

EDMUND KEY

IBLA 89-498

Decided January 16, 1991

Appeal from a decision of the Folsom Resource Area Office, Bureau of Land Management, requiring removal of all structures and personal property from Golden Key mining claims (CA MC 59015 - CA MC 59018).

Vacated and remanded.

1. Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Environment--Mining Claims: Surface Uses--Wilderness

Approval of a mining plan of operations providing for surface occupancy of mining claims by the claimant was inconsistent with a decision requiring that he remove structures and personal property from the claims by June 1989. To support a finding that surface occupancy of the claims exceeded the manner and degree of use to which the claims were put prior to Oct. 21, 1976, within the meaning of 43 U.S.C. § 1782(c) (1988), the record must indicate whether there was surface occupancy of the claims on or before that date.

APPEARANCES: Edmund Key, Fresno, California, pro se; Burton J. Stanley, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On May 24, 1989, Edmund Key appealed from a decision dated April 28, 1989, by the Folsom Resource Area Manager, Bureau of Land Management (BLM), that directed him to "remove all structures and personal property from your Golden Key 1 through 4 placer mining claims (CA MC 59015 - CA MC 59018), located along the North Fork of the Merced River and within the Merced River WSA [Wilderness Study Area]" (Decision at 1). 1/

1/ A "wilderness study area" is "a roadless area or island that has been inventoried and found to have wilderness characteristics as described in section 603 of [the Federal Land Policy and Management Act of 1976 (FLPMA)] and section 2(c) of the Wilderness Act of 1964 (78 Stat. 891)." Interim Management Policy and Guidelines for Lands Under Wilderness Review, 44 FR 72014, 72034 (Dec. 12, 1979).

Key states in his statement of reasons (SOR) that "I first filed on these claims in May of 1975 and have been actively working same with * * * dredges. * * * I also feel that I am under the 'Grandfather Clause' in the operation of my mining claims." In response to an order issued September 17, 1990, he has supplemented his SOR, explaining that, prior to October 21, 1976, he had built a small cabin on his claim where he slept and stored his mining equipment. To support his assertion he has supplied affidavits and a photograph said to show the claim and improvements erected on the claim.

Departmental regulation 43 CFR 3802.0-6 provides that

[t]he Federal Land Policy and [M]anagement Act requires the Secretary to regulate mining operations in lands under wilderness review to prevent impairment of the suitability of these areas for inclusion in the wilderness system. However, mining operations occurring in the same manner and degree that were being conducted on October 21, 1976, may continue, even if they are determined to be impairing. Mining activities not exceeding manner and degree shall be regulated only to prevent undue and unnecessary degradation of public lands.

Similarly, 43 CFR 3802.1-3 allows the continuation of mining operations within a WSA without the necessity to obtain an approved plan of operations provided the mining operations were being conducted in the same manner and degree as on October 21, 1976.

A memorandum written following a March 7, 1987, inspection of the Golden Key placer claims by Carl Perrson, BLM Geologist, to the Folsom Resource Area Manager concludes "[a]s Mr. Key began residing on the claim in 1981, and has increased the scale of activities on his claims, [43 CFR 3802.1-3] would not apply." Id. at 2. The memorandum observes, concerning occupancy by Key, that "[t]he original cabin which was built in 1981 washed out during the flooding of 1986. A new cabin (18 x 20 feet) has been constructed. * * * A small trailer is also present on the claim." Id. at 3, 4. This statement, however, is contradicted by Key's supplemented SOR. The geologist's conclusion concerning Key's occupancy of his claims apparently underlies his recommendation that

BLM must be assured that the cabin site be "substantially unnoticeable by June 1989, when the Secretary of the Interior is scheduled to send a recommendation to the President. * * * Furthermore, it is recommended that Mr. Key be prohibited from any further road building or increasing the scale of his mining operations without prior approval from BLM.

Id. at 4, 5.

On February 9, 1987, a mining plan of operations had been submitted by Key which provided for a cabin and other property to be located on the

claims. It is apparently these same items of property that BLM now wishes to remove. This mining plan was approved by the Area Manager, although the plan was later modified to provide that a bond be furnished. The record before us contains nothing to indicate that the plan approved by the Area Manager has not been observed in practice by Key. It does not appear that he has ever been served a notice of noncompliance pursuant to 43 CFR 3802.4-1 for any breach of the plan.

Pursuant to 43 CFR 3802.1-3, a plan of operations is not required for operations that were being conducted on October 21, 1976, unless the operation is undergoing changes that exceed the manner and degree of operations on that date, or unless operations that are being carried out in the same manner and degree are causing undue or unnecessary degradation. Apparently BLM assumed Key's cabin was constructed after 1976 because, after it was discovered in March 1984 and described in an April 2, 1984, Initial Report of Unauthorized Use, BLM sent Key a letter, in December 1986, saying that a review of its records "revealed that [he had] located the claims" 2/ and "indicate[d] that [he did] not have a Plan of Operations on file with this office, as required under Title 43, Code of Federal Regulations (CFR), Subpart 3802, Exploration and Mining, Wilderness Review Program. Therefore, it is presumed that your mining activities are of a 'casual use' nature only." 3/

BLM observed that "erection of structures, and storage of vehicles and other personal property," among other activities, were not included in casual use 4/ and concluded its December 1986 letter by stating:

You are suspected of occupancy and other unauthorized activities which are deemed to be a public nuisance and may impair wilderness values of the area. An on-site inspection of your mining . . . claims, will be conducted during the next 30 days to determine the extent of the alleged unauthorized activities.

BLM conducted the inspection on January 7, 1987. The notes of the inspection read: ". . . "Old Blue/grey Ford van . . . 12' silver trailer . . . 1st encountered (photos 0-12) upper level house & outhouse plus 10

2/ The record indicates the four claims were located on Jan. 10, 1975.

3/ It might also have been assumed, given the fact that the claims were located in January 1975, that mining activities were being exercised in the same manner and degree as on Oct. 21, 1976, and that Key had not filed a plan of operations because none was required under Departmental regulation 43 CFR 3802.1-3.

4/ 43 CFR 3809.0-5(b) defines "casual use" as

"activities ordinarily resulting in only negligible disturbance of the Federal lands and resources. For example, activities are generally considered 'casual use' if they do not involve the use of mechanized earth moving equipment or explosives or do not involve the use of motorized vehicles in areas designated as closed to off-road vehicles as defined in Subpart 8340 of this title."

pickup loads of junk, approx. -- 16" x 30" [sic] house (emphasis in original)." BLM also interviewed Key that day. The report of the interview reads in part:

Mr. Key said that he met a BLM employee at the N.F. Crossing, about 1979, and told him that was going to build a cabin on his claim. The BLM employee said it was fine with him he could go ahead so that is what he said was his authorization to build a cabin on his claim.

* * * * *

I gave Mr. Key the [43 CFR Parts] 3809 & 3802 regulations . . . and explained the Plan of Operations was required for his occupancy. Mr. Key said he would submit the Plan of operations.

Key did submit a Plan of Operations on February 9, 1987. It listed a "4 x 4 Toyota for hauling supplies & equipment" as the heavy equipment that would be maintained on the claims and a "small cabin for shelter & storage" and a "trailer to stay in near dredges" as the structures that would be maintained. Although BLM's January 7, 1987, inspection report recites that Key said that he would construct his cabin after 1976, the record, as supplemented by Key, now indicates there was a cabin on the claim before then.

On August 23, 1989, we ordered briefing concerning this matter because we found the predicate for removal of property from the Key claims to be unclear. In our order we

requested that counsel for BLM respond to appellant's SOR * * * In doing so, counsel should address whether this Board can decide this appeal on the record without recourse to a hearing to determine whether, as appellant contends, he possesses a valid existing right to continue his mining operation as it was conducted on October 21, 1976. The effect of the 1987 mining plan of operations as approved by BLM should be explained in terms of the decision issued on April 28, 1989: is it BLM's position that appellant has failed to comply with the 1987 plan, or that it has expired? If so, how does the expiration of the 1987 plan affect rights acquired by appellant prior to October 21, 1976?

Id. at 2.

Counsel for BLM responded to our order by furnishing us with copies of 1989 BLM instruction memoranda and a statement that:

The Bureau of Land Management issued the decision appealed from herein pursuant to the requirements of 43 U.S.C. § 1782(c) which has been interpreted to require that all post-FLPMA activities on a mining claim which differ substantially in manner or degree from the uses being made of the claim at the time of passage of

FLPMA must be removed from the claim prior to June 30, 1989. * * * To the extent that appellant contests the fact that the structure at issue herein was constructed after the passage of FLPMA, a factual hearing would be required to allow BLM to establish that fact. The Bureau of Land Management is prepared to submit [sic] affidavits demonstrating that the subject cabin was not present on the claim on October 21, 1976 if the Board deems this method to be appropriate for resolving this limited factual issue. The Bureau does not dispute that appellant has a right to continue his mining operation as it was conducted on October 21, 1976. The administrative record reflects that the mining plan of operations and the approval thereof calls for the removal of the subject cabin prior to June 30, 1989. The decision appealed from is consistent with the approved plan of operations.

Id. at 2. No affidavits were supplied with counsel's brief.

We have examined the plan of operations dated February 6, 1987, and the approval of the plan by the area manager dated October 22, 1987. The plan says nothing about removal of the cabin at any time, although it does recite, at question 6, that the operator plans to live on the claims. The plan also mentions, at question 8, that a trailer will be used to "stay in." BLM's approval letter refers to a bond to cover costs of reclamation. The approval letter, addressed to Key's attorney, states, pertinently:

[Key's] Plan of Operations is approved, provided that a bond is submitted to cover the cost of reclamation of the cabin. * * *

We have reconsidered and will rescind our requirement to supply a quit claim to the cabin. However, you must be reminded the bond is required. Mr. Key is presently in non-compliance with our regulations since he has not supplied a bond. If the bond is not received by November 30th at the latest, further action will be taken to remove this unauthorized structure from the public lands. Also, after receiving the bond, if Mr. Key fails to remove the cabin before May 1989 we will attach the bond and remove it ourselves.

Id. at 1, 2.

[1] On the record now before us there is no showing that there has been noncompliance with the 1987 plan of operations. Nor, is there any showing that the manner and degree of mining operation has changed since Key began to work his claims in 1975. While the Area Manager's approval of Key's mining plan--and the April 28, 1989, decision on appeal--assumed that the existence of a cabin on the claims amounted to a change in the manner or degree of mining operations on the claims, there is no evidence before us to show that this conclusion relies on known fact. This finding appears to rest entirely on the 1987 report of the staff geologist, quoted above, which is contradicted by the supplemented SOR.

Unlike the case considered in Havlah Group, 60 IBLA 349, 88 I.D. 1115 (1981), there apparently is no issue in the instant appeal about whether there was a discovery on the Golden Key claims. Id. at 365, 88 I.D. at 1121. If Key's current activity does not exceed the manner and degree operations were conducted prior to October 21, 1976, BLM may only regulate his activities in order to prevent unnecessary or undue degradation of the environment. Havlah Group, supra at 357, 88 I.D. at 1119; 43 CFR 3802.0-6. It does not appear that appellant has been provided an opportunity to demonstrate he had a valid discovery on that date and continues to have one. Id. at 351-52, 361, 88 I.D. at 1116, 1121. Instead, BLM has conceded, as pointed out above, that Key "has a right to continue his mining operation as it was conducted on October 21, 1976." Moreover, the plan of operations solicited by BLM and submitted by Key was subsequently approved by BLM. The approved plan does not provide for removal of the cabin, but provides that there will be maintained on the claim a "small cabin for shelter and storage [and a] trailer to stay in near dredges." Id. at question 8.

Although the letter approving Key's plan recites that Key was "presently in non-compliance with our regulations" no notice of noncompliance seems ever to have been sent him. Counsel for BLM has explained that the decision issued April 28, 1989, was not a notice of noncompliance but rather an action taken to implement a provision of the 1987 plan which provided for removal of a nonconforming use. This interpretation of the mining plan, however, finds no support in the record, because the mining plan makes no reference to removal of any buildings and Key has never agreed that any use made of the claims by him exceeds the use he began in 1975. To the contrary, he contends that his use is grandfathered because it has not changed since October 21, 1976, and included, on that date, all present improvements. While he has, we must assume, posted the required bond, there is no showing before us that there has been a change in the manner or degree of his operation since 1975.

This record does not support BLM's decision on appeal. Kanawha & Hocking Coal & Coke Co., 112 IBLA 365, 368 (1990); Wayne D. Klump, 104 IBLA 164, 166 (1988); Soderberg Rawhide Ranch Co., 63 IBLA 260, 261-62 (1982); and see Jim D. Wills, 113 IBLA 396 (1990), California Wilderness Coalition, 101 IBLA 18, 30 (1988). On remand, BLM may determine whether use by Key, prior to October 21, 1976, was different in manner or degree from his operations after that date, and, if that position is taken, facts to support such a conclusion must appear in the record. If it is BLM's position that operations currently in progress constitute undue or unnecessary degradation of the lands affected by them, the facts on which that conclusion is founded must be made to appear in the record, assuming BLM's position is that the claims are otherwise valid. See 43 CFR 3802.1-3. If BLM's position is that the claims are not valid mining claims because there has been no discovery, as was the situation found in Havlah Group, supra, or for some other reason, opportunity should be provided to Key to establish that he has a valid discovery on the claims. Id. If investigation reveals there is no discovery, a contest should be initiated.

The case file is therefore remanded for appropriate action consistent with this opinion. By vacating the decision, we are not ordering BLM to initiate a contest or to issue a notice of noncompliance, because we do not have enough information before us concerning the situation on the Key claims to hazard a guess about whether any such action is appropriate. If there is a violation of Departmental regulation by some activity or condition on the claims here at issue, there should be a determination concerning the appropriate action to be taken when the relevant facts have been brought to light. Jim D. Wills, supra.

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 vacated and remanded for appropriate action consistent with this decision.

Franklin D. Arness
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge