

INTERIOR BOARD OF LAND APPEALS

Paul M. Shock

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Appeal from a decision of the Caliente Resource Area Manager, California, Bureau of Land Management, extending time for reclamation of unauthorized mining operations and requiring plan of operations and reclamation bond. CA MC 228372.

Affirmed.

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

When a mining claim is located partially within a wilderness study area, the regulations in 43 CFR Part 3802 apply, and BLM may properly issue a notice of noncompliance requiring a mining claimant to remove unauthorized structures from a wilderness study area reclaim disturbed lands, and submit a plan of operations and reclamation bond.

APPEARANCES: Paul M. Shock, Lake Isabella, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Paul M. Shock has appealed from a decision of the Area Manager, Caliente Resource Area, California, Bureau of Land Management (BLM), dated September 13, 1989, extending the time set for reclamation of unauthorized mining operations required by an August 8, 1989, notice of noncompliance, and requiring submission of a plan of operations and a reclamation bond.

On June 27, 1989, BLM special agents Mary Pat King and Michael McColl reported unauthorized use and occupancy of public land along Erskine Creek in sec. 16, T. 27 S., R. 33 E., Mount Diablo Meridian, Kern County, California, consisting of a "Sportsman camper," registered to Shock, a "large container/shed," and a "flatbed containing scrap wood," located just off Erskine Creek Road, which crosses the creek at several points, in sec. 16 (Incident Record, dated July 6, 1989, at 1). The agents stated that "areas on both sides of the road had been bulldozed with the natural vegetation having been uprooted and pushed out of the area, including at least one live digger pine tree." They also recorded seeing a canister containing "some claim papers" belonging to Shock.

After BLM agent King spoke to Shock on July 4, 1989, she reported that: "[Shock] admitted having done the dozing. Virgil Schuette had also told me

that it was Shock who had done the dozing. Schuette claimed that he warned him not to do it without authorization from BLM." *Id.* King then cited Shock with destruction of natural features (vegetation damaged and removed by the dozing), in violation of 43 CFR 8365.1-5(a). On July 6, 1989, Shock filed with BLM a copy of the notice of location of the Shock No. 1 placer mining claim (CA MC 228372) in the NE¼ of sec. 16, showing that the claim was located on June 1, 1989.

Also on July 6, 1989, Shock submitted to BLM a notice of intended mining operations on his claim. He stated that he would construct a dam across Erskine Creek in order to obtain water for the operation of a trommel and sluices, which would be used to process gravel obtained from the bed of the creek to obtain gold and garnets. Regarding reclamation, Shock stated that he would "leave [the area] the way I found it." He also admitted that he had a motor home and additional equipment, including a backhoe, two pick-up trucks, a small portable machine shop, and a two-ton truck on the claim, and that he "ha[d] made a fire break."

On August 8, 1989, the Area Manager issued a notice of noncompliance to Shock. The notice stated that Shock's unapproved surface disturbing activities involving use of a backhoe had violated 43 CFR 4140.1(b) and 8365.1-5(a) by destroying vegetation, and also 43 CFR 2920.1-2 and 9239.2-1, to the extent that they constituted unauthorized enclosure, use, or occupancy of public lands. Further, the Area Manager found that Shock's activities located west of Erskine Creek Road, which had been designated part of the Piute Cypress Wilderness Study Area (WSA) (CA-010-046), were conducted without prior approval of a plan of operations, contrary to 43 CFR 3802.1-1, and had impaired the suitability of the area for preservation as wilderness, in violation of section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1988). Accordingly, the Area Manager required Shock to cease residing on the land by August 12, 1989, and to remove all personal materials and the shed and reclaim all surface disturbance by September 1, 1989.

Construing Shock's notice submitted on July 6, 1989, as a notice of "proposed" operations, the Area Manager rejected the notice as "inadequate" because the operations would either result in the destruction of stream bank vegetation, thereby unnecessarily and unduly degrading the public lands contrary to Exec. Order No. 11990, dated May 24, 1977 (3 CFR 121 (1978)), or impair the suitability of the land for preservation as wilderness, as prohibited by section 603 of FLPMA. Accordingly, the Area Manager required Shock to

resubmit a notice (for five acres or less of disturbance outside of the Wilderness Study Area) or a Plan of Operations (within the Wilderness Study Area) to reflect your plans in light of this letter. No activity is permitted other than that necessary to hold your claim until all approvals for more intense activity are received from the state, county, and BLM.

The record shows that Shock received the notice of noncompliance on August 9, 1989. No appeal was taken from this notice.

Thereafter, the Area Manager issued his September 13, 1989, decision. Finding that Shock had failed to reclaim the surface disturbance caused by his unauthorized activities both within and outside the WSA, the Area Manager extended the time for compliance, requiring reclamation by October 15, 1989. In the absence of reclamation, the Area Manager stated that BLM would remove Shock's personal materials and reclaim the land at Shock's expense. Finally, the Area Manager stated that, because Shock had failed to comply with the notice of noncompliance, he was to submit a plan of operations and would also be required to submit a bond "to provide for reclamation," in accordance with 43 CFR 3809.3-2(e). The amount of the bond was to be determined after the plan of operations was filed. The record indicates that Shock received the September 1989 decision on September 15, 1989.

On October 3, 1989, Shock submitted a plan of operations for the Shock No. 1 placer mining claim, in response to the requirement in the Area Manager's September 1989 decision. On October 12, 1989, he also filed a notice of appeal of that decision with the Area Manager. Although the Acting Area Manager took subsequent action on the plan of operations in a November 8, 1989, decision that approved the plan subject to certain stated conditions, he had no jurisdiction to do so. The filing of the appeal vested jurisdiction in the Board. Thana Conk, 114 IBLA 263, 273 (1990). Subsequent State Director review on March 21, 1990, was also performed without authority and is therefore not relevant to our review. Only the decision issued on September 13, 1989, is properly before us for review.

On appeal before this Board, Shock admits that after he located his placer mining claim he "cleaned the weeds and trash off" two areas with a tractor and moved his motor home onto the west side and a shed onto the east side of the Erskine Creek Road (Notice of Appeal, dated Oct. 13, 1989, at 1). He contends that he could clear the sites next to Erskine Creek Road without notifying or obtaining prior approval from BLM, because such activity amounted to casual use under 43 CFR 3809.1-2. He also argues that he properly filed a notice of intended mining operations on July 6, 1989, 15 days before engaging in any such operations, consistent with 43 CFR 3809.1-3, where such operations would disturb less than 5 acres. He states that he then "dry was[hed] material on the West side of the road" (Notice of Appeal, dated Dec. 7, 1989, at 1). Finally, Shock contends that he is not required to reclaim land disturbed by his activities or to remove any of his equipment, including the shed. He argues that the area on the west side of the road, which is within the WSA, remains open to mineral exploration and development. As to the east side of the road, which is outside the WSA, Shock states that he is entitled to pursue mining operations pursuant to a valid location.

The Department has promulgated two sets of regulations that govern surface disturbing activities on mining claims that require a claimant to give BLM a notice of intent, obtain approval of a plan of operations, or take no administrative action. Which regulations apply depends on whether

the mining claim is located within a WSA (43 CFR Subpart 3802) or outside a WSA (43 CFR Subpart 3809). See Robert E. Oriskovich, 106 IBLA 93, 94, 101 (1988); Keith R. Kummerfeld, 74 IBLA 106, 109 (1983). In the case of a mining claim located partially within a WSA, the regulations in 43 CFR Subpart 3802 apply. See Richard W. Taylor, 119 IBLA 310, 314 (1991), vacated and remanded on other grounds, Taylor v. Lujan, No. CV-F-91-571 REC (E.D. Cal. Nov. 10, 1992).

It is clear that Shock was required by 43 CFR 3802.1-1 to obtain BLM approval of a plan of operations prior to engaging in any of the surface disturbing activities which he undertook on the subject mining claim. Pertinently, 43 CFR 3802.1-1 provides that an

approved plan of operations is required * * * prior to commencing * * * (b) Any mining operations which destroy trees 2 or more inches in diameter at the base; (c) Mining operations using * * * mechanized earth moving equipment, such as bulldozers and backhoes; * * * [or] (e) The construction or placing of any mobile, portable or fixed structure on public land for more than 30 days.

See L. C. Artman, 98 IBLA 164, 168 (1987); Havlah Group, 60 IBLA 349, 356, 88 I.D. 1115, 1118-19 (1981). Shock defends his failure to do so with the contention that he was not required to obtain approval of a plan of operations or even to notify BLM of his activities where they constituted "casual use" under 43 CFR 3809.1-2. But since a portion of the claim was located within a WSA, the regulations in 43 CFR Subpart 3809 do not apply. Thus, we need not consider whether provisions of 43 CFR 3809.1-2 sanctioning casual use have any application in this case. For the same reason, Shock's attempt to invoke 43 CFR 3809.1-3, providing for notification before operations which disturb 5 acres or less during any calendar year, must fail.

When there has been a violation of 43 CFR 3802.1-1, BLM is required by 43 CFR 3802.4-1(b) and (c) to issue a notice of noncompliance specifying action required to correct the noncompliance if it is causing impairment of wilderness suitability. See L. C. Artman, supra at 168-69. Impairment has occurred if activity has affected the land so that the impact 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 his wilderness recommendation to the President or has degraded wilderness values so far as to significantly constrain that recommendation. See 43 CFR 3802.0-5(d). In this case, BLM concluded that Shock's activities "have impaired the wilderness values of the [WSA]" (Notice of Noncompliance, dated Aug. 8, 1989, at 1). Shock has not challenged this finding. It is supported by the record. The evidence is clear that he bulldozed and placed a motor home on that part of his claim within the WSA before the June 27, 1989, BLM inspection. Because this inspection occurred before the Secretary was scheduled to make his recommendation to the President regarding wilderness suitability by June 30, 1989, it clearly disclosed activity that was then impairing the land, within the meaning of 43 CFR 3802.0-5(d). The impact of Shock's

activity could not then have been reclaimed to the point of being substantially unnoticeable in the area as a whole by June 30, 1989, and it continued until well after June 30, 1989. We therefore affirm the finding that there was impairment made by the Area Manager.

We hold that the Area Manager properly issued the August 1989 notice of noncompliance, requiring reclamation and removal of structures after Shock had bulldozed land and placed a motor home and a shed within and immediately outside the Piute Cypress WSA, without obtaining prior approval of a plan of operations. See L.C. Artman, *supra* at 168-69. BLM possessed authority to require reclamation and removal of the structures where Shock had failed to obtain prior approval of a plan of operations by virtue of 43 CFR 3802.4-1(c). Cf. Pierre J. Ott, 125 IBLA 250 (1993) (plan of operations required for activity in a potential addition to the national wild and scenic rivers system). Insofar as the Area Manager's September 1989 decision confirms issuance of the notice of noncompliance by extending time for reclamation of the disturbed area, we affirm that decision.

The August 1989 notice of noncompliance also rejected the notice of intended operations submitted by Shock on July 6, 1989. Even construing this notice as though it were a plan of operations required by 43 CFR 3802.1-1, we need not consider whether the Area Manager properly rejected it where the notice of noncompliance was not timely appealed. Under 43 CFR 4.411(a) an appeal was required to be filed within 30 days of receipt of the notice. Shock first filed a notice of appeal on October 12, 1989, more than 30 days after receipt of the notice of noncompliance on August 9, 1989. Therefore, we decline to pass on the validity of that notice with respect to the rejection of Shock's proposed operations, inasmuch as the September 1989 decision contained no confirmation of that rejection. See Differential Energy, Inc., 99 IBLA 225, 229 (1987).

The September 1989 decision properly before us for review required Shock to submit a plan of operations and a reclamation bond because he had failed to comply with the August 1989 notice of noncompliance. Shock does not challenge the finding that he had failed to comply with the notice of noncompliance, except to state that sometime after receipt of that notice he removed his motor home from the subject mining claim and then reseeded the area. He does not state precisely when such activity occurred. Nor does he state that he removed the shed or the motor home or reclaimed any of the disturbed area before the September 1, 1989, deadline. Moreover, special agent King reports that, in an August 30, 1989, meeting with Shock, he "admitted that he had not removed any of his belongings or reclaimed any of the land" (Incident Record at 3). The motor home was said by her to be on the claim, along with the shed, on September 2, 1989. The record contains a memorandum to the file from the Area Manager, dated September 13, 1989, reporting a conversation on that date with Shock in which he only then agreed to "move his trailer back to the trailer park."

While the Area Manager relied in error on 43 CFR 3809.3-2(e) when he required Shock to provide a plan of operations and reclamation bond, nonetheless Shock was required to submit and obtain approval of a plan of operations. See 43 CFR 3802.1-1; Robert E. Oriskovich, *supra* at 102; William E.

Godwin, 82 IBLA 105, 107 (1984). BLM could also properly require the submission of an appropriate reclamation bond. See 43 CFR 3802.2; Robert E. Oriskovich, *supra* at 102; William E. Godwin, *supra* at 107. Because Shock failed to comply with the August 1989 order to reclaim the subject land, we conclude that the Area Manager had reason to require a bond and we also affirm this part of his September 1989 decision.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 1989 decision is affirmed.

Franklin D. Arness
Administrative Judge

We concur:

Bruce R. Harris
Deputy Chief Administrative Judge

R. W. Mullen
Administrative Judge