

INTERIOR BOARD OF LAND APPEALS

Pierre J. Ott

125 IBLA 250 (February 11, 1993)

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Appeal from a decision of the State Director, California, Bureau of Land Management, modifying a plan of operations for placer mining. CA MC-68318 and CA MC-178779.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Surface Management--Mining Claims: Plan of Operations--Wild and Scenic Rivers Act

BLM properly required the operator of a placer mining claim to conform suction dredging operations in a river designated for potential addition to the national wild and scenic rivers system and related occupancy to a modified plan of operations because such operations do not constitute casual use under 43 CFR 3809.0-5 (1991).

APPEARANCES: Pierre J. Ott, pro se; Deane Swickard, Area Manager, Folsom Resource Area, Bureau of Land Management, U.S. Department of the Interior, Folsom, California, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE ARNESS

Pierre J. Ott has appealed from a decision of the State Director, California, Bureau of Land Management (BLM), dated July 30, 1991, requiring his mining operations and related occupancy in connection with the Rooker No. 1 placer mining claim (CA MC-68318) and the No No Mining Company millsite claim (CA MC-178779) to conform to a modified plan of operations. The Rooker mining claim is situated in the SE $\frac{1}{4}$  sec. 31, T. 3 S., R. 18 E., Mount Diablo Meridian, Mariposa County, California, along the Merced River. Ott's occupancy includes a millsite claim situated in sec. 6, slightly upstream from the mining claim. The portion of the Merced River involved here was designated a potential addition to the national wild and scenic rivers system by section 2(a) of the Act of November 2, 1987, Pub. L. No. 100-149, 101 Stat. 880 (codified at 16 U.S.C. § 1276(a)(99) (1988)).

On March 14, 1986, BLM received a "Plan of Operations" signed by Ott on March 12, 1986, and jointly worked out between Ott and BLM. The plan permitted, in connection with the subject mining claim, year-round dredging of the river and related occupancy of the land. Mining was to be "diligent, continuous and of a long term nature." Compliance with all Federal, State, and local laws was required by the plan.

In his July 1991 decision, the State Director notified Ott that he had determined that mining operations under Ott's existing plan of operations had caused "unnecessary and undue degradation" to the public lands within the Railroad Flat Campground (Decision at 1). The State Director found that BLM had analyzed the environmental impact of allowing operations to continue under that plan or of modifying or cancelling that plan in an April 1991 Environmental Assessment (EA). The EA, he noted, concluded that the existing operations represented a "significant health, safety and fire hazard." Id. (referring to EA at 4). He further stated that the modified plan, which was designed on the basis of the EA, provided reasonable measures to prevent unnecessary and undue degradation of the public lands. He also stated that it conformed to BLM's Merced Wild and Scenic River Management Plan (Management Plan) and with the revised regulations of the California Department of Fish and Game, which limited suction dredging to the period from June 1 to October 15. The State Director, therefore, required that Ott's mining operations comply with the modified plan. Ott appealed timely from the State Director's July 1991 decision.

The modified plan of operations restricts suction dredging operations, permits related occupancy of public lands under certain conditions, and provides for reclamation of disturbed areas. It prohibits use of dredges with intake diameters greater than 8 inches; limits dredging operations to the State-designated dredging season (June 1 - October 15), to certain stretches of the river, and to only one-half of the river; and prohibits the use of explosives and mechanized earth-moving equipment. Camping in a tent, vehicle-mounted camper, or trailer by an operator engaged in diligent, continuous dredging operations is permitted during the dredging season only. Upon the completion of operations each dredging season, all campsites and mining claims are to be left free of trash and abandoned personal items and all personal property is to be removed within 5 days of the cessation of dredging operations. A bond is required to cover the costs of removing abandoned items and reclaiming disturbed areas. Finally, the plan requires compliance with all applicable Federal, State, and local laws.

In his statement of reasons for appeal (SOR), appellant contends that he is not required to conform his mining operations to the modified plan since he is engaging in "casual use operations," which are purportedly defined in 43 CFR 3809.1-3(a) as operations disturbing less than 5 acres. He argues that he need only notify BLM of his operations pursuant to that regulation, but has been prevented from doing so. Appellant also makes mention in his appeal of a letter/decision, also dated July 30, 1991, by the Area Manager. Therein, the Area Manager required appellant, in accordance with the State Director's July 1991 decision, to execute and submit the modified plan of operations, along with a bond in the amount of \$1,000, within 30 days of receipt of the letter/decision. In this letter, the Area Manager stated that appellant was precluded from undertaking any operations before BLM's acknowledgement of receipt of the executed plan and bond.

The State Director, in his July 1991 decision, stated that appellant is required to obtain a reclamation bond. Appellant's only objection to the bond requirement is that he is engaging in casual use operations and,

as such, he is not required to obtain a bond. See SOR at 2-3. Appellant's operations, however, do not constitute casual use. Rather, they are such that appellant is required to obtain prior approval of a plan of operations. Thus, under 43 CFR 3809.1-9(b), he may properly be required to obtain a reclamation bond. Cf. Robert E. Oriskovich, 106 IBLA 93, 102 (1988) (mining claims within wilderness study area). Appellant does not challenge BLM's authority (found in 43 CFR 3809.1-7) to modify the original plan of operations or any particular aspect of the modified plan. Nor, except as noted below, can we find any error in the plan. The appeal before us is limited to a question of the propriety of the requirement that appellant generally conform his mining operations to the modified plan, given the nature of his intended operations.

[1] Departmental regulations establish three levels of mining operations, depending on their potential impact on the public lands. See generally 45 FR 78902, 78904 (Nov. 26, 1980). Of least impact are "casual use operations." 43 CFR 3809.1-2. Such operations are defined in 43 CFR 3809.0-5(b) as "activities ordinarily resulting in only negligible disturbance of the Federal lands and resources." An operator is not required to notify BLM prior to engaging in such operations. See 43 CFR 3809.1-2. Nor is he required to obtain prior approval of a plan of such operations. See id.

The next level is operations that cumulatively disturb the surface of 5 acres or less of Federal land in any given calendar year. As to these operations (unlike casual use operations), the operator is required to notify BLM before beginning work. See 43 CFR 3809.1-3(a); Karry K. Klump, 123 IBLA 377, 380 (1992). However, he is not required to obtain prior approval of that notice or of a plan of operations. See 43 CFR 3809.1-3(b); Bruce W. Crawford, 86 IBLA 350, 384, 92 I.D. 208, 226-27 (1985).

Of greatest impact are operations that cumulatively disturb the surface of more than 5 acres of Federal land in any given calendar year. For such operations, the operator is required to obtain prior approval of a plan of operations. See 43 CFR 3809.1-4; Differential Energy, Inc., 99 IBLA 225, 230, 236 (1987). An operator is also required to obtain prior approval of a plan of operations in the case of "[a]ny operation" in certain designated areas, including any area designated for potential addition to or a component of the national wild and scenic rivers system. 43 CFR 3809.1-4. Excepted from this latter requirement are "casual use operations." See id. Not excepted are operations which cumulatively disturb the surface of 5 acres or less of Federal land, but which are not considered casual use operations. See 48 FR 8814-15 (Mar. 2, 1983); 45 FR 78902 (Nov. 26, 1980).

Appellant correctly states that his operations are not in an area designated as a component of the national wild and scenic rivers system. However, they are in an area designated for potential addition to that system. See 16 U.S.C. § 1276(a)(99) (1988). Therefore, appellant is required by 43 CFR 3809.1-4 to obtain prior approval of a plan of operations except where his operations constitute casual use operations. Under 43 CFR 3809.0-5, operations will not be considered casual use if they involve the "use of mechanized earth moving equipment." BLM argues that

appellant's use of gasoline-powered suction dredges, which are capable of removing 10 cubic yards of material from the bed of the Merced River each hour in connection with his mining operations constitutes the "use of mechanized earth moving equipment." Suction dredges capable of removing by mechanized means large quantities of earth from the surface of the Federal lands (albeit from the bed of a river) are "mechanized earth moving equipment." Appellant has provided no evidence that his operations will not involve the use of such equipment. Nor does he provide any other reason to conclude that such operations constitute casual use operations.

Appellant has previously indicated that his activities on the Merced River require an approved plan of operations, having agreed to such a plan in March 1986 and operated under it ever since. Further, BLM points to the fact that, in responding to criminal charges brought against appellant, his attorney stated that appellant's "dredging activity" was not "casual," and a plan of operations was therefore needed for it ("Points and Authorities In Support of Motion for Dismissal of Information," United States v. Ott, No. 91-033-DLB (E.D. Cal.), at 4). See Memorandum to the Board from the Area Manager, dated Sept. 4, 1991, at 2. This admission by appellant also indicates that he regarded his operations to be other than "casual use operations." Finally, BLM states that more than 12 similar suction dredging operations along the Merced River operate under approved plans of operation. See id. Appellant has not offered any reason why he should be treated any differently than other operators and we can discern none.

Accordingly, for all these reasons, we conclude that appellant's anticipated mining operations cannot be considered casual use operations, within the meaning of 43 CFR 3809.0-5(b). See Lloyd L. Jones, 125 IBLA 94, 97-98 (1993), and cases cited therein. Appellant was properly required by the State Director to conform his mining operations to a modified plan of operations, and we affirm the State Director's July 1991 decision requiring appellant to conform his operations to the modified plan.

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.

Franklin D. Arness

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Administrative Judge

## ADMINISTRATIVE JUDGE MULLEN CONCURRING:

I agree with Judge Arness, but believe that the Modified Plan of Operations should be written to more closely reflect the facts in this case.

The conditions set out in Appendix F to the Final Merced Wild and Scenic River Management Plan, dated March 1991, entitled "Requirements for Placer Mining of the Merced River Streambed," contain terms very similar to those in the Modified Plan of Operations. For example, Exhibit F, under the heading "Suction Dredging and Motorized Sluicing," states:

Dredging will be permitted from June 1 to October 15 (Zone C classification, California Fish and Game) except for that section of the river 300 feet west of Mountain King Mine to the 867 foot elevation of Lake McClure, which is closed to dredging (Zone A classification, California Fish and game). [Emphasis in original.]

The following language is found under the heading "Suction Dredging Operations" in the Modified Plan of Operations:

2. The dredging season as defined by California Department of Fish and Game regulations is from June 1 to October 15.

3. The section of the Merced River from a point 300 feet west of Mountain King Mine to the 867 foot elevation of Lake McClure downstream is closed to dredging operations. This section has been given Zone A classification by the California Department of Fish and Game.

It is clear from the Management Plan, location notices, and maps in the case file that the claims subject to the plan of operations are on a tributary of the Merced river east of and upstream from the Mountain King Mine. It appears doubtful that Paragraph 3 of the Modified Plan of Operations has any bearing upon activities on the mining claims subject to that plan.

Similarly, Section 4 of the Modified Plan of Operations confines dredging operations to one-half of the river and is taken from a restriction on activities on the Merced River. The contemplated dredging operations are on a small tributary of the Merced River, and there is nothing to indicate that the uses discussed in the Management Plan which led to this restriction will take place on the tributary.

A review of the language of these and similar provisions found in the Amended Operating Plan appears warranted. See Draco Mines, Inc., 75 IBLA 278 (1983).

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R. W. Mullen  
Administrative Judge