

PIERRE J. OTT, JIM D. WILLS

IBLA 90-477, 90-478

Decided April 2, 1992

Appeals from a decision of the California State Office, Bureau of Land Management, affirming notice of noncompliance issued by the Folsom Resource Area Manager, that required submission of mining plans of operations prior to commencement of operations on mining claim CA MC 71725.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Environment--Mining Claims: Surface Uses: Wilderness

A mining plan of operations limited in duration to operations on land in a wild and scenic river study area in 1989 was not shown to continue in effect after Dec. 31, 1989.

2. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Environment--Mining Claims: Surface Uses: Wilderness

A mining plan of operations was properly required for dredging operations in a wild and scenic river study area pursuant to Departmental regulation 43 CFR 3809.1-4 when claimants failed to show that their operations were excepted from the general rule that mining in such a study area required submission of a plan of operations.

APPEARANCES: Pierre J. Ott, Midpines, California, and Jim D. Wills, Mariposa, California, pro sese.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On May 31, 1990, the Folsom, California, Resource Area Manager, Bureau of Land Management (BLM), issued identical notices of noncompliance to Pierre J. Ott and Jim D. Wills for mining on CA MC 71725 without an approved plan of operations. Appellant Wills sought review by the State Director of the Resource Area Manager's decision pursuant to 43 CFR 3809.4(a). The State Director determined that the issue raised by the appeal was "whether or not you must submit a plan of operations" (Decision at 1). He found that a plan of operations was required pursuant to "43 CFR

3809 to prevent unnecessary degradation and provide for reasonable reclamation," and affirmed the action taken by the Resource Area Manager. ^{1/} We find that the State Director accurately identified the issue on appeal and that his decision was correct.

Placer mining claim CA MC 71725, the J&G #1, is situated in sec. 8, T. 4 S., R. 18 E., Mt. Diablo Meridian, within the Merced River wild and scenic study area in Mariposa County, California. The claim was acquired by appellants on December 7, 1989. Appellants argue that they were not required to submit a plan of operations because their grantor had obtained approval of a plan of operations prior to transfer of the claim to appellants in December 1989, and that the approved plan was also transferred to appellants as part of the grant. Appellant Wills argues separately that annual plans of operations are not required in any event and that the prior approved plan continues in effect. He denies that he has ever failed to comply with BLM regulations governing his mining operations.

Alternatively, after arguing that his grantor's plan continues to apply to current operations, appellant Ott contends that no plan of operations is required because operations on the claim fall into the "casual use" category. Ott argues that BLM applied an incorrect "nonimpairment standard" to his operations on CA MC 71725, which consist of dredging in the riverbed that "will be completely erased by high water" (Ott Statement of Reasons (SOR) at 1, 2). He argues that he has always mined on his claims in the Merced River area in compliance with BLM regulations, and that no bond may be required of him because no plan of operations is required of a miner engaged in "casual use" (SOR at 3).

[1] The State Director found correctly, therefore, that appellants' argument is that they need not file a plan of operations before working CA MC 71725. Having so decided, he rejected the argument by appellants that the 1989 plan of operations continued in effect in later years. His decision explains that, concerning the plan of operations filed by the prior claimant, a

plan of operations was approved for 1988. On March 22, 1989, another plan of operations was received for 1989 and was approved

^{1/} Wills appealed both to the State Director and to this Board. The State Director found that, pursuant to provision of 43 CFR 3809.4, appeal was properly taken first to that office under 43 CFR 3809.4(e). Ott, however, appealed directly to this Board. Inasmuch as both appeals were taken from identical notices of noncompliance, involve the same issue, the same claim, and the same facts, no purpose would be served by requiring that Ott's appeal be sent back to the State Director for decision, since the two cases are so similar as to be identical for all purposes. Under the circumstances, both cases may properly be consolidated and decided now, since further proceedings could not produce a different result. See e.g., Herbert J. Hansen, 119 IBLA 29, 30 (1991), finding that make-work inter-Departmental transfers should be avoided in order to advance administrative economy in appellate review.

for the 1989 "season." No plan of operations was received for 1990 and no notification of a new owner/operator was received by [BLM]. Therefore [BLM] is correct in stating that there is no current approved plan of operations for this claim since the previous approved plans of operations filed by [your predecessor] were for the 1988 and 1989 "seasons" and have now expired. Since there is no existing approved plan of operation for CA MC 71725, [BLM] has the authority to request a new plan of operation from you as stated in 43 CFR 3809.1-6.

(Decision at 2). Except as concerns the Director's conclusion that BLM has authority to require submission of a plan, appellants do not dispute the factual predicate of this statement. On the record before us, therefore, we conclude that there was no plan of operations governing mining on CA MC 71725 in effect after December 31, 1989, when the 1989 plan expired by its own terms.

[2] Concluding that a plan of operations was required before operations on CA MC 71725 could begin in 1990 under the new owners, the decision required a plan of operations to be filed and affirmed the notice of noncompliance issued by the Resource Area Manager. *Id.* The notice of noncompliance had found that the operation by appellants was significantly different from that conducted by their predecessor: they were mining on the west side of the river, opposite from the site of the prior operations, and were "excavating gravel and cobbles from the streambed and piling them onto the west bank of the river" (Notice at 2). Appellants do not disagree with this finding. 2/

They argue, however, that their conduct does not impair the wilderness character of the stream where it takes place, that their activity is substantially the same conduct as was approved for their grantor's operations, and that BLM has set a higher standard for the operations of appellants than is required or allowed by law.

A plan of mining operations is required before commencing activity for "any operation, except casual use, in * * * [a]reas designated for potential addition to * * * the national wild and scenic rivers system." 43 CFR 3809.1-4(b)(2). The term "casual use" is defined at 43 CFR 3809.0-5(b):

Casual Use means activities ordinarily resulting in only negligible disturbance of the Federal lands and resources. For example, activities are generally considered casual use if they do not involve the use of mechanized earth moving equipment or explosives or do not involve the use of motorized vehicles in

2/ Appellant Wills has requested a hearing. The record before us, however, establishes that there is no disagreement about the facts at issue, although appellants draw different conclusions from their circumstances than does BLM. A hearing is not required in such a case. Sealaska Corp., 115 IBLA 249 (1990).

areas designated as closed to off-road vehicles. * * * [Emphasis in original.]

The quoted regulations establish that mining operations conducted within a study area generally require a plan of operations. An exception to this general requirement exists if the operations are so minimal that they constitute "casual use" within the meaning of 43 CFR 3809.0-5(b). To establish that such an exception exists, a miner must show that his operations will cause only a negligible disturbance. See 43 CFR 3809.0-5(b).

Appellants have not described their proposed operations to establish that their use is "casual." While they dispute the authority of BLM to regulate their operations in the manner proposed, they have shown no reason why they should not be required to file a plan of operations for their mining operations conducted within the study area.

Their arguments confuse the burden of proof required in such cases: it is for appellants to show that their operations amount to casual use and therefore require no plan of operations. It is not required that BLM establish that their operations are not excluded from the general requirement that there shall be a plan filed for mining within the study area. See generally Galand Haas, 114 IBLA 198 (1990) concerning the burden of proof on appellants before this Board. On the record before us, BLM has adequately documented the need for a plan of operations on this claim by establishing that operations conducted by appellants after 1989 included earth moving that was changing the west bank of the river.

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.

Franklin D. Arness
Administrative Judge

I concur:

James L. Byrnes
Administrative Judge