

DALE F. GIMBLETT

IBLA 80-961

Decided December 22, 1981

Appeal from decision of Cottonwood Resource Area Headquarters, Bureau of Land Management, Cottonwood, Idaho, disapproving plan of operations for mining claim within proposed wilderness study area.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Mining Claims: Generally

The Bureau of Land Management is directed by sec. 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976), to manage lands under review for wilderness suitability so as to prevent impairment of wilderness characteristics, except that the continuation of existing mining uses in the same manner and degree in which they were being conducted on the date of enactment of FLPMA (Oct. 21, 1976) is allowed. Such grandfathered use is properly regulated to prevent unnecessary or undue degradation of the land and its resources.

2. Federal Land Policy and Management Act of 1976: Wilderness -- Mining Claims: Generally

The existence of mining operations actually being conducted on the land on Oct. 21, 1976, and not mere statutory right to use is required to authorize subsequent mining activities in the same manner and degree.

3. Federal Land Policy and Management Act of 1976: Wilderness -- Mining Claims: Generally

A mining claim located prior to the Federal Land Policy and Management Act of 1976 (Oct. 21, 1976) on which a valid

discovery has existed from Oct. 21, 1976, to the present constitutes a valid existing right. The owner of such a claim on land under wilderness review will be allowed to continue mining operations to full development even if operations will impair wilderness suitability, subject to regulation to preclude unnecessary or undue degradation of the land and its resources.

APPEARANCES: Dale F. Gimblett, pro se; Roger W. Nesbit, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

This appeal is brought by Dale F. Gimblett from a decision of the Manager, Cottonwood Resource Area Headquarters, Bureau of Land Management (BLM), Cottonwood, Idaho, dated August 7, 1980, disapproving appellant's plan of operations for his mining claim within a proposed wilderness study area (WSA). The plan of operations was filed in accordance with Departmental regulations at 43 CFR Subpart 3802, 1/ issued pursuant to section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976).

The BLM decision found that the claim in issue as well as the planned access road are located within the proposed Marshall Mountain WSA to be reviewed for suitability for preservation as wilderness. 2/ The BLM decision found that no grandfathered existing use under section 603 of FLPMA, 43 U.S.C. § 1782 (1976), or valid existing right as defined in 43 CFR 3802.0-5(k) was present in this case. Accordingly, BLM held that the public land under review is subject to interim management to prevent impairment of the area's wilderness suitability.

The BLM decision further stated that the proposed road construction detailed in appellant's plan of operations would not qualify under the nonimpairment standard. After completion of an environmental assessment, BLM determined that the road building would constitute a noticeable imprint of man's work which is not temporary and which could not be reclaimed to the point of being substantially unnoticeable by the time the Secretary of the Interior gives the President his recommendation on the suitability of the land for wilderness.

1/ Departmental regulations in 43 CFR Subpart 3802, Exploration and Mining, Wilderness Review Program, were published in the Federal Register (45 FR 13968) on Mar. 3, 1980, and were effective Apr. 2, 1980.

2/ Inventory unit Idaho 62-10, Marshall Mountain, consisting of 6,524 acres, has subsequently been designated a wilderness study area. 45 FR 75587 (Nov. 14, 1980).

Appellant also filed a supplemental plan of operations for the subject mining claim in which he proposed to establish a trail (as distinguished from a road) to the mine operation and to clear the entrances to three existing adits on the claim. These activities were allowed by BLM. Thus, appellant has been neither denied access to his claim nor the opportunity to perform assessment work thereon.

Appellant asserts in his statement of reasons for appeal that his mining claim is located in a mining district important for mineral development purposes which should not be included in a WSA. Appellant further contends that the area does not meet the "roadless" requirement of section 603 of FLPMA, 43 U.S.C. § 1782 (1976). In addition, appellant contends that he has had an active mining claim since 1975 because of the performance of annual assessment work thereon.

In answer to appellant's statement of reasons, the Solicitor alleges that the suitability of the area for wilderness preservation is not a proper ground for challenging the application of restrictions on uses which might impair the wilderness characteristics of the land as long as the suitability of the land for wilderness is under review. The Solicitor further contends that appellant does not have "grandfather" rights under 43 U.S.C. § 1782(c) (1976) because it is actual use and not mere entitlement to use which controls the manner and degree in which existing uses are allowed to continue. It is alleged that appellant's plan of operations far exceeds in manner and degree the actual mining use of the claim prior to October 21, 1976.

The Solicitor asserts that disapproval of Gimblett's plan of operations does not violate his rights under the mining law. Even if it is assumed that the mining law gave appellant the right to build an access road to his claim, the Solicitor contends that in passing FLPMA Congress specifically amended the mining law, particularly the rights of ingress and egress, citing 43 U.S.C. § 1732(b) (1976). Further, it is pointed out that BLM has approved construction of an access trail to the mining claim.

The Secretary of the Interior is directed by section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1976), to review those roadless areas of 5,000 acres or more identified during the inventory of the public lands as having wilderness characteristics 3/ and make a recommendation to the President regarding the suitability or nonsuitability of each such

3/ Sections 103(i) and 603 of FLPMA, 43 U.S.C. §§ 1702(i) and 1782 (1976), incorporate by reference the definition of wilderness characteristics embodied in section 2(c) of the Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1976), set forth as follows:

"A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped [sic] Federal

area for preservation as wilderness. Specific guidance with respect to management of those identified lands pending completion of the review and action by Congress in response to the recommendations is provided by section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), which states in pertinent part:

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection.

This management mandate for wilderness review lands is further tempered by the provision of section 701(h) of FLPMA that all actions of the Secretary under the Act shall be subject to "valid existing rights." 43 U.S.C. § 1701 note (1976).

Regulations implementing this management authority require an approved plan of operations for mining activities on lands under wilderness review prior to conducting operations which might impair wilderness values, such as construction of access roads, cutting of trees over 2 inches in diameter, or use of mechanized earthmoving equipment such as bulldozers. 43 CFR 3802.1-1. An approved plan of operations is not required for operations continued in the same manner and degree as operations existing on October 21, 1976, unless they are causing undue or unnecessary degradation of the land and its resources. 43 CFR 3802.1-3.

With respect to appellant's contention that the area is not suitable for wilderness because of its value for mining, it must be recognized that the purpose of the wilderness study is to weigh the value of competing uses of land found to have wilderness characteristics in order that an informed choice may be made as to whether the land is most

fn. 3 (continued)

land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."

suitable for wilderness preservation. Absent a lack of wilderness characteristics, which is not shown on the record, this determination is properly made at the conclusion of the wilderness study. See State of Utah v. Andrus, 486 F. Supp. 995, 1003 (D. Utah 1979); Union Oil Co. (On Reconsideration), 58 IBLA 166 (1981).

Three remaining issues are raised by this appeal. The first is whether rejection of appellant's plan of operations on the ground of impairment of wilderness characteristics is contrary to the express exception in section 603(c) of FLPMA allowing "continuation of existing mining * * * uses * * * in the manner and degree in which the same was being conducted on the date of approval of this Act * * *." 43 U.S.C. § 1782(c) (1976). A second issue is whether the BLM decision rejecting the plan of operations on the ground of impairment is reasonable and supported by the record. Finally, this case presents the issue of whether rejection of appellant's plan of operations for the mining claim located prior to enactment of FLPMA, on the ground of impairment of wilderness characteristics, is contrary to section 701(h) of FLPMA, 43 U.S.C. § 1701 note (1976), which requires that all actions of the Secretary of the Interior under the statute shall be subject to "valid existing rights."

[1, 2] Section 603(c) of FLPMA provides a bifurcated standard for management of tracts of land of 5,000 acres or more identified as having wilderness characteristics. BLM is authorized to manage the lands so as to prevent impairment of wilderness characteristics unless the lands are subject to an existing mining, grazing, or mineral leasing use. Section 603(c) authorizes continuation of such existing uses in the "same manner and degree" as they were being conducted on October 21, 1976. In the case of such an existing use conducted in the same manner and degree, BLM is authorized to regulate only so as to prevent unnecessary or undue degradation of the environment. State of Utah v. Andrus, supra at 1005; 43 CFR 3802.1-3. The existence of some operation which is actually being conducted on the land on October 21, 1976, is a prerequisite to authorization of subsequent activities in the same manner and degree. The statute is referring to actual existing uses, as distinguished from statutory rights to use the land, when it authorizes continuation of existing uses in the same manner and degree. State of Utah v. Andrus, supra at 1006.

The record supports the finding of BLM that the development of appellant's claim detailed in the plan of operations exceeded the manner and degree of any existing mining use of the claim and, accordingly, did not constitute a grandfathered use. Although assessment work as required by law was apparently carried on prior to October 21, 1976, there is no indication of development work of the nature and scope of the work detailed in the rejected plan of operations.

Further, the record supports the BLM determination that the operations proposed in the rejected plan would impair the suitability of the subject area for wilderness designation contrary to the interim management guidelines provided in section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976). "Impairment of suitability for inclusion in the Wilderness System" is defined in 43 CFR 3802.0-5(d) as follows:

(d) "Impairment of suitability for inclusion in the Wilderness System" means 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 on the suitability of a wilderness study area for inclusion in the National Wilderness Preservation System or have degraded wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness.

The environmental assessment prepared by BLM in order to evaluate appellant's plan of operations sets forth the impact of implementation of such operations. The assessment explains in part:

Excavation of the proposed road, using a Caterpillar tractor, would result in significant surface disturbance in the area of construction. Vegetation in the impacted area would be destroyed. Because the steepness of the subject slope would require extensive cut and fill, disturbance would occur upon a much greater area than the 12-foot width of the actual roadway. The extent of the down cast would make satisfactory recontouring and replacement of topsoil on the disturbed area unrealistic. Therefore, the site could not be reclaimed by recontouring all cuts and fills, replacement of topsoil, and the restoration of plant cover by reseeding or replanting, to a condition of being substantially unnoticeable in the WSA as a whole by the time the Secretary of the Interior makes his recommendations on the area to the President. The reclamation period established in the IMP is 4 years after approval of the activity. The noticeable imprint of man's work resulting from the proposed action would adversely affect wilderness quality.

Regarding the possibility of mitigation and/or reclamation of the impact of appellant's planned access road, the environmental assessment stated:

No mitigation would be possible that would allow the proposed road construction to meet the non-impairment standard as defined in 43 CFR 3802.0-5 (d). Road construction in a steep, timbered area cannot be considered a temporary activity; it is not capable of being reclaimed to a condition of being unnoticeable in the WSA as a whole within 4 years. Therefore, the non-impairment standard could not be met.

[3] The final issue is whether rejection of appellant's plan of operations for mining claims located prior to FLPMA (October 21, 1976) is consistent with the provision of section 701(h) of FLPMA, 43 U.S.C. § 1701 note (1976), to the effect that all actions of the Secretary of

the Interior under the Act shall be subject to "valid existing rights." The term "valid existing right" is defined in the regulations as requiring a valid discovery on a mining claim as of October 21, 1976, which discovery continues to be valid at the time of exercise of the right. 43 CFR 3802.0-5(k). The interim management policy developed by BLM for management of lands under wilderness review provides that mining claimants who located claims on or before October 21, 1976, and are able to demonstrate a discovery as of that date under the Mining Law of 1872, as amended, 30 U.S.C. §§ 22-24, 26-28, 29, 30, 33-35, 37, 39-42 (1976), "will be allowed to continue their mining operations to full development even if the operations are causing or will cause impairment." U.S. Department of the Interior, Bureau of Land Management, Interim Management Policy and Guidelines For Land Under Wilderness Review, 44 FR 72013, 72031 (Dec. 12, 1979) (hereinafter cited as Interim Management Policy); Solicitor's Opinion, M-36910 (Supp.) 88 I.D. 909 (1981). ^{4/} The interim management policy further provides that the operator will be required to show evidence of such a discovery prior to any BLM grant of approval and that BLM may verify the data through field examination and, if necessary, initiate contest proceedings. Interim Management Policy, supra at 72031. The interim management policy further notes that reasonable access will also be granted to valid pre-FLPMA claims and that such access will be regulated to prevent or minimize impairment of the area's wilderness suitability to the extent possible consistent with enjoyment of claimant's rights. Interim Management Policy, supra at 72031. Accordingly, the regulations and the interim management policy expressly recognize and protect valid existing rights of mining claimants within wilderness study areas.

It is not unreasonable to require a claimant to make a preliminary showing of facts which support a valid existing right. Upon such a showing, BLM may elect either to contest the validity of the claim with notice to claimant and opportunity for a hearing or to permit operations in connection with the claim even though they may impair wilderness characteristics. Appellant has presented no evidence regarding the existence of a discovery on the subject claim and in the absence of tender of a preliminary showing to BLM, the decision is properly affirmed.

^{4/} Mining activities in connection with pre-FLPMA claims where "valid existing rights" are established are subject to regulation by the Secretary of the Interior to prevent unnecessary or undue degradation of the lands and their resources. 43 U.S.C. § 1782(c) (1976); Solicitor's Opinion, M-36910 (Supp.) 88 I.D. 909 (1981). Since this regulation extends only to activities which are not necessary or which are excessive or unwarranted in mining development, no constitutional issue of a taking is presented. Solicitor's Opinion, supra. Further, the right to develop locatable mineral resources on the public lands under the Mining Law of 1872 was expressly made subject to "regulations prescribed by law." 30 U.S.C. § 22 (1976).

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.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Douglas E. Henriques
Administrative Judge

