

GEORGE STROUP

IBLA 2002-9

Decided November 29, 2004

Appeal from a decision of the Field Manager, Royal Gorge, Colorado, Field Office, Bureau of Land Management, rejecting a notice of operations and requiring approval of a plan of operations to construct an access road to a placer mining claim. COC-65021.

Affirmed.

1. Mining Claims: Placer Claims–Mining Claims: Plan of Operations–Mining Claims: Surface Uses

BLM properly rejects a mining claimant's notice of operations and requires submission and approval, pursuant to 43 CFR Subpart 3809, of a plan of operations to construct an access road across public lands within an area of critical environmental concern.

APPEARANCES: George Stroup, pro se; Roy L. Masinton, Field Manager, Royal Gorge Field Office, Colorado, Bureau of Land Management, U.S. Department of the Interior, Cañon City, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HEMMER

George Stroup appeals from an August 13, 2001, decision of the Field Manager, Royal Gorge, Colorado, Field Office, Bureau of Land Management (BLM), rejecting his July 27, 2001, Notice that he was constructing a motorized access road within an area of critical environmental concern in order to conduct placer mining operations on his mining claim in Colorado. BLM's decision required approval of a plan of operations for construction of the proposed road over lands within that area under 43 CFR Subpart 3809.^{1/}

^{1/} BLM issued its decision on Aug. 3, 2001, but instructed Stroup that he had a right to seek review of the decision by the State Director, Colorado. BLM later changed
(continued...)

By way of background, in 1996, BLM approved the Royal Gorge Resource Management Plan (RMP), inter alia, designating certain public lands in the resource area as the Arkansas Canyonlands Area of Critical Environmental Concern (ACEC). While the RMP proposed withdrawal of ACEC lands from mineral entry, no such withdrawal took place by 2001.

On January 6, 2001, Stroup located the Christine PL # 1 placer mining claim, CMC-251423, encompassing 20 acres of public land in the W $\frac{1}{2}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 18, T. 18 S., R. 71 W., Sixth Principal Meridian, Fremont County, Colorado, on both sides of the Arkansas River. Stroup apparently advised BLM that he was interested in procedures for recording the claim. BLM notified Stroup by letter dated January 10, 2001, that the subject land was within a powersite withdrawal, and thus recordation was governed by the Mining Claims Rights Restoration Act of 1955 (MCRRA), Pub. L. No. 84-359, 69 Stat. 682, codified as amended at 30 U.S.C. §§ 621-625 (2000), which opened public lands reserved for powersite purposes to entry under the general mining laws. BLM also advised Stroup that “any proposal” for “exploration or mining operations * * * would be subject to Federal regulations at 43 CFR Subpart 3809, and state laws for “Mined Land Reclamation.” (Jan. 10, 2001, BLM Letter to Stroup.)

Stroup filed a copy of his certificate of location for recordation with BLM on January 26, 2001, pursuant to section 314(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(b) (2000). The mining claim is located within the ACEC. The lands included within the mining claim are also situated in an area of public lands withdrawn and reserved for powersite purposes by a July 2, 1910, Executive Order. Thus, BLM’s acceptance of the recordation was governed by the MCRRA and implementing regulations at 43 CFR Part 3730. Allen Kroeze, 153 IBLA 140, 142 (2000).

The MCRRA requires that, before a locator of a placer mining claim may conduct mining operations, the Department has 60 days after the filing of the notice of location in which to determine whether placer mining operations may substantially interfere with other uses of the lands. 30 U.S.C. § 621(b) (2000). The Secretary has the authority to conduct a hearing on the mining claim during which time activity on it is further suspended, and after which the Secretary must make one of several decisions regarding further development of the mining claim. Id. In order to decide whether to hold the hearing, BLM, as the Secretary’s delegate, must prepare a determination of substantial interference in accordance with 43 CFR 3736.1(b).

^{1/} (...continued)

that view and advised Stroup he was required to file an appeal to this Board. BLM stated that the decision was effective on Aug. 13, 2001, for the purpose of an appeal to the Board. (BLM Letter to Stroup dated Aug. 13, 2001.)

Accordingly, BLM did not accept the recordation of the mining claim but set about to make the appropriate MCRRA determination regarding the mining claim.

Stroup completed an application for proposed operations described as a “highbanker” type using a 2.5 horsepower engine. (Feb. 22, 2001, Notification for Motorized Placer Operations.) It is not possible to determine from the record when the Notification was submitted. A handwritten note on this Notification indicates that BLM received it on March 15, 2001, and that Stroup requested an “immediate starting date.” In addition, Stroup submitted a letter to BLM stating that he “disagreed” with BLM regulations implementing the MCRRA and requiring a 60-day substantial interference determination, and defining “casual use” for purposes of 43 CFR Subpart 3809. Stroup’s letter indicates that BLM had advised him that use of a “motorized pump” constituted more than “casual use” and he disagreed. This letter was dated March 22, 2001, but hand-delivered to BLM on March 5, 2001.

BLM responded with a letter dated March 13, 2001, in which it explained that Stroup must follow BLM regulations in their entirety. BLM sent Stroup a copy of the MCRRA regulations. Despite Stroup’s objection, BLM informed Stroup it was proceeding with the determination required by that statute.

On March 20, 2001, BLM finalized a “Determination of Land Use Plan Conformance and NEPA Adequacy.” (No. CO-200-2001-0046 DNA). BLM references its consideration of environmental impacts under section 102(2)(C) of the National Environmental Policy Act of 1969, as amended, 42 U.S.C. § 4332(2)(C) (2000), within a 1987 “umbrella” Environmental Assessment (No. CO-050-RG-88-2) prepared for the purpose of allowing decisions for small placer operations to be made in a rapid and efficient manner.

In a separate MCRRA “Conclusion” dated March 21, 2001, apparently based on the DNA, BLM concluded that the mining claim’s recordation, and resulting mining operations, were likely to substantially interfere with other uses, since the claim is situated in the Arkansas Canyonlands ACEC. BLM stated that the “greatest potential” for problems arose in the following four ways: (1) substantial interference with anglers and recreational goldpanners, where the claim area provides one of the only walk-in locations for access by such recreational users in the Royal Gorge; (2) substantial interference with visual and scenic resources in the Royal Gorge, where recreational users raft and tourists travel by train through the claim area; (3) substantial interference with a railroad right-of-way that passes through the claim area; and (4) substantial interference with a fisheries habitat in the claim area. (Conclusion, Mar. 21, 2001.) Accordingly, BLM determined to accept the recordation of the mining claim only if the claimant signed a “mining agreement.”

Stroup executed the required mining agreement on March 21, 2001. By committing to it, Stroup expressly agreed that “[a]ny proposed mining and/or operation will be subject to [BLM] Surface Management Regulations, 43 CFR [Subpart] 3809,” and that, “[b]efore any work begins, an approved plan of operations will be required due to the area being located with[in] an area of critical environmental concern.”^{2/} (Mining Agreement, Mar. 21, 2001, at 2.) The agreement also stated that “[m]ining and/or prospecting operations may be subject to regulations of the Colorado Division of Minerals and Geology” (CDMG). *Id.* Because Stroup agreed to the terms of and signed the mining agreement, BLM officially recorded Stroup’s placer mining claim on March 26, 2001.

The record states that Stroup submitted a plan of operations for his proposal to engage in exploratory operations using highbanking methods. BLM serialized the plan of operations as COC-65021. No plan of operations appears in the record.

BLM prepared an “Environmental Assessment Record” (EAR), which addressed the likely environmental impacts of the proposed operations addressed in the alleged plan of operations. Based on the EAR, the Acting Field Manager issued a Finding of No Significant Impact (FONSI) on April 18, 2001, approving the proposed operations, subject to mitigating conditions. The FONSI specifically limited access by Stroup to foot travel beyond the parking lot at the end of the road in sec. 18. The EAR reveals that roads beyond the parking lot had been closed to vehicular traffic in the latter part of the 1990s, because they were “erosive, spreading, and * * * developing into dumping sites.” (EAR at 8.)

BLM forwarded the April 18, 2001, FONSI with a letter of that same date. Both the FONSI and the letter advised Stroup of the approval and the stated mitigation terms. The letter also indicated that Stroup had communicated a desire to change his opportunities for access to the mining claim.

Your verbal notification to our office that you wanted to cut the fence [along the boundary of the parking lot], install a gate, and use a vehicle for transport of mining equipment was provided well after the majority of the environmental assessment was already complete. If you still desire this access, please provide a complete written description of your mining and access proposal in the format required by 43 CFR 3809.1-5

^{2/} BLM has referred to the 43 CFR Subpart 3809 regulations which were promulgated by the Department effective Jan. 20, 2001. *See* 65 FR 69997 (Nov. 21, 2000). We will generally refer to these regulations, as subsequently reaffirmed or amended in a subsequent rulemaking in manners not relevant here. *See* 66 FR 54834 (Oct. 30, 2001).

so that we can evaluate it as a modification to the original plan of operations. [^{3/}]

(Apr. 18, 2001, BLM Letter to Stroup at 2.)

On April 20, 2001, Stroup submitted a formal request to modify his plan of operations in order to obtain vehicular access to his mining claim. He stated that he had made a “mistake * * * in not writing down [his] request for motorized access to the Claim.” (Apr. 20, 2001, Stroup letter to BLM, on behalf of Christine Mining & Milling Co.) He sought to use an existing road from the parking lot southeast to the southwest corner of his claim “on top of the cliff,” for the purpose of bringing “men and equipment to and from the claim on work days and for security while there is no work.” Id. Stroup noted that “[t]here will not be any earth[-]moving equipment used on the road at this time.” Id.

BLM approved the proposed modification, subject to mitigating conditions, by decision dated April 27, 2001. BLM stated that the use of the existing road was restricted to that connected with exploratory operations, but that the number of trips should be the “least amount possible.” (BLM Decision, dated Apr. 27, 2001, at 2.) BLM approved “minor repairs” to the road, but stated: “No vehicular access is authorized beyond the location [depicted] on the map (to the river terrace) and this approval does not constitute authorization for road building.” Id. (emphasis added). BLM’s map was incorporated into BLM’s Apr. 27, 2001, decision.

On May 22, 2001, Stroup met with BLM employees. Apparently at this time, Stroup orally sought approval to construct a new road. By letter dated May 29, 2001, BLM informed Stroup that its preliminary conclusion was that it would not authorize construction of the proposed road, since it would result in unnecessary and undue degradation of the public lands. BLM suggested that Stroup request modification of his plan of operations to provide an alternative route that would partially cross private land, and thus require that landowner’s written consent.

Thereafter, acknowledging that Stroup had been unable to obtain the private landowner’s authorization for alternative access or to acquire access by other means, BLM notified him by letter dated June 21, 2001, of what Stroup needed to do in order to obtain approval for both road construction and exploratory operations using a backhoe. Contradicting its position in its May 29, 2001, letter that Stroup should amend the plan of operations, BLM now stated that Stroup should submit a “Notice of Intent to Conduct Prospecting Operations” (NOI), both to BLM and to the Colorado Mined Land Reclamation Division which would be the “primary permitting

^{3/} The cited regulation, in 2000, referred to contents of plans of operations, and had been superceded at the time of BLM’s Apr. 18, 2001, letter by 43 CFR 3809.401.

authority.” (Letter to Stroup, dated June 21, 2001, at 1-2.) BLM stated that it would perform any necessary environmental review and comment to the CDMG regarding the notice, further stating: “[T]his area has been designated as an Area of Critical Environmental Concern, and our recommendations to [CDMG] would likely include engineered road construction techniques that would not result in degradation of this area.” Id.^{4/}

During a meeting with Stroup that took place on June 26, 2001, BLM stated that the road must be engineered by a “professional road building expert,” such that it was “built correctly and [would] not result in significant damage to the public lands.” (Memorandum to the File from Dan Grenard, BLM, dated June 26, 2001.) According to the record, at this meeting Stroup disagreed that an engineered road was needed, and also disagreed with any requirement that he deal with a Colorado State agency. Id.

On August 1, 2001, Stroup submitted what he called a “Notice” of his intention to proceed with construction of an access road to the claim area, beginning on August 11, 2001. He asserted that the route was the “only possible access available to enter our operations with the least amount of degradation to the land.” (Notice at 1.) Stroup stated that the work would consist of using a “tracked dozer” to improve the existing road, and then constructing a new road: “The new route is only 550 feet long, the width of the driving surface is only 12 feet and we will have a 2 to 1 inside cut that is about 5 feet. Water bars will be [p]ut in as needed to control water run off.” Id. He noted that disturbed areas would be reclaimed and that reasonable measures would be taken to prevent unnecessary and undue degradation of the public lands. Id. at 2-3.

BLM rejected Stroup’s Notice in its August 2001 decision. BLM explained that in order to seek approval for roadbuilding activity associated with his placer mining claim, Stroup was required by 43 CFR 3809.11(c) to submit a plan of operations instead of a Notice, since the public lands at issue are situated in the ACEC special status area. (Decision at 1.) BLM stated that the plan of operations should ensure that the proposed road, which crossed an “extremely steep cliff side” highly visible to the public and posed potential environmental problems, was properly designed, constructed, operated, maintained, and reclaimed in compliance with the

^{4/} BLM described Stroup’s proposal as one to construct a road from the parking lot to the cliff side overlook, using a “4-10 ‘cat’ with a six way tilt blade.” The road would have a switch back, and allow Stroup to bring a backhoe to the river terrace, where he would dig a series of holes close to 20 feet deep in order to test excavated material for the purpose of determining the viability of undertaking mining operations. Id.

performance standards of 43 CFR 3809.420.^{5/} Id. at 2. BLM noted that the road should be designed by a certified engineer and should maintain grades, widths, and drainage specifications so as to minimize erosion, siltation, air pollution, and other resource impacts, with “end hauling and storage” of material for eventual reclamation, rather than “side casting.” Id. at 2.

BLM stated that Stroup would be required to comply with the bonding requirements of 43 CFR 3809.522 through 3809.556, as a guarantee that the road would be properly reclaimed. In addition, BLM explained that Stroup must obtain approval by the CDMG since BLM had an existing management agreement with the State pursuant to 43 CFR 3809.200. BLM concluded that Stroup’s current proposal to “build an undesigned road using unacceptable construction techniques in an [ACEC] would result in irreparable harm to resources that can not be effectively mitigated and would be considered unnecessary and undue degradation of the public lands (43 CFR 3809.415(a) [(2001)]).” Id. at 2.

Stroup timely appealed to the Board. In his central argument, he contends that he properly submitted a “Notice of Intent” under 43 CFR 3809.1-3 (2000), because the placer mining operation, including improvement of the existing access road and construction of the new access road, would disturb less than five acres of public land. Acknowledging that the rule he cited was not in effect when he submitted his Notice, Stroup argues that he was unable to obtain a current Code of Federal Regulations containing the amended rules and that this made it impossible for him to follow regulations to which he had no access. (Notice of Appeal and Statement of Reasons (SOR) at 1.) Stroup also objects to BLM’s insistence that he submit information to CDMG, and argues that BLM, and not the State of Colorado, is under Congressional mandate to implement the mining laws. Stroup objects to having to obtain an engineer to design the road, arguing that “we are not building a public access road but only a motorized trail.” Id. at 3. Finally, Stroup complains that he cannot set a dollar amount for a bond until BLM establishes the amount of one needed.

Despite these objections, Stroup states his intention to cooperate with BLM concerning the design, construction, operation, maintenance, and reclamation of an access road to his placer mining operations. (SOR at 3 (“I will do what ever you want us to do to accomplish our task. * * * I w[ill] do my part and follow every Federal law that pertains to the federal mining law.”).) Stroup commits that he will not begin any roadbuilding activity until the matter is settled. Id.

^{5/} This rule was amended by the Department effective Dec. 31, 2001, in a manner not pertinent to this appeal. See 66 FR at 54861 (Oct. 30, 2001).

[1] BLM is correct that, within an ACEC, a mining claimant is required to obtain BLM approval of a plan of operations in order to conduct road building activities, even if those activities disturb less than 5 acres of public lands.^{6/} The question of what Stroup must submit to conduct road development is determined by the fact that the site of his mining operations and proposed road construction is within an area designated by the 1996 Royal Gorge RMP as an ACEC. Section 103 of FLPMA, 43 U.S.C. § 1702(a) (2000), defines an ACEC to include areas of the public lands requiring “special management attention” “to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards.” D.J. Laughlin, 154 IBLA 159, 160 (2001).

The Department has consistently provided by rules in effect today and in 2000 that in order to undertake mining operations and other surface-disturbing activities within an ACEC, including constructing, operating, and maintaining a road for access to mining operations, a mining claimant must obtain approval of a plan of operations. This requirement was expressly incorporated into the March 21, 2001, mining agreement signed by Stroup.

The rule cited by Stroup, 43 CFR 3809.1-3 (2000), permits a mining claimant to engage in mining operations, including constructing, operating, and maintaining an access road to the site of such operations, by filing a notice of intent without need for approval where the operations would cumulatively disturb less than five acres of public land in any one calendar year. See 43 CFR 3809.1-3(a) and (b) (2000); Differential Energy, Inc., 99 IBLA 225, 230 (1987). Notwithstanding that rule, however, 43 CFR 3809.1-4 (2000) provided that BLM approval of a full plan of operations was required for “[a]ny operations, except casual use, in * * * [d]esignated Areas of Critical Environmental Concern,” even if the total disturbance of public lands was expected to be less than five acres. Joe Trow, 123 IBLA 96, 102 (1992) (43 CFR 3809.1-4 applicable to addition to national wild and scenic river system). “Casual use,” within the meaning of 43 CFR 3809.0-5(b) (2000), was limited to activity “ordinarily resulting in only negligible disturbance of the Federal land and resources,” and specifically excluded the “use of mechanized earth moving

^{6/} For purposes of deciding this appeal, we accept Stroup’s assertion that his proposed roadbuilding operations would disturb less than five acres of public land. Such a conclusion, however, is not verifiable on this record. Stroup contends on appeal that 850 feet of existing road need to be widened from 10 to 12 feet along a few places for a length of 200 feet, and that the new road would be constructed to a width of 12 feet, along 450 feet, with a disturbance 20 feet wide. Stroup states the resulting total disturbance would be 0.74 acres. (SOR at 1.) The EAR refers to a U.S. Geological Survey topographic map showing that, to safely reach the mining claim, over 1700 linear feet of new road would be required. (EAR at 10.)

equipment.” Thus, Stroup would have been required to obtain approval of a plan of operations to construct roads under regulations applicable in 2000.

Rules applicable in August 2001, when Stroup filed his notice, and today maintain the requirement that, for ACECs, plans of operations must be filed notwithstanding the amount of disturbed acreage. “You must submit a plan of operations for any operations causing surface disturbance greater than casual use in [ACECs] where [43 CFR] § 3809.21 does not apply.” 43 CFR 3809.11(c). As amended on November 21, 2000, and remaining in effect today, Subpart 3809 defines “[o]perations” to include “reasonably incident uses, whether on a mining claim or not, including the construction of roads.” 43 CFR 3809.5 (emphasis added). Casual use, likewise, excludes “use of mechanized earth-moving equipment.” *Id.* Thus, by virtue of 43 CFR 3809.11(c), Stroup was required to seek approval for construction of the road through an ACEC by filing a plan of operations. For this reason, we conclude that BLM properly rejected Stroup’s Notice.

We also agree with BLM that it may require a mining claimant to submit documents for approval by a state agency. The decision states that BLM has entered into an agreement with CDMG requiring involvement of the State in approving mining and related operations, and that such agreements are expressly contemplated in BLM rules. As BLM notes, 43 CFR 3809.200 explicitly contemplates joint State/Federal programs in which BLM may defer to decisions of the State. Such agreements are subject to limitations in 43 CFR 3809.203 including the requirement that BLM “concur with each State decision approving a plan of operations.” 43 CFR 3809.203(a). Thus, given that Stroup must submit a plan of operations for road construction within an ACEC, BLM is required by law to concur in such a State decision.^{7/} To the extent the challenged decision, by referencing BLM’s prior discussions and communications with Stroup, contains any ambiguity on this point we stress that BLM’s exercise of its own authority must be consistent with the rules found in 43 CFR Subpart 3809.^{8/}

^{7/} “Under this kind of agreement, BLM retains certain responsibilities that are inherent in Federal public land management under FLPMA, and may not be delegated. These include concurrence on the approval of each plan of operations and responsibility for other Federal laws, * * *. The effect is to allow State management of the programs with the minimum oversight necessary to carry out Federal law.” 65 FR at 70030. Further, 43 CFR 3809.3 provides that the Subpart 3809 regulations control over conflicting State laws and regulations, except that there is deemed to be no conflict where the State provides a “higher standard of protection for public lands.”

^{8/} Stroup reasonably contends that BLM’s communications with him have been
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This Board's consideration of Stroup's remaining concerns are premature at this juncture. Stroup complains that the requirement to obtain an engineer to design the road is excessive. This Board can only confirm that under BLM regulations, Stroup is required to submit a plan of operations that complies with the terms of 43 CFR 3809.401. We cannot make any determination regarding requirements that may be imposed under the cooperative State/Federal agreement referred to by BLM, because it does not appear in this record. Determining the amount of bond is also premature, as Stroup notes, until the time that the appropriate authority approves, and BLM concurs in, a plan of operations. We thus express no opinion on that topic.

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 affirmed.

Lisa Hemmer
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge

^{8/} (...continued)

misleading. As noted above, BLM, like Stroup, cited outdated regulations in giving guidance to him. More problematic, in its letter to Stroup dated June 21, 2001, BLM expressly stated: “[W]e informed you that mining operations were permitted by the State of Colorado, Mined Land Reclamation Division. * * * this type of operation requires a Notice of Intent to Conduct Prospecting Operations.” (Emphasis added.) The record contains no further explanation of the BLM/CDMG agreement than this, and BLM has not included any such agreement in the record. In its answer, BLM states that it has addressed this previously in letters and correspondence, and explains that the Colorado Mined Land Reclamation Division is now CDMG. See Oct. 2, 2001, Answer at 2. BLM's decision now refutes BLM's advice to Stroup to file a Notice of Intent.