

DOYLE CAPE

IBLA 84-204

Decided February 28, 1984

Appeal from decision of the California Desert District Manager, Bureau of Land Management, rejecting proposed mining plan of operation for work within the Orocopia Mountains. CA MC 89635 through CA MC 89643.

Affirmed.

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

The Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701, 1782(c) (1976), requires the Secretary to regulate mining operations in lands under wilderness review to prevent impairment of the suitability of these areas for prospective or potential inclusion in the wilderness system. Where a proposed mining plan of operation on such land calls for the use of mechanized earthmoving equipment to clear a new area and the creation of new roads in new areas, BLM properly rejected the plan.

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

Mining operations in lands under wilderness review may continue even if they are determined to be impairing wilderness values if the operations are occurring in the same manner and degree that they were being conducted on Oct. 21, 1976. Mining activities not exceeding that manner and degree shall be regulated only to prevent undue and unnecessary degradation of public lands. However, 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.

APPEARANCES: Doyle Cape, pro se.

## OPINION BY ADMINISTRATIVE JUDGE STUEBING

Doyle Cape appeals from the October 20, 1983, decision of the California Desert District Office, Bureau of Land Management (BLM), rejecting his proposed mining plan of operation for the "Goat" group of unpatented mining claims, falling within secs. 13, 14, 23, and 24 of T. 7 S., R. 11 E., San Bernardino base line and meridian. These unpatented mining claims are near Orocopia Canyon in the Orocopian Mountains of Riverside County. The subject claims were located on March 27, 1981, by appellant and Elbert (Boyd) Rose. The claims were located within wilderness study area (WSA) CDCA-344 which had become effective May 10, 1979. <sup>1/</sup> On July 20, 1983, however, WSA CDCA-344 was deleted in its entirety from wilderness study status "to bring the Bureau's wilderness review into compliance with recent decisions of the Interior Board of Land Appeals" holding that "[s]plit-estate lands were improperly identified for wilderness study under section 603 of the Federal Land Policy and Management Act of 1976 [FLPMA] \* \* \*." 48 FR 33056 (July 20, 1983).

Appellant submitted his plan of operation for the "Goat" group of unpatented mining claims on August 3, 1983. Because of unprecedented weather and flooding, BLM invoked the terms of 43 CFR 3809.1-6(a)(3) to extend their review period to November 2, 1983.

On September 9, 1983, a decision was issued in Sierra Club v. Watt, Civ. No. S-83-35 (D.C., E.D. Calif.), wherein the Sierra Club had requested a preliminary injunction to block the Secretary's December 30, 1982, order <sup>2/</sup> and its subsequent clarifications, including the July 20, 1983, instruction to delete WSA CDCA-344 from wilderness study status. The Court granted the injunction, thereby restraining the Department from taking any action on the subject lands that would have been prohibited in the absence of the Secretary's order and subsequent instructions. In response to the court order, BLM, in Instruction Memorandum No. 84-11, dated October 6, 1983, stated that the lands involved are to be managed according to the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), published in the Federal Register on December 12, 1979 (44 FR 72014), as amended 48 FR 31854 (July 12, 1983), and other instructions and regulations applicable to WSA's. Consequently, on October 20, 1983, the District Manager of the BLM

<sup>1/</sup> See 44 FR 19044 (Mar. 30, 1979) and 44 FR 22521 (Apr. 16, 1979).

<sup>2/</sup> 47 FR 58372 (Dec. 30, 1982) amends previous wilderness inventory decisions by BLM, eliminating 173 wilderness study areas containing approximately 667, 587 acres. This effort was a response to IBLA decisions ruling that (1) areas smaller than 5,000 acres do not qualify for wilderness study under section 603 of FLPMA; (2) lands where the Federal Government owns the surface but where the subsurface mineral estate is nonfederally owned (split estates) do not qualify for wilderness study under section 603 of FLPMA; and (3) it was improper to assess an area's wilderness characteristics in association with contiguous lands administered by agencies other than BLM. This notice states that decisions by the Department on additional areas in the above categories will be published in the Federal Register at a later date.

California Desert District Office rejected appellant's mining plan of operation because he could not permit "any activities in this area that would create permanent or long-term impairment of the wilderness quality" (Decision at 1).

Cape appeals the decision of the District Manager, asserting that the Court's order allows for existing mining operations and for individual rights of the persons affected by the court action. He contends that there are mining claim deeds on the subject property held by co-owner Ida Lee Hughes dating as far back as 1946. He also contends that the court order in Sierra Club, supra, is being used by BLM as an excuse for denying his rights to improve, mine, or sell his mining claims; that the order, in fact, allows BLM to make individual decisions based on the individual circumstances.

[1] The Court in Sierra Club v. Watt, supra, ordered that former WSA's dropped from study status due to the Secretary's orders regarding split estate conflicts, areas less than 5,000 acres, and contiguous wilderness values should continue to be managed in compliance with section 603(c) of FLPMA. Under FLPMA, BLM is directed to manage such lands 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. See FLPMA, supra at section 1782(c), 43 CFR 3802.0-6 (1982). There are two management standards under section 603(c): one that applies to uses of the land existing on October 21, 1976, and one that applies to uses coming into existence after that date. See Rocky Mountain Oil & Gas Association v. Watt (RMOGA), 696 F.2d 734 (10th Cir. 1982); State of Utah v. Andrus, 486 F. Supp. 995 (D.C. Utah 1979); Solicitor's Opinion, M-36910: "BLM Wilderness Review -- Section 603, Federal Land Policy and Management Act," 86 I.D. 89 (1979), as modified by M-36910 (Supp.), 88 I.D. 909 (1981).

The new uses are regulated to the extent necessary to prevent impairment of wilderness characteristics. It is clear that BLM established that according to BLM mining claim records that all the claims involved in the subject appeal were staked after 1976 with no prior rights accruing. Consequently, BLM examined appellant's proposed mining plan of operations calling for the use of mechanized earthmoving equipment to clear a new area, the creation of new roads, and the upgrading of existing roads within an active wash area. BLM determined that since the majority of the work was to take place outside the wash on new areas and on roads so long unused that they had nearly returned to their natural state, that appellant's plan of operation must be rejected in its entirety 3/ in order to prevent impairment of the wilderness characteristics of this area. Appellant apparently does not disagree, because he does not contend that the proposed action would not impair the area's suitability for wilderness. Rather, he contends that the

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3/ In a memorandum to the State Director from District Manager, California Desert, dated Dec. 2, 1983, it was stated,

"Mr. Cape filed an amended plan of operation to cover only work within the active wash area \* \* \*. Since we are in the process of authorizing nonimpairing work within the active wash area, Mr. Cape is appealing our decision as it applies to work that we determined would cause long-term wilderness impairment." (Emphasis in original.)

court order allows for existing mining operations and gives BLM the latitude to permit him to create roads out of the wash area and to mine the ores on his claim.

[2] Appellant is apparently arguing that the second management standard under section 603(c) is the appropriate one to apply to his circumstances. Where mining operations are "existing uses" they are exempted from the nonimpairment standard. Existing uses may continue in the "same manner and degree" of actual use as was being conducted on October 21, 1976. They may be regulated only to the degree required to prevent unnecessary and undue degradation. RMOGA, supra; State of Utah, supra; Solicitor's Opinion, supra. Obviously, this standard is less strict than the nonimpairment standard.

By asserting that he has valid existing rights <sup>4/</sup> extending back to 1946 by way of his association with Mrs. Ida Lee Hughes, <sup>5/</sup> appellant is contending that his existing uses may continue. The record, however, does not establish that appellant has valid existing rights. See Havlah Group, 60 IBLA 349, 360-61, 88 I.D. 1115, 1120-21 (1981). Even if this Board could accept appellant's assertion at face value, there is no basis upon which to premise a different conclusion than that reached by BLM to reject appellant's mining plan of operations. As the Court states in State of Utah, supra at 1006:

Unless the statute [section 603(c) of FLPMA] is referring to activity that was actually taking place on that date, there is no way to give meaningful context to the "manner and degree" language. In order to determine whether or not a given operation is being conducted in the same manner and degree as it was formerly being conducted, there must be some former activity against which the extent of the present operation can be measured. Presumably, when the statute refers to existing uses being carried out in the same manner and degree it is referring to actual uses, not merely a statutory right to use. [Emphasis by the Court.]

Consequently, BLM must look to actual uses existing on October 21, 1976, in order to authorize continuation of existing uses in the same manner and degree as prescribed by FLPMA. See Havlah Group, supra at 358, 88 I.D. at 1119. Since there is no indication in the record of development work in the nature of the work detailed in the rejected plan of operation being carried on prior to or on October 21, 1976, BLM could not have authorized appellant's proposed activities anyway. See Havlah Group, supra at 357-58, 88 I.D. at

<sup>4/</sup> 43 CFR 3802.0-5(k) (1982) defines "valid existing right" as meaning "a valid discovery had been made on a mining claim on October 21, 1976, and continues to be valid at the time of exercise."

<sup>5/</sup> Mrs. Ida Lee Hughes is listed as co-owner of CA MC 89635 through CA MC 89643 with Doyle Cape and Elbert B. Rose (Boyd) on the Dec. 6, 1982, assessment work notice. In a note to BLM received on June 8, 1981, appellant states he has enclosed "3) Copy of the Quit Claim Deed signed by E. A. Hughes releasing his interest in Goat Claims #7# 8# 9 to his wife Ida Hughes." The "Old Billie" mining claims report, dated October 1964, identifies the claim presumably owned by Hughes as located in sec. 22, T. 7 S., R. 11 E. whereas the "Goat" claims are located in secs. 13, 14, 23, and 24.

1119-20. The Court in Sierra Club, supra, allowed third-party rights to be preserved only to the extent they are lawful under WSA management. It does not allow BLM the latitude to do anything other than it has done.

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.

Edward W. Stuebing  
Administrative Judge

We concur:

Will A. Irwin  
Administrative Judge

Anne Poindexter Lewis  
Administrative Judge

