

EUGENE MUELLER

IBLA 86-1626

Decided August 4, 1988

Appeal from a decision of the Northern Malheur Resource Area Office, Bureau of Land Management, disapproving a mining plan of operations for the Veronica Lee and Verla Ruth mining claims. MCP 6-07.

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

The Federal Land Policy and Management Act of 1976, 43 U.S.C. | 1782(c) (1982), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of the suitability of these areas for potential inclusion in the wilderness system. However, mining operations on such lands may continue if the operations are occurring in the same manner and degree as on Oct. 21, 1976. A mining plan of operations for claims located after Oct. 21, 1976, even though those claims embrace the same lands covered by different claims located prior to Oct. 21, 1976, cannot be considered to be a continuation of any operations undertaken pursuant to the previous claims and cannot qualify for the less restrictive management standard.

2. 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

Approval of a mining plan of operations for post-FLPMA mining claims within a wilderness study area may properly be denied when planned road building and blasting impacts could not be rendered substantially unnoticeable before a final wilderness designation decision is made.

APPEARANCES: Eugene Mueller, Cedarburg, Wisconsin, pro se.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Eugene Mueller, President, The Gem Shop, Inc., has appealed from a decision by the Northern Malheur Resource Area Office, Bureau of Land Management (BLM), dated July 25, 1986, which denied approval of mining plan of operations MCP 6-07 (mine plan), for two unpatented lode mining claims, the Veronica Lee and Verla Ruth. The claims, located for green picture jasper, are situated in sec. 8, T. 27 S., R. 43 E., Willamette Meridian, within the Blue Canyon Wilderness Study Area (WSA) (OR-03-73) in Malheur County, Oregon.

Mueller and a partner located the claims on September 11, 1984, and recorded them with BLM on September 24, 1984. The location notices state that the claims cover "abandoned" claims: the Big Hole #2 and Lacey claims. Mueller apparently had attempted to obtain the Big Hole #2 and Lacey claims before they were deemed abandoned and void for failure to file notices of assessment work timely in 1983, pursuant to the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. | 1744 (1982). The mine plan project area, which has been subject to mining activity since the early 1970's, also includes another post-FLPMA claim and two pre-FLPMA claims. None of those three claims is subject to the mine plan under consideration.

Appellant's mine plan proposed the selective removal of small pockets of the best quality jasper from the two claims. Equipment would enter the area on an existing, pre-FLPMA road and five branch roads each up to 1,500 feet long and 12 feet wide would be constructed. Rock would be broken with a bulldozer and by blasting. The jasper would then be broken using a compressed air breaker and small amounts of explosives. Waste material would be allowed to fall downslope. Rubber tired off-road vehicles, one half ton or larger, would remove commercially valuable extracted jasper.

The Mueller Plan of Operations Environmental Assessment (EA) No. OR-030-6-28, prepared by BLM, acknowledged that approximately 2-3 acres of surface disturbance exists on appellant's two claims as a result of mineral extraction which appeared to have occurred prior to the passage of FLPMA in 1976. Five to 10 acres of additional disturbance is expected on the two claims over the 20-25 year life of the operation (EA at 6). BLM estimates that the reestablishment of natural vegetation could take up to 20 years (EA at 16, 19). Greater potential for erosion would exist in tractor roads and excavated material (EA at 16). BLM also noted that the project area can be seen from a portion of the Owyhee River, designated as a wild river in the National Wild and Scenic Rivers System (EA at 15).

The BLM decision stated that the mine plan for the Veronica Lee and Verla Ruth claims would impair the suitability of the area for preservation as wilderness. Due to steep slopes, shallow soils, and low precipitation in the area, BLM concluded that the proposed new disturbance on the post-FLPMA claims could not be reclaimed to a substantially unnoticeable state by the date the Secretary of the Interior is to submit his recommendation to the President on the suitability of this WSA for wilderness designation. Therefore, BLM decided not to allow this proposed mining plan.

Appellant argues that the claims do not meet wilderness criteria, because they show prior surface disturbance. Appellant points out that the mine plan was devised to cause minimal disturbance and he believes that proposed road construction may have been part of the rationale for the denial, even though it was not mentioned in the decision. Any reliance on proposed road construction as a basis for denial would be improper, he claims, because the right of access to mining claims is guaranteed. Further, he objects to the post-FLPMA classification of these claims.

[1] Section 603(c) of FLPMA, 43 U.S.C. | 1782(c) (1982), requires that WSA's be managed so that their suitability for preservation as wilderness will not be impaired (the nonimpairment standard). Doyle Cape, 79 IBLA 204 (1984). The implementing regulations at 43 CFR Subpart 3802 call for surface management controls over mineral activities in a WSA to ensure that the statutory nonimpairment standard is met. See 43 CFR 3802.0-1. In general, the Secretary may not allow 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 regarding the area's suitability for preservation as wilderness. 43 CFR 3802.0-5(d).

However, FLPMA contains a statutory exception to the nonimpairment standard for pre-existing mining uses. Such uses may continue in the manner and degree in which they were conducted on October 21, 1976, even if the activities impair wilderness characteristics. 43 U.S.C. | 1782(c) (1982). Mining operations conducted in the same manner and degree as on October 21, 1976, may continue, even if they are impairing. Such activities shall be regulated only to prevent undue and unnecessary degradation of public lands. 43 CFR 3802.0-6; see State of Utah v. Andrus, 486 F. Supp. 995, 1005 (D. Utah 1979).

Appellant seeks to invoke this exception to management under the nonimpairment standard, on the basis that the activities in the proposed mine plan constitute a continuation of pre-existing activities on the same claims in the same manner and degree that occurred before 1976.

This lesser management standard is not appropriate here. The exception to the management standard clearly contemplated the continuation of an ongoing operation on pre-FLPMA claims. The claims involved in this appeal are post-FLPMA claims. The fact that there were pre-FLPMA operations on other claims which embraced the same land as appellant's claims does not entitle appellant to the benefit of a lesser standard. Appellant has proposed a new operation on his post-FLPMA claims.

In this case, appellant unsuccessfully attempted to obtain the pre-FLPMA claims which covered the area in question. After those claims were declared void, appellant located the new claims. The location notices state appellant's intent that these claims represented new locations over "abandoned" claims. Appellant's two disputed claims are not a continuation

of any earlier claims. 1/ Therefore, we conclude that BLM correctly applied the standard for post-FLPMA claims in this case. 2/

[2] BLM determined that appellant's mine plan could not meet the nonimpairment standard for post-FLPMA claims. The plan included road building and blasting impacts which could not be eliminated before the wilderness designation decision is made. Appellant is correct that a miner has a right of access to his mining claim. See 30 U.S.C. | 22 (1982). However, FLPMA amended the mining law to authorize BLM to regulate the method and route of access over Federal lands so as to prevent permanent impairment of wilderness characteristics in WSA's. State of Utah v. Andrus, supra at 1006. Thus, the impacts of proposed road construction are clearly proper considerations for review of a mining plan of operations in a WSA.

The record supports the BLM determination that this mine plan proposal would impair the suitability of the area for wilderness designation. See 43 U.S.C. | 1782(c) (1982); Havlah Group, 60 IBLA 349, 358, 88 I.D. 1115, 1120 (1981). Therefore, BLM correctly disapproved this mine plan of operations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski Will A. Irwin
Administrative Judge Administrative Judge

1/ The pre-FLPMA claims were declared abandoned and void. Therefore, there could be neither an amendment nor a relocation of those claims. See Fairfield Mining Co., 89 IBLA 209, 213-14 (1985).

2/ Even if appellant's claims were pre-FLPMA claims, it appears he does not propose to conduct his activities in the same manner and degree as operations were being conducted on Oct. 21, 1976. Therefore, the status quo pending wilderness consideration would not be maintained. See Rocky Mountain Oil & Gas Association v. Watt, 696 F.2d 734, 749 (10th Cir. 1982); State of Utah v. Andrus, supra.