

INTERIOR BOARD OF LAND APPEALS

Dave Paquin

129 IBLA 76 (March 25, 1994)

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DAVE PAQUIN

IBLA 93-286      Decided March 25, 1994

Appeal from a decision of the El Centro, California, Area Manager, Bureau of Land Management, denying a mining plan of operations for claims in a wilderness study area. CAMC 64403-64410, CAMC 67117-67121, CAMC 107537-107539.

Affirmed.

1. 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

A finding by BLM that a proposal in a mining plan of operations for construction of a road and other mechanized surface disturbing activity on unpatented post-FLPMA mining claims located within a WSA would impair the area's suitability for inclusion in the wilderness system provided sufficient reason to deny approval of the proposed mining plan.

APPEARANCES: Dave Paquin, Santee, California, pro se.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Dave Paquin has appealed from a January 20, 1993, decision of the El Centro, California, Resource Area Manager, Bureau of Land Management (BLM), denying a mining plan of operations proposing road construction and other mechanized surface disturbing activity on unpatented mining claims CAMC 64403-64410, CAMC 67117-67121, and CAMC 107537-107539, located between December 20, 1979, and January 3, 1982, in secs. 21, 22, 27, and 28, T. 13 S., R. 23 E., San Bernardino Meridian, Imperial County, California, within Little Picacho Peak Wilderness Study Area (WSA) #356. Although the Area Manager's decision erroneously informed Paquin he had the right to appeal the decision to the State Director, the California State Office properly forwarded Paquin's appeal to this Board for decision. See 43 CFR 3802.5(a).

In 1980, after discussing with BLM procedures for obtaining access either through the Imperial National Wildlife Refuge or Little Picacho Peak WSA, Paquin sought permission from the U.S. Fish and Wildlife Service (FWS) to rebuild an old road through the refuge. When FWS denied his request, Paquin filed a plan of operations, dated March 25, 1981, with BLM on May 1,

1981, seeking construction of a road through the WSA to enable him to transport a compressor, backhoe, and loader to his claims in order to expose minerals for further testing. On July 28, 1981, BLM informed him that road construction within the WSA could not be approved because it would impair the wilderness suitability of the WSA. BLM explained that since Paquin's mining claims were located after October 21, 1976, they were neither grandfathered uses under section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1988), nor valid existing rights, and that unless he modified his proposal so as not to impair the wilderness suitability of the area, BLM would be unable to approve it. Management of the WSA in accordance with the nonimpairment standard, BLM found, should continue until Congress decided to exclude it from wilderness review.

On March 11, 1983, Paquin filed a plan of operations proposing to build a 1/3-mile extension of the unauthorized Billy Jo mine road to reach his claims. He explained that he had been sampling by hand and carrying everything in by backpack, but that expanded access was needed to perform additional work. After an environmental assessment was prepared for his plan to consider whether it conformed to the nonimpairment criteria for WSA's, BLM denied approval of the plan on June 3, 1983. Since the proposed activities were within Little Picacho Peak WSA, Paquin was informed that BLM was required to regulate mining operations on such lands to prevent impairment of their suitability for inclusion in the wilderness system. After citing the definition of impairment found at 43 CFR 3802.0-5(d), BLM observed that, even though it had not recommended the WSA for wilderness classification, nevertheless management of the area to prevent impairment was required until Congress decided whether it should become part of the wilderness system.

BLM found that the terrain traversed by the proposed road left doubt whether it could be reclaimed so as to be substantially unnoticeable in conformity to applicable regulations. It was determined that trenching with mechanized earth moving equipment could permanently expose strong visual contrasts. BLM opined that Paquin's proposed road building and trenching would not meet the nonimpairment criteria listed in the Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), originally published at 44 FR 72014 (Dec. 12, 1979) and thereafter amended at 48 FR 31854 (July 12, 1983) and now found at section H-8550-1 of the BLM Manual, because those activities, combined with effects of the unauthorized construction and use of the Billy Jo road, would result in impacts on naturalness that might significantly limit the Secretary's ability to implement FLPMA sec. 603(c). BLM informed Paquin that he would be allowed to use vehicles on the road provided he did not maintain it with mechanized earth-moving equipment and submitted a \$2,000 performance bond to insure compliance. No appeal from this decision appears in the case file.

On August 7, 1986, the California State Director, BLM, responding to issues raised by Paquin at a public meeting, agreed with the earlier BLM determinations that Paquin's proposals to construct a road to reach his post-FLPMA mining claims would cause impacts that could not be reclaimed so as to be substantially unnoticeable and could not be authorized by BLM,

but that Paquin's use of the illegally constructed Billy Jo road would be possible provided no regrading or extension of the road were allowed and a minimum reclamation bond of \$2,000 were posted. The State Director suggested that Paquin either perform nonimpairing assessment work or apply for deferment of assessment work.

Paquin submitted another plan of operations on February 24, 1989, again seeking construction of vehicular access to his mining claims, and on July 6, 1989, BLM denied the plan for reasons given in the June 3, 1983, denial of Paquin's March 1983 plan. BLM suggested nonimpairing methods for fulfilling assessment work requirements and informed Paquin he might request deferment of annual assessment work.

Paquin appealed this rejection of his plan on August 3, 1989, arguing that the area should never have been made a WSA and that once BLM determined that the area was not suitable for wilderness designation the area should have been managed for multiple use under the undue degradation, multiple use standard. Paquin contended that since there had been mining in the WSA for 150 years and he had conducted extensive exploration activities in the area in the 1960s and 1970s, his use of the area should be grandfathered even though he did not file his claims until later. He also sent a copy of his appeal with a cover letter to Congressman Hunter, requesting his assistance. In a covering letter to Hunter, Paquin asserted that, contrary to BLM's repeated denials, the BLM State Director had authority under the IMP to release a parcel from WSA status upon finding that the area was unsuitable for wilderness. He also stated that, within the purview of the IMP, existing old mining roads and claims should have prevented consideration of the area for inclusion in the wilderness system in the first place, and that, even if the area had been recommended as suitable for wilderness, the IMP limited BLM's ability to control access to his claims to a 2-year period which had expired.

BLM did not forward Paquin's appeal to this Board; instead, it responded to the appeal by reiterating that it lacked authority to delete a WSA from consideration for the wilderness program and that Paquin's claims did not qualify as valid existing rights since they were not filed before enactment of FLPMA. BLM elaborated further on the reasons for rejection of Paquin's plan and appeal in response to Congressman Hunter's inquiry on Paquin's behalf, informing the Congressman that the provisions of the IMP cited by Paquin did not apply to Little Picacho Peak WSA. BLM indicated that issues concerning designation of the area as a WSA were considered during the inventory phase of wilderness review and resulted in a finding that the area had requisite wilderness values for WSA status, and that since Paquin's claims were post-FLPMA claims, IMP provisions concerning valid existing rights were inapplicable.

On December 23, 1992, Paquin again submitted a plan of operations proposing to extend the existing Billy Jo road and conduct mechanized prospecting operations. He also inquired about the status of his 1989 appeal and an earlier appeal of a rejection of a request to repair an old washed out mining road, and whether his claims were exempt from newly established rental

fees. BLM denied his plan of operations on January 20, 1993, explaining that the proposed access involved entry into the Imperial Wildlife Refuge which could only be approved by FWS. BLM observed that the plan did not describe reclamation of the planned activities, and repeated that because the claims were located in a WSA presented to Congress for action, BLM could not allow any impairment within the area. Paquin's earlier appeals, BLM explained, had been denied by decisions dated August 7, 1986, and July 6, 1989, and circumstances had remained unchanged since those denials. Paquin was also informed that he did not qualify for exemption from rental fees.

On appeal Paquin concedes that his plan proposed access through the wildlife refuge and that in 1989 BLM denied his proposal to use an old road to reach his claims. He asserts, however, that after he appealed the 1989 decision, he was free to use the road until his appeal was resolved. Paquin claims that the WSA contains numerous roads that were used for over 100 years until BLM and FWS closed them in 1976, and that these access routes are needed now. Paquin suggests that prior use qualifies them as R.S. 2477 public highways that should be returned to state or county jurisdiction and that roads and mines in the area make it unsuitable for wilderness designation. Admitting that he did not include proposed reclamation measures in his plan, Paquin submits that the road issue is the basic issue in this case. He alleges that others are currently using the closed roads, a fact he contends warrants review before any bond requirement for his own use of the roads is imposed.

Because BLM should have forwarded Paquin's 1989 appeal to this Board, the issues raised by that appeal will be addressed in this decision. Nonetheless, Paquin's claim that until his appeal is resolved he is entitled to use the road identified in his 1989 plan must be rejected. Although denial of that plan was automatically stayed by the filing of his appeal (see 43 CFR 4.21(a) (1989)), that circumstance did not authorize use of the road; the stay means that the decision denying the 1989 plan is not effective pending appeal, not that the proposed plan was approved or that the planned activities are authorized. See Robert E. Oriskovich, 128 IBLA 69, 70-71 (1993). Although Paquin refers to an earlier unresolved appeal of a BLM decision rejecting his request to repair a road that washed out sometime in 1979-80, that appeal is not part of the record in this case and is not now before the Board. To the extent Paquin's proposed access route crosses lands under FWS jurisdiction, neither the appealed BLM decisions nor our resolution of them affects those lands.

[1] Section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1988), directs the Secretary of the Interior to review roadless areas of 5,000 acres or more identified during inventory of the public lands as having wilderness characteristics and report to the President his recommendation of the suitability of each such area for preservation as wilderness. While an area is under wilderness review and until Congress has rejected it for wilderness designation, BLM is required to manage that WSA under the nonimpairment mandate of section 603(c). See International Silica Corp., 124 IBLA 155, 157 (1992), and authorities cited. Chapter I.B.2. of the IMP, 44 FR 72018 (Dec. 12, 1979), provides guidance for application of nonimpairment criteria

in BLM's management of WSA's: an activity is nonimpairing if it is temporary; any impacts are capable of being reclaimed to a condition of being substantially unnoticeable by the time the Secretary is scheduled to send his recommendation to the President; and if, after any needed reclamation is complete, the area's wilderness values have not been degraded so as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness. See also 43 CFR 3802.0-5(d).

FLPMA does provide an exception to the nonimpairment standard for mining and grazing uses existing on October 21, 1976, allowing mining and grazing to continue in the same manner and degree as they were conducted on October 21, 1976, even if such grandfathered uses would impair the wilderness suitability of the land. 43 U.S.C. § 1782(c) (1988); Murray Perkins, 116 IBLA 288, 293 (1990). Section 701(h) of FLPMA provides that actions of the Secretary under FLPMA are subject to valid existing rights, which includes mining claims with a valid discovery existing before enactment of FLPMA. John Loskot, 71 IBLA 165, 167 (1983). Paquin's assertions to the contrary notwithstanding, we find that because his claims were located after October 21, 1976, they neither fall within the "grandfathered uses" exception to the nonimpairment standard nor constitute valid existing rights. Furthermore, pre-FLPMA mining activities in the area unrelated to Paquin's present post-FLPMA claims or the WSA designation do not vest Paquin with a right to unregulated access to his claims. See Lloyd L. Jones, 127 IBLA 270, 274 (1993). The nonimpairment standard applies to BLM management of mining activities proposed for Paquin's claims.

Paquin does not argue that the proposed access road and mechanized mining activities would not impair the wilderness suitability of the WSA, and we find that the record supports BLM's finding that these activities would violate the nonimpairment standard. Paquin has instead directed his challenge towards identification of the area as a WSA, and he finds error in continued management of the area under the nonimpairment standard following a finding that the WSA was not suitable for wilderness designation. Any question whether the Little Picacho Peak area had wilderness characteristics sufficient to be included in the study phase of wilderness review, however, was settled when BLM designated the area a WSA, and that designation is no longer subject to challenge; Paquin's contention that mining claims and roads (including possible R.S. 2477 public highways) in the area made it unsuitable for WSA designation is untimely. See San Juan County Commission, 123 IBLA 68, 71 (1992). That BLM did not recommend the WSA for inclusion in the wilderness system does not affect the continuing management of the WSA. Robert L. Baldwin, Sr., 116 IBLA 84, 87 (1990), and cases cited. The final decision whether it will be included in the wilderness system rests with Congress, and the Department's duty to manage the lands consistent with the nonimpairment standard continues until Congress has acted. Id. at 88.

To the extent Paquin has raised arguments not specifically addressed herein, they have been considered and rejected.

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.

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Franklin D. Arness  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge