

THE GEM SHOP, INC.

IBLA 93-565

Decided June 20, 1996

Appeal from a decision of the Malheur Resource Area Manager, Vale, Oregon, Bureau of Land Management, denying approval of a mining plan of operations for a claim in a wilderness study area. OR 49610.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations—Federal Land Policy and Management Act of 1976: Wilderness—Mining Claims: Plan of Operations

A finding by BLM that a proposal in a mining plan of operations to excavate a 1 1/2-acre open pit using a tracked loader, power drill, and explosives on an unpatented post-FLPMA mining claim within a WSA would impair suitability of the area for inclusion in the wilderness system provided sufficient reason to deny approval of the plan.

APPEARANCES: Eugene Mueller, President, The Gem Shop, Inc., Cedarburg, Wisconsin.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The Gem Shop, Inc. has appealed from a June 17, 1993, decision by the Malheur Resource Area Manager, Vale, Oregon, Bureau of Land Management (BLM), denying approval of a mining plan of operations proposed for the Wild Chance lode mining claim, ORMC 82747. The plan disallowed by BLM proposed using a tracked loader, power drill, and explosives to excavate an open pit not greater than 1 1/2 acres in total extent, subject to the limitation that not more than half an acre would be disturbed at any given time. The proposed mining operation was to take place in sec. 20, T. 27 S., R. 43 E., Willamette Meridian, on land that BLM determined was within the Blue Canyon Wilderness Study Area (WSA).

The Wild Chance claim was located in 1985, after enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1994); according to appellant it covers the same ground as a claim located in 1973 which was disturbed by mining operations prior to 1976. Nonetheless, BLM refused to allow appellant to open a pit on the previously mined

land, finding that the operation proposed was contrary to Departmental regulations at 43 CFR 3802 and provisions of the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), 44 FR 72027 (Dec. 12, 1979). BLM determined that:

Under these guidelines, reclamation had to be completed on all newly disturbed areas by the time the Secretary of Interior was scheduled to send his recommendations for wilderness designation to the president. \* \* \* This deadline was September 30, 1990. After this date, no new disturbance which requires reclamation can be allowed. \* \* \* Your proposal to create an open pit with a tracked loader, power drill and blasting is clearly a case where reclamation would be required to avoid conflicts with wilderness values. Therefore your proposal cannot be approved under our current guidance.

(BLM Decision at 1).

Appellant argues that the land where the Wild Chance is found was disturbed by mining before 1976 "at the top of the lava rim, higher in altitude than any other disturbance in the area. Not a good location to be 'substantially unnoticeable'" (Reply filed Nov. 1, 1993). It is also contended by appellant that, until such time as Congress acts to make the land in question part of a wilderness, "our statutory rights under the mining law prevail" and the land at issue "shall continue to be subject to appropriation' under the mining law" (Statement of Reasons (SOR) at 2). Assuming that this alleged state of the law includes a right to obtain a patent to the Wild Chance claim, appellant takes the position that BLM should do nothing to inhibit production of minerals from the claim. Further, appellant suggests that the claim is not in the WSA. See SOR at 2, Reply.

Under provision of section 603 of FLPMA, 43 U.S.C. § 1782 (1994), the Secretary is required to make recommendation to the President concerning whether areas under wilderness study are suitable for inclusion in the wilderness system. While action on the recommendation so made is pending, FLPMA section 603(c) requires that a WSA must be managed by BLM "so as not to impair the suitability of such areas for preservation as wilderness," the so-called "nonimpairment criteria." See Dave Paquin, 129 IBLA 76, 79 (1994), and authorities cited therein. While appellant suggests that the Wild Chance is not within a WSA and need not be so managed, no evidence has been offered to show that BLM erred in finding that the Wild Chance is in the WSA; a map furnished by appellant with the proposed mining plan indicates that the claim lies west of a road or trail that defines the eastern boundary of the WSA. Other maps of the WSA provided in the case file by BLM corroborate this circumstance. The record before us indicates the claim is entirely within the WSA. But even if part of it were outside the WSA, so long as part of the claim lies inside the study area, we must apply the regulations at 43 CFR Part 3802, governing mining within a WSA. Paul M. Shock, 126 IBLA 232, 235 (1993).

[1] Applying the regulations at 43 CFR Part 3802, BLM could allow mining operations in the WSA to continue "in a manner that minimizes environmental impacts." 43 CFR 3802.1-5(b). The regulations, however, require BLM to determine if proposed mining operations would impair "suitability of the area for preservation as wilderness." 43 CFR 3802.1-5(b). The phrase "impairment of suitability for inclusion in the wilderness system" is defined by the regulations to mean "taking actions that cause impacts that cannot be reclaimed to the point of being substantially unnoticeable in the area as a whole by the time the Secretary is scheduled to make a recommendation to the President." 43 CFR 3802.0-5(d). See also IMP at 44 FR 72018 (Dec. 12, 1979). In this case, the date by which such reclamation should have been accomplished was already past when appellant filed the plan at issue; BLM took notice of this fact when approval of appellant's plan was denied, finding that the proposed action, which would require reclamation, would impair wilderness qualities of the WSA during the pending review of BLM's recommendation.

Appellant does not contend that open pit mining of the Wild Chance would not impair suitability of the area for inclusion in the wilderness system, but argues that, because the land now claimed was disturbed by mining before 1976, mining should be allowed on the claim presently held by appellant. It is true that operations in existence on October 21, 1976, are permitted, under 43 CFR 3802.1-3, to continue to operate in the same manner and degree as they were then being conducted, subject to certain conditions, as an exception to the nonimpairment criteria of the IMP and Departmental regulations governing WSAs. It is not clear, however, that any operations on the Wild Chance before 1976 can be directly related to those now proposed to be conducted by appellant. There is no contention that there were continuing mining operations on the claim in October 1976, nor is it argued that the proposed operations will continue in the same manner and degree as did the earlier operations.

More to the point, appellant concedes that BLM correctly found the Wild Chance mining claim that was located in 1973 and, eventually recorded with BLM as ORMC 25250, was declared abandoned and void in 1985 for failure to file documents required by FLPMA section 314, 43 U.S.C. § 1744 (1994). Following extinguishment of ORMC 25250 in 1985, ORMC 82747 (the claim that is the subject of the plan pending before us), was located that same year. The prior claim that was not properly recorded under FLPMA section 314 was forfeited. United States v. Locke, 471 U.S. 84, 98 (1985). Appellant cannot, however, claim any residual rights from the 1973 claim or tack the present claim to the forfeited claim. Dave Paquin, 129 IBLA at 80; Lloyd L. Jones, 127 IBLA 270, 274 (1993). Consequently, there being no claim in existence prior to enactment of FLPMA to which appellant can trace a grandfathered use or claim of right, the nonimpairment standard derived from FLPMA section 603(c) applies to BLM management of mining activity on the Wild Chance claim, as BLM found.

By challenging BLM's conclusion that the previously mined area was correctly found to be substantially unnoticeable so as to be qualified for inclusion in the WSA, appellant seeks to overturn a finding to the contrary made in a final inventory decision issued by BLM in November 1980. This tardy challenge to BLM's finding concerning the wilderness quality of the land encompassing the Wild Chance claim must be rejected as untimely made, the time for commenting concerning establishment of the WSA being long past. Similarly, the argument that inclusion of the land in the Wild Chance in a WSA is ineffective to modify any rights to claims filed under the mining law cannot prevail, because, although appellant assumes otherwise, the mining law was amended in 1976 by enactment of FLPMA. See, generally, Paul Vaillant, 90 IBLA 249, 254 (1986). Section 603 of FLPMA establishes that, in the case of areas under study for inclusion in the wilderness system, mining activities on claims located after enactment of FLPMA that might impair wilderness qualities are subject to regulation as described in this opinion. Finally, while appellant suggests that an absolute right exists to prosecute the Wild Chance claim to patent without hindrance from BLM regulation, no basis for this conclusion has been shown. Nor is it clear that BLM's refusal to approve the mining plan proposed by appellant raises any issue concerning issuance of a patent; this contention is at best premature and must also be rejected.

It is therefore concluded that under 43 CFR 3802.1-5(b), BLM was required to evaluate the mining plan filed by appellant for the Wild Chance claim to determine whether it would impair "the suitability of the area for preservation as wilderness." In doing so, BLM correctly found that open pit mining of the claim as proposed by appellant would violate the nonimpairment standard, and that, moreover, since a report recommending the WSA for inclusion in the wilderness system had been made, no impairing activity could be allowed until after the report had been acted upon. Since the plan proposed by appellant was not entitled to an exception from the nonimpairment standard applied by BLM, the decision to deny approval of appellant's mining plan conformed to Departmental regulations implementing FLPMA section 603(c) and the IMP.

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.

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Franklin D. Arness  
Administrative Judge

I concur:

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James L. Burski  
Administrative Judge

