

VIRGIL SCHUETTE

IBLA 91! 208

Decided December 22, 1994

Appeal from a decision of the Caliente Resource Area Office, California, Bureau of Land Management, requiring mining site to be reclaimed. CAMC 175222 and CAMC 175223.

Affirmed.

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 notifying a claimant that continued occupancy of mining claims is unauthorized, requiring reclamation of the site, and demanding the removal of a mobile home, generators, and other personal property from mining claims because the property is located within a WSA is properly affirmed where the IMP provides that any temporary impacts must be removed and reclaimed by June 30, 1989, the date the Secretary was scheduled to send his recommendation on that WSA to the President.

APPEARANCES: Virgil Schuette, pro se.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Virgil Schuette has appealed from a January 10, 1991, decision by the Caliente Resource Area Manager, California, Bureau of Land Management (BLM), notifying him that his continued occupancy of the Miss Kate #1 and #2 placer mining claims (CAMC 175222 and CAMC 175223) was unauthorized, requiring him to perform reclamation work on the site, and directing him to remove his equipment and personal property from the site. The claims are situated within the Piute Cypress Wilderness Study Area (WSA) and are described as the S $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, sec. 9, T. 27 S., R. 33 E., Mount Diablo Meridian. The claims were located on January 7, 1986.

On March 20, 1989, appellant filed with BLM a "Mining Notice" summarizing mining and milling operations for the Kate #1 and #2 claims. Appellant stated that he and his family resided in a mobile home on the site but

that he also planned to use an existing cabin in the SE¼ SE¼ of sec. 9 "for workers employed in mining and milling on these claims." That notice contained a handwritten map showing his water source, tailings disposal, and exploration site to be north of the Erskine Creek Road outside the WSA, and his dam site, mill site, and mobile home site to be south of that road, inside the WSA. ^{1/} By letter of April 14, 1989, the Area Manager approved appellant's planned operation, except for the housing of employees on the site.

On September 13, 1989, the Area Manager issued an interlocutory decision demanding reclamation of the mining site. The decision asserted that appellant's operation impaired the wilderness suitability of the area and was therefore in violation of 43 CFR 3802.4! 1(b). The decision stated that, according to BLM policy, all operations in WSA's were required to have impacts reclaimed by June 30, 1989. Appellant was ordered to remove all equipment and personal property and complete reclamation within 30 days of receipt of the decision. ^{2/}

Appellant evidently met with BLM staff, who apparently assisted him in preparing an additional Mining Notice amending his March 20 notice to comply with BLM's September 13, 1989, decision. That notice contains a photocopy of a topographic map of the area depicting appellant's operation. All of the improvements are depicted on that map as lying to the north of the road. Those locations reflected appellant's decision to move his sites out of the WSA, rather than the actual location of the sites. On October 18, 1989, appellant filed with BLM a "Plan of Operation or Mining Notice," offering to move his operation to a location outside the WSA over a 90! day period. Among other items, appellant proposed "to construct a road adjacent, and just north of Erskine Creek from the 5th crossing for a distance of about 500 feet to access my mill."

On January 10, 1991, simultaneously with the decision appealed from, the Area Manager issued a "Letter of Acknowledgement" responding to appellant's "Plan of Operation or Mining Notice." The Area Manager noted that no reclamation had been performed as required by the September 13, 1989, decision. With respect to appellant's proposal to construct a road along the north side of Erskine Creek, the Area Manager stated that the

^{1/} Material presented by appellant in his statement of reasons indicates that the road forms the boundary of the WSA. Although a map depicting the boundary of the WSA was evidently attached to BLM's Sept. 13, 1989, decision, no copy of that map was placed in the case record. Fortunately, appellant provided this map and other relevant information in his statement of reasons, obviating the need to remand the case to BLM for assembly of a complete record.

^{2/} The basis for BLM's characterization of this decision as "interlocutory" is not clear. It appears instead to have been an appealable decision. As BLM issued a subsequent decision that was appealed, its failure to provide for an immediate appeal has worked no injustice here.

site of the proposed road was in a heavily-vegetated riparian zone subject to periodic flooding, and that a road would cause unnecessary and undue degradation to the area. The Area Manager invited appellant "to submit a new [access] proposal" or contact BLM staff "to work out a less impacting route alignment." The Area Manager stated that, in view of appellant's failure to clean up his site, his continued occupancy of the public lands would be under review.

In the January 10, 1991, decision now on appeal, the Area Manager notified appellant that, since his mining site had not been reclaimed and equipment had not been removed, his occupancy was unauthorized. Citing 43 CFR 3802, the decision stated that appellant's continued presence on the site "impairs wilderness values." The decision ordered appellant to reclaim the land "by removing all equipment and personal property [and] to reseed the site in a plan which you will work out with" BLM's staff geologist.

[1] The standard for managing a WSA during wilderness review is found in section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1988). The Secretary is expressly directed 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." 43 U.S.C. § 1782(c) (1988). See generally Ralph E. Pray, 105 IBLA 44, 46 (1988); California Wilderness Coalition, 101 IBLA 18, 25 (1988). "Impairment of suitability for inclusion in the Wilderness System" is defined as causing such impacts "that cannot be reclaimed to the point of being substantially unnoticeable" by the time the Secretary is scheduled to make his recommendation as to the area's suitability for wilderness. 43 CFR 3802.0-5(d).

In furtherance of this directive, the Department has adopted Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), ^{3/} which are binding on all BLM state offices. See generally The Wilderness Society, 106 IBLA 46 (1988); L. C. Artman, 98 IBLA 164 (1987). These guidelines provide guidance to BLM employees in the management of WSA's pending ultimate congressional determination regarding whether the study areas should be included in the permanent wilderness system. Oregon Natural Resources Council, 114 IBLA 163 (1990). The IMP provides specifically:

[A]ny 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

^{3/} The IMP was originally published at 44 FR 72014 (Dec. 12, 1979) and was thereafter amended at 48 FR 31854 (July 12, 1983). A Handbook for BLM was subsequently issued to make the IMP a part of BLM's directive management system. See H-8550-1. Citations in the text are to the Handbook page.

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. [Emphasis supplied.]

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

The file contains BLM Instruction Memorandum (IM) No. CA! 87! 272, June 16, 1987. According to that memorandum, California's Statewide wilderness report was to be submitted to Washington in June 1989, and impacts were to be removed from and reclamation was to be completed in all WSA's no later than June 30, 1989. The IM stressed that reclamation had to be accomplished for both authorized and unauthorized actions. The IM also clarified that "reclamation" could involve the removal of any temporary facilities (such as appellant's mobile home, generators, and mining equipment) and revegetating disturbed areas.

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. Richard W. Taylor, 119 IBLA 310, 313 (1991); Robert L. Baldwin, Sr., 116 IBLA 84 (1990); Oregon Natural Resources Council, 114 IBLA 163, 167 (1990). BLM may not depart from the IMP without justification, and that justification must be shown in the record. Richard W. Taylor, supra at 313.

Also included in the file is a portion of the Final Environmental Impact Statement (EIS) on the Preliminary Wilderness Recommendations for the Central California Area. In the EIS, none of the acreage within the Piute Cypress WSA is recommended for wilderness designation. However, it is immaterial 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).

In the decision on appeal, BLM did not cite specific instances of noncompliance; rather, it merely asserted that appellant's presence in the WSA impaired wilderness values and ordered him to remove his equipment and personal property. While BLM might have explained the basis of its decision more fully, we can agree that the presence within the WSA of a mobile

home, generators, and other personal property of the type being used by appellant on the claims was an impairment of the wilderness values of the WSA. Under the express terms of the IMP, the impacts of such use, even though temporary, were required to be reclaimed no later than June 30, 1989, the deadline set for BLM's wilderness recommendation. BLM's decision properly ordered appellant to reclaim those impacts.

Appellant asserts on appeal that only about 10 percent of his "working" is within the WSA. Appellant states that "all of my work is outside of the WSA [and] all of my claims are not in the WSA." However, appellant's own drawing confirms the presence of a mobile home and personal property on lands within the WSA.

Appellant points to a letter from BLM dated November 12, 1986, advising him that any operations on another mining claim within the WSA had to be reclaimed by 1991. He also questions why BLM approved his plan of operations on April 14, 1989, if it wanted him to vacate the site, suggesting that BLM's failure to provide adequate notice of the June 1989 deadline for reclamation requirements prevented BLM from requiring him to complete reclamation as provided in the IMP. He also suggests that BLM's approval of his mining plan created an occupancy right that survived the June 30, 1989, deadline.

We find nothing in the statute, regulations, or IMP recognizing a grandfather right simply because BLM has approved a mining plan prior to the reclamation deadline established by the IMP. Only pre-FLPMA mining operations may continue in the same manner and degree as on October 21, 1976. See 43 CFR 3802.0! 6; 3802.1-3. Appellant's claims were located after that date. In any event, BLM had no legal basis to bar nonimpairing use prior to June 30, 1989, and therefore could not properly have rejected appellant's mining plan simply because the deadline was approaching. However, after June 30, it was required by the IMP to see that all impairments, even temporary impairments, were removed from the WSA. It properly did so here. While BLM might have done more to ensure that appellant was apprised that the deadline had been advanced to June 1989 and to advise him in 1989 of the impending deadline for reclamation, that does not prevent the application of the IMP in this case.

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.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge

