

Editor's note: Reconsideration denied by Order dated Nov. 6, 1991; Appealed -- Civ.No. F-91-571 REC (ED Calif. Oct. 22, 1991); set aside, remanded, (Nov. 10, 1992)

RICHARD W. TAYLOR

IBLA 89-497, 90-223

Decided June 11, 1991

Appeal from two trespass notices and a decision of the Folsom Resource Area, Bureau of Land Management, denying a mining plan of operations and directing the claimant to remove all structures and other personal property from the Tingley's Ledge, KPTL, and Golden Key #3 mining claims.

Expedited consideration granted; IBLA 90-223 dismissed in part and remanded in part; IBLA 89-497 set aside in part, and affirmed in part.

1. Administrative Procedure: Administrative Record--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--Mining Claims: Surface Uses--Public Lands: Administration--Rules of Practice: Generally--Wilderness Act

A BLM decision requiring removal of structures and other personal property from a mining claim because the property is located within a wilderness study area is properly set aside and remanded when the evidence in the record is insufficient to support the conclusion that the structures and other personal property are, in fact, located within the wilderness study area.

2. Administrative Authority: Generally--Administrative Procedure: Judicial Review--Board of Land Appeals

The Board of Land Appeals exercises no supervisory authority or appellate jurisdiction over proceedings pending in the district court or over actions taken by a United States Marshal pursuant to a subpoena issued by a district court.

3. Appeals: Generally--Practice Before the Department: Persons Qualified to Practice--Rules of Practice: Appeals: Dismissal

An appeal brought by a person who has not shown that he is qualified under 43 CFR 1.3 to represent the party issued and adversely affected by a trespass notice is properly dismissed.

APPEARANCES: Richard W. Taylor, Ceres, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Richard W. Taylor has filed two appeals. These appeals are interrelated and have been consolidated. In the appeal identified as IBLA 90-223 Taylor appeals the issuance of two trespass notices. 1/ His appeal in IBLA 89-497 is from an April 28, 1989, Folsom Resource Area, Bureau of Land Management (BLM), decision denying approval of a mining plan of operations for the Tingley's Ledge placer mining claim (CA MC 190404) and directing Taylor to "remove all structures and other personal property from the Tingley's Ledge claim and from the KPTL and Golden Key #3 mining claims (CA MC 164055 and 59017 respectively) by June 30, 1989" (Decision at 1).

The Tingley's Ledge placer mining claim was located on March 31, 1987. 2/ Taylor filed a plan of operations (Plan) dated May 31, 1988, with BLM on July 1, 1988. His Plan proposed continuation of ongoing suction dredge placer mining during nonwinter month periods when the water flow was high and clean. During muddy periods 3/ when it would be unsafe to use the suction dredge, Taylor proposed "to do some high bank placiering [sic] in areas where existing operations have been underway for several years" (Plan at 1). All of the proposed work was to be performed by Darrel Smith, a full-time resident on the claim. The Plan states that Smith camps on the KPTL claim and acts as a security guard for the Tingley's Ledge and KPTL claims. Taylor states that the structures on the Tingley's Ledge claim include a small structure, a camper, a flotation platform boat, the remains of an outhouse, and the remains of a suction dredge. He states that Smith's operator's shelter, comprised of a van and a leanto, are also on the claim. Taylor's Plan proposed consolidation of the structures with Smith occupying the shelter on the Tingley's Ledge, dismantling of Smith's shelter, and remobilizing Smith's van. Taylor also proposed removing the camper, remains of the outhouse, and the suction dredge. The suction dredge would be placed

1/ On Apr. 10, 1991, Taylor filed a petition for expedited review stating that he was seeking expedited consideration because of pending criminal trespass charges before the Federal district court. We deem it appropriate to grant expedited consideration.

2/ The Tingley's Ledge placer mining claim was located by Craig and Preston Tingley. The Tingleys conveyed the claim to Richard W. Taylor and Lula B. Taylor by quitclaim deed dated Apr. 30, 1988. In turn, the Taylors conveyed a 24-percent interest in the claim to Darrel L. Smith and a 24-percent interest to Raymond Mendoza by quitclaim deed dated May 16, 1988. Richard Taylor and Lula B. Taylor each retained a 26-percent inter-est in the claim.

3/ Taylor states that the muddy conditions are the result of 1987 forest fires. He relates that when the rate of flow increases upstream silt run-off causes the river to become extremely muddy and creates an unsafe dredging environment, limiting underwater dredging visibility to 6 inches.

in storage for use in the larger scale placer activity mentioned earlier. According to Taylor, "[t]his action will reduce the number of structures on this claim to what we believe to be current BLM guidelines." Id. at 2.

In its decision denying Taylor's Plan 4/ BLM describes the Tingley's Ledge claim as being situated in the North Fork of the Merced River within the Merced River Wilderness Study Area (WSA). BLM states that the proposed operations could not be allowed because of the reclamation deadline (Decision at 1). The decision also directs Taylor to remove all personal property from the Tingley's Ledge, KPTL (CA MC 164055), and Golden Key #3 mining claims (CA MC 59017), by June 30, 1989, noting that activities within the latter two claims were conducted pursuant to a March 7, 1987, plan of operations, and that Taylor had submitted a \$500 reclamation bond for those operations. Id. BLM advised Taylor that, if he failed to remove the structures by the deadline, the bond would be attached and that structures and personal property remaining after the deadline would be considered abandoned and would be removed by BLM. Id.

Addressing future operations within the WSA, BLM advised that the only activities permitted after June 30, 1989, were those not requiring a plan of operations under 43 CFR 3802.1-1. BLM noted, however, that permitted activities could include operating a suction dredge under a standard California Department of Fish and Game permit, and prospecting and mining activities not requiring mechanized earth-moving equipment or explosives (Decision at 2). Portable structures such as camper trailers or tents could, BLM advised, be placed on the land for up to 30 days during any 90-day period, but that a \$1,000 surety bond would be required if a trailer was used. Id.

On appeal, Taylor contends that BLM's decision is contrary to: (1) the Federal Land Policy and Management Act of 1976; (2) "the spirit and context" of "The Interim Management Policy and Guidelines for Lands Under Wilderness Review" (IMP); (3) 43 CFR 3802.4-1; (4) 43 CFR 3809.3-2; (5) the Board's decision in Bruce W. Crawford, 86 IBLA 350, 92 I.D. 208 (1985); (6) the Board's order in Pierre J. Ott, IBLA 89-82, James D. Wills, IBLA 89-83, and Robert D. Borg, IBLA 89-84; and (7) question 6 of the same order (Taylor's SOR at 2). Taylor insists that the structures and personal property on the KPTL and Tingley's Ledge claims are located outside the WSA, that the Golden Key #3 claim is not within the WSA, and that there are no shelters or personal property on the Golden Key #3 claim. Id. at 3-5. Appellant additionally contends that if BLM's decision is a notice

4/ Taylor states that when he received no response to his proposed Plan, he contacted BLM by telephone and was advised that BLM did not want to approve or disapprove the Plan but would allow the operations on the Tingley's Ledge claim to continue at the current level until June 1989 (Exh. J to Taylor's Statement of Reasons (SOR)). BLM does not dispute Taylor's contention that it did not respond promptly to approve or disapprove Taylor's Plan. BLM's failure contravenes 43 CFR 3802.1-5, applicable to plan approval within a WSA, and 43 CFR 3809.1-6, applicable to plan approval outside a WSA.

of noncompliance, he is unable to identify specifically the standards he has failed to meet. He observes that BLM's decision asserts that the IMP is the authority for its action, as the decision indirectly quotes the IMP. He maintains that reclamation need not be performed because the nonimpairment standard is being met. Specifically, Taylor states that his Plan contemplates no large-scale activity until after the WSA matter is resolved. He questions BLM's authority to declare property on the claims abandoned and the criteria for abandonment. He challenges BLM's right to attach his bond without due process of law, and avers that BLM failed to respond to his May 30, 1988, Plan in a timely manner and failed to advise him of his appeal rights.

[1] As a general proposition, the authority of the Secretary to restrict surface impacts incident to mining is significantly greater if the surface impacts of mining lie within a WSA. Section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1988), directs the Secretary to manage WSA land in a manner that will not impair its suitability for inclusion in the wilderness system (nonimpairment standard).

Section 603(c) of FLPMA provides an exception to the nonimpairment standard permitting existing mining and grazing uses to continue "in the manner and degree in which the same was being conducted on October 21, 1976" (43 U.S.C. § 1782(c) (1988)), even though that activity might cause impairment of wilderness characteristics. Robert L. Baldwin, Sr., 116 IBLA 84, 87 (1990). Those "grandfathered" or pre-existing uses are restricted only to the extent necessary to prevent any unnecessary or undue degradation. Id.; Oregon Natural Resources Council, 114 IBLA 163, 167 n.6 (1990); State of Utah v. Andrus, 486 F. Supp. 995, 1004 (D. Utah 1979); Havlah Group, 60 IBLA 349, 357, 88 I.D. 1115, 1119 (1981).

Taylor does not contend that use of the facilities located on the claims was either grandfathered or a valid existing right. The claims were located in 1985, which was subsequent to the 1980 WSA designation, and there is nothing in the record that would support either assertion. As to management of WSA's pending a determination of suitability for inclusion in the permanent wilderness system, this Board has consistently found the guidelines established by the IMP to be binding on BLM. Robert L. Baldwin, Sr., supra; Oregon Natural Resources Council, supra at 167; The Wilderness Society, 106 IBLA 46, 55 (1988); L. C. Artman, 98 IBLA 164, 168 n.6 (1987). BLM may not depart from the IMP without express justification, and that justification must be shown in the record. The IMP was published at 44 FR 72014 (Dec. 12, 1979), and amended at 48 FR 31854 (July 12, 1983).

BLM does not contend that the facilities in question are permanent. In fact, after a 1987 field examination of the structures, BLM concluded that the facilities on the claims were both temporary and reasonably incident to mining (Aug. 5, 1987, Decision, Decision Record, and Report). The IMP specifically provides that

any temporary impacts caused by the activity must, at a minimum, be capable of being reclaimed to a condition of being

substantially unnoticeable in the wilderness study area (or inventory unit) as a whole by the time the Secretary of the Interior is scheduled to send his recommendation on that area to the President, and the operator will be required to reclaim the impacts to that standard by that date.

44 FR 72022 (Dec. 12, 1979). The foregoing language was not altered in the amended IMP (see 48 FR 31854-56 (July 12, 1983)).

Nor is it material that the Secretary may not intend to recommend the subject area for inclusion in the wilderness system, because

[t]he final determination regarding the area's inclusion or noninclusion in the wilderness system lies with Congress, and the Department's duty to manage the lands consistent with the nonimpairment standard remains unchanged until Congress has acted. Unless and until the lands embraced by appellants' mining claims are removed from the WSA, they must be managed under the nonimpairment standard mandated by statute.

Robert L. Baldwin, Sr., supra at 88. See also Manville Sales Corp., 102 IBLA 385, 392 (1988). There is no dispute that the Secretary was scheduled to send a recommendation on all WSA's in California to the President on June 30, 1989.

The applicable regulation, 43 CFR 3802.1-1, requires a plan of operations for any operations (other than those identified in 43 CFR 3802.1-2) if any part of a mining claim is within a WSA. Section 3802.1-1(e), which is particularly relevant to this decision, requires a plan of operations for the "construction or placing of any mobile, portable or fixed structure on public land for more than 30 days."

The requirement that temporary impacts be removed prior to submission of the Secretary's recommendations, however, applies only to those impacts within the boundaries of the WSA. Consequently, the situs of the structures, improvements, and other personal property, not the fact that some part of the claim is situated within a WSA, is the critical factor. If the structure in question is not within a WSA, the issue becomes whether the surface use--be it placement of structure and personal property or occupancy--exceeds the statutory limitation that the activity be reasonably incident to mining (see United States v. Langley, 587 F. Supp. 1258, 1263 (E.D. Cal. 1984); discussion in Bruce W. Crawford, supra at 358-79, 92 I.D. at 212-23).

If the claimant's activity violates Departmental regulations because it is not reasonably incident to mining, BLM's remedy is to issue a notice of noncompliance. 5/ (See 43 CFR 3802.4-1; 43 CFR 3809.3-2; Bruce W.

5/ BLM's decision does not allege violation of any regulatory standard, nor is there any other indication that the decision was intended to constitute a notice of noncompliance.

Crawford, *supra* at 377, 92 I.D. at 222-23.) Addressing the reasonably incident to mining question, we stated in Crawford, that, "[t]he fact of occupancy, absent a showing that the occupancy is not reasonably incident to mining, cannot, ipso facto, establish that a prohibited use has occurred." Bruce W. Crawford, *supra* at 374-75; 92 I.D. at 221 (emphasis in original). In Crawford, we further recognized that if occupancy of the claims is necessary for the development of the mineral deposit, the effect of an order requiring a claimant to cease occupancy is tantamount to a taking of the right to mine. Bruce W. Crawford, *supra* at 376, 92 I.D. at 222.

Hence, we concluded

that, to the extent to which BLM's actions may be predicated on the statutory limitation that allowable surface uses of unpatented mining claims are only those reasonably incident to mining, a decision ordering the cessation or limitation of occupancy in the instant case may only be entered after notice and an opportunity for a hearing.

Id.

Turning first to the Golden Key #3 claim, we note that the maps in the record do not support the conclusion that any part of the Golden Key #3 claim lies within the WSA. Having reached this conclusion, we need not attempt to determine the location of the structures and other personal property which lie on the Golden Key #3 claim.

Taylor refers to Exhibit C2 to his SOR in support of his assertion that the KPTL claim, discovery point, camp, and all operations on the KPTL claim are located outside the WSA. This exhibit depicts KPTL as being partially within and partially outside the WSA. 6/ BLM has filed no answer to Taylor's SOR, and there is nothing in the records rebutting Taylor's description of the location of the structures and other personal property, and nothing in the record supporting BLM's conclusion that the structures or other personal property on the KPTL claim lie within the WSA. 7/

In the normal course of review, the Board considers both the legal issues raised by appellant and the specific factual determinations on which

6/ This is not the first time that Taylor has alleged that the surface impacts now under review were not within the WSA. He raised the same contention when BLM directed him to submit a bond as a condition of approving his Plan on the KPTL. There is no record of a BLM response to this assertion as initially stated or on appeal. We will assume the facts asserted to be true.

7/ It is also noteworthy that the Steve Anderson affidavit, appended to the "Search Warrant On Written Affidavit," makes no representation that the alleged unlawful occupation or surface impacts are occurring within a WSA. The thrust of the affidavit is that Taylor's occupancy is not reasonably incidental to mining operations.

the agency's decision was based. Conoco, Inc., 96 IBLA 384 (1987). Absent a record supporting the agency's factual determinations, the Board cannot sustain a finding applying the relevant law. Id. at 390. BLM's decision is predicated on the premise that the structures and other personal property on the Golden Key #3 and KPTL mining claims are within the confines of the Merced River WSA, but there is nothing in the record supporting that conclusion. BLM's decision regarding the structures and personal property on the Golden Key #3 and KPTL mining claims must be set aside and remanded.

Addressing the Tingley's Ledge claim, Taylor states that, "if the boundary line of the WSA is the old road looping through the Tingley's Ledge claim, all structures and personal property on the claim lie outside the WSA" (SOR at 5). We disagree. Careful examination of the maps in the record, specifically Exhibits C2, L, and J reveals that, even if the road is the "Schilling Ranch Road" (see Exh. L), Taylor's structures and other personal property would still lie easterly of the Merced River and within the WSA. The WSA description describes Merced River as the northerly boundary as it proceeds westerly, continuing along the Merced River to the Schilling Ranch Road river crossing, and then describes the boundary as along the Schilling Ranch Road and private property boundaries. The map in case file CA MC 190404, which was filed in conjunction with the Plan, depicts all of Taylor's structures and other personal property on the easterly bank of the Merced River and to the south of the road. This places all Taylor's structures and personal property on the Tingley's Ledge claim (as shown on his Exh. L) within the WSA. The record supports BLM's conclusion that the structures and other personal property on the Tingley's Ledge claim lie within the confines of the Merced River WSA, and we affirm BLM's decision as to that claim.

[2] We now turn to Taylor's appeal of the trespass notices, search warrant, and subpoena issued by the District Court for the Eastern District of California. The record contains a copy of a "Search Warrant On Written Affidavit" issued by the District Court for the Eastern District of California, and a copy of a subpoena requiring Taylor to testify before a grand jury. While Taylor may be correct that the issues raised in the district court are also presented in IBLA 89-497, this Board exercises no supervisory authority or appellate jurisdiction over proceedings pending in the district courts or actions taken by the United States Marshal pursuant to subpoena issued by the court. Jim D. Wills, 113 IBLA 396, 400 n.4 (1990). Consequently, we are without jurisdiction to adjudicate the merits of IBLA 90-223 as it relates to the search warrant and subpoena issues, and that appeal in part is dismissed.

We find the trespass notice issued to Taylor and at issue in IBLA 90-223 to be interlocutory and hence not ripe for adjudication. The trespass notice issued to him merely alleges that he is in trespass for various reasons and states that "failure to comply with this notice will result in further action to protect the interests of the United States" (Notice at 2). It did not state a deadline for compliance or provide a period within which Taylor could respond to the allegations contained in

the notice, nor did it state either the action BLM would take in the event of noncompliance or when any such action may be taken. The trespass notice is thus more properly described as a notice of proposed action than a decision to act. Taylor's appeal is properly treated as a "protest" or objection "to any action proposed to be taken" by BLM. 43 CFR 4.450-2. The trespass notice issued to Taylor is hereby remanded to BLM to be treated as a protest. Should Taylor's protest be denied, an appeal from BLM's decision denying the protest will lie to this Board.

[3] The second trespass notice was issued to "Darrel Smith" (co-owner of the claim), in care of Taylor. Smith has not joined in this appeal and Taylor has not shown that he is qualified under 43 CFR 1.3 8/ to represent Darrel Smith. An appeal brought by a person who does not qualify to practice under 43 CFR 1.3 is subject to dismissal. Resource Associates of Alaska, 114 IBLA 216 (1990); Leonard J. Olheiser, 106 IBLA 214, 215 (1988); Robert G. Young, 87 IBLA 249, 250 (1985). IBLA 90-223, accordingly, is dismissed in part.

8/ 43 CFR 1.3, Who may practice, provides:

"(a) Only those individuals who are eligible under the provisions of this section may practice before the Department, but this provision shall not be deemed to restrict the dealings of Indian tribes or members of Indian tribes with the Department.

"(b) Unless disqualified under the provisions of § 1.4 or by disciplinary action taken pursuant to § 1.6:

"(1) Any individual who has been formally admitted to practice before the Department under any prior regulations and who is in good standing on December 31, 1963, shall be permitted to practice before the Department.

"(2) Attorneys at law who are admitted to practice before the courts of any State, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Trust Territory of the Pacific Islands, or the District Court of the Virgin Islands will be permitted to practice without filing an application for such privilege.

"(3) An individual who is not otherwise entitled to practice before the Department may practice in connection with a particular matter on his own behalf or on behalf of

"(i) a member of his family;

"(ii) A partnership of which he is a member;

"(iii) A corporation, business trust, or an association, if such individual is an officer or full-time employee;

"(iv) A receivership, decedent's estate, or a trust or estate of which he is the receiver, administrator, or other similar fiduciary;

"(v) The lessee of a mineral lease that is subject to an operating agreement or sublease which has been approved by the Department and which grants to such individual a power of attorney;

"(vi) A Federal, State, county, district, territorial, or local government or agency thereof, or a government corporation, or a district or advisory board established pursuant to statute; or

"(vii) An association or class of individuals who have no specific interest that will be directly affected by the disposition of the particular matter."

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision on the Golden Key #3 placer claim and KPTL lode mining claim is vacated; BLM's decision on the Tingley's Ledge placer mining claim is affirmed; IBLA 90-223 is dismissed in part and remanded in part to BLM for action consistent with this decision.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge