for inclusion in the wilderness system. This being the case, the mining plan of operations

cannot be approved. See Oregon Natural Resources Council, *supra*; The Wilderness Society, *supra* at 55.

Appellants do not contend that BLM failed to adhere to the requirements of the IMP when determining that the activities described in the proposed mining plan of operations would impair the suitability of the WSA. Rather, they argue that it is arbitrary and capricious for BLM to reject their plan of operations after concluding that the lands are not suitable for inclusion in the wilderness preservation system. Appellants may be absolutely correct when stating that BLM strongly recommends that this WSA not be included in the permanent wilderness preservation system. However, BLM's management responsibilities have not been changed by this determination. The final determination regarding the area's inclusion or noninclusion in the wilderness system lies with Congress, and the Department's duty to manage the lands consistent with the nonimpairment standard remains unchanged until Congress has acted. Unless and until the lands embraced by appellants' mining claims are removed from the WSA, they must be managed under the nonimpairment standard mandated by statute. Manville Sales Corp., *supra* at 392. See generally State of Utah v. Andrus, *supra*. ^{3/}

Accordingly, 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 affirmed.

R. W. Mullen
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

^{3/} BLM would not be constrained by the nonimpairment standard if the lands were removed from the WSA and found unsuitable for management in the permanent wilderness system.