

INTERIOR BOARD OF LAND APPEALS

Committee for Idaho's High Desert

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COMMITTEE FOR IDAHO'S HIGH DESERT

IBLA 93-232

Decided September 12, 1994

Appeal from a decision by the Manager, Bennett Hills Resource Area, Idaho, Bureau of Land Management, finding no significant impact, based upon Environmental Assessment No. ID050-EA-92-114, and approving Plan of Operations No. IDI 29452.

Affirmed.

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

Under sec. 603(c) of FLPMA, lands within a WSA must be managed in a manner so as not to impair the suitability of such areas for preservation as wilderness. 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. The Secretary is not charged with maintaining the existing wilderness character of every parcel and FLPMA did not prohibit mining activity within a WSA if it does not create an impairment.

2. Environmental Quality: Environmental Statements--Mining Claims: Plan of Operations

The Board will affirm a FONSI for proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination that the impact is insignificant is reasonable in light of the environmental analysis.

3. Environmental Quality: Environmental Statements--Mining Claims: Plan of Operations

When making its determination that proposed mining activity would not impair the suitability of the area for preservation as wilderness, BLM was required to make subjective judgment decisions. Those decisions are entitled to considerable deference, even though

reasonable men might differ in making such assessments. When BLM's subjective decisions are challenged on appeal there must be a showing of clear error of law or demonstrable error of fact.

APPEARANCES: Randy Morris, Chairperson, Committee for Idaho's High Desert, and Laird J. Lucas, Esq., Boise, Idaho, for appellant; Kenneth M. Sebby, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

#### OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Committee for Idaho's High Desert (the Committee) has appealed a finding of no significant impact (FONSI) and record of decision approving Plan of Operations No. IDI 29452 for the Corridor Placer Claim #26, issued by the Manager of the Bennett Hills Resource Area, Idaho, Bureau of Land Management (BLM), on February 4, 1993. The Corridor Placer Claim #26 is located in sec. 15, T. 5 S., R. 17 E., Boise Meridian, and within the Shoshone Wilderness Study Area (WSA). The FONSI determination was based upon Environmental Assessment (EA) No. ID050-EA-92-114. <sup>1/</sup>

On August 6, 1992, Bill Hamm, the mining claimant, submitted a plan of operations to BLM for review and approval. This plan called for removal of loose, water-worn boulders from the Corridor Placer Claim #26, which had been located along a 2,200-foot-long and 100-foot-wide dry section of the Big Wood River Channel. Under Hamm's proposal, between 10 and 20 truckloads, or approximately 5,120 cubic feet of boulders suitable for landscaping and architectural purposes, would be removed from a 4.77-acre portion of the claim. There would be no road construction, blasting, or topsoil removal. The stones would be retrieved using a rubber-tired bucket loader, which would travel in the dry riverbed. Cavities left by removal would be filled with smaller stones. The only contemplated surface disturbance would consist of removed boulders, displaced gravel, and small patches of flattened vegetation (EA at 3).

In its EA, BLM found that impacts of the proposed action would have no significant impact upon the WSA as a whole and would have no effect on a congressional designation with respect to suitability or nonsuitability for preservation as wilderness. In a February 4, 1993, amendment to the EA, BLM included the stipulation that Hamm would be required to re-seed any patches of vegetation flattened by his vehicles.

[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

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<sup>1/</sup> An EA is required for proposed mining within a WSA. See 43 CFR 3802.3-1.

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) 2/ 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 Secretary is not charged with maintaining the existing wilderness character of every parcel; FLPMA did not prohibit mining activity within a WSA; and the IMP contains specific guidelines for permitting mining operations under the 1872 mining laws. See H-8550-1 at 54-56. There can be no doubt that guidelines are weighted toward providing environmental protection (see Eugene Mueller, 103 IBLA 308, 310 (1988)). However, they do not bar actions which do not cause an impairment.

On appeal the Committee contends that the contemplated action would remove one of the WSA's most outstanding features - "smooth, water-worn basalt sculptures treasured by amateur and professional photographers, sightseers, and the general public" (Statement of Reasons (SOR) at 11). The Committee contends that these boulders are a great natural wonder whose aesthetic value in place far exceeds the mineral or material value of the stone. In addition, the Committee asserts that removal of the boulders would cause long-term impacts, result in new surface disturbances, and require reclamation. The Committee alleges that the "reclamation plan itself will create additional surface disturbances and other environmental impacts \* \* \* which will be more than temporary and require reclamation" (SOR at 12).

BLM responds that the final Idaho Wilderness Study Report (1991) for the Shoshone WSA 3/ makes no mention of the Big Wood River as having wilderness characteristics or values and makes no mention of smooth, water-worn basalt sculptures, let alone describe the basalt stones as outstanding

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2/ 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 the BLM's directive management system. See H-8550-1. Citations in the text will be to the Handbook page.

3/ Excerpts from this document are attached to BLM's answer.

features. Having noted this finding, BLM states that under the IMP guidelines, an activity is not impairing if it is temporary; if its impacts are capable of being reclaimed to a condition of being substantially unnoticeable; and if, after reclamation is completed, 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 or nonsuitability for preservation as wilderness.

The EA reveals that BLM has not ignored the visual values of naturally sculpted, water-worn boulders. In 1992, BLM conducted an inventory and began withdrawing segments of the Big Wood River channel judged to contain outstanding formations from entry under the Mining Law. The segments of the river within the Shoshone WSA were not withdrawn because that section of the channel was not found to exhibit sufficient uniqueness and quality to justify withdrawal (EA at 5).

The impacts of the proposed action are listed beginning at page 6 of the EA. Among those impacts are minor disturbance to vegetation, temporary disturbance to wildlife and recreational use caused by mining noise, and bare spots in the riverbed after removal of the rocks. BLM found that the small spots would be substantially unnoticeable and large spots would be reclaimed by backfilling with smaller river rock.

The Committee's allegations of long-term impacts are neither documented in BLM's analysis nor described by the Committee, and we find no support for a finding that they are reasonably foreseeable as a result of the proposed action. Accordingly, the Committee's argument reveals no violation of the nonimpairment criteria.

The Committee also argues that no operations can be conducted on the land because the land cannot be reclaimed by the October 21, 1991, reclamation deadline, which has passed. The basis for this argument is found in 43 U.S.C. § 1782(a) (1988), which directs the Secretary to review potential wilderness areas and from time-to-time make recommendations to the President as to the suitability or nonsuitability of such areas for preservation as wilderness "[w]ithin fifteen years of October 21, 1976," and 43 U.S.C. § 1782(c) (1988), states that

[d]uring the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue 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 \* \* \*.

The fact that the 15-year period has elapsed does not alter BLM's responsibilities for WSA lands under the statutory directives and the implementing regulations. <sup>4/</sup>

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<sup>4/</sup> In Instruction Memorandum No. 89-600 (July 13, 1989), the Director, BLM, mindful of the reclamation deadline, authorized only temporary uses which could easily be terminated when Congress acts on the wilderness designation.

Next, the Committee argues that all environmental questions relevant to the plan of operations were not considered in the EA. The Committee asserts that the EA failed to consider cumulative impacts, that is, the cumulative impacts upon the soils, vegetation, and visual attributes when the activities described are considered together with "other past, present and reasonably foreseeable future actions" (SOR at 15). The Committee asserts that the EA failed to consider erosion potential, climate, or precipitation. The Committee specifically cites Hamm's entry and disturbance of the site prior to BLM's approval of his plan of operations as a prior impact not considered by BLM, but gives no example of any other past or any present, or reasonably foreseeable environmental concern that should have been, but was not considered in the EA.

Cumulative impacts were, in fact, analyzed and are discussed at page 7 of the EA. Specifically addressing Hamm's activity, BLM states that on July 28, 1992, which was prior to filing a plan of operations, BLM observed Hamm's activity in the Big Wood River channel in the WSA. The disturbances noted were recent tire tracks and approximately five rocks marked with engineer's tape. No evidence of rock removal in the WSA was observed, and impact was considered insignificant.

The Committee argues that the EA did not consider an appropriate range of alternatives. The EA examined authorizing the action and two alternatives: denial of the proposed action and approval of the proposed action with modification. BLM contends that all reasonable alternatives were considered, leaving no unresolved conflicts that would require consideration of additional alternatives.

[2] A FONSI determination will be affirmed on appeal if, after conducting an EA, BLM finds that a proposed action will produce no significant impact, the record reflects a careful review of environmental issues, relevant environmental concerns have been identified, and the final determination is reasonable. An appellant challenging a FONSI has the burden of proving error. Powder River Basin Resource Council, 124 IBLA 83, 91 (1992).

Having reviewed BLM's decision record and the proposed mining plan, we conclude that the record reflects a reasonable assessment of anticipated impacts, and supports a reasonable conclusion that those impacts will be insignificant and nonimpairing. The Committee urges a finding that BLM erred when it failed to consider those factors in the course of preparing its EA. The Committee's efforts stem from its disagreement with BLM's characterization and evaluation of the site features and terrain characteristics.

[3] The fact that the Committee's evaluations and opinions differ from those of BLM is understandable. BLM was required to make subjective judgment decisions when assessing whether the proposed action would impair the suitability of the area for preservation as wilderness. Those subjective judgment decisions are entitled to considerable deference, even though

reasonable men might differ in making such assessments. When BLM's subjective decisions are challenged on appeal, they may not be overcome by mere expressions of disagreement. There must be a showing of clear error of law or demonstrable error of fact. Utah Wilderness Association, 86 IBLA 89, 90-91 (1985); Committee for Idaho's High Desert, 85 IBLA 112, 115 (1985). Appellant has failed to establish that approval of the plan of operations was unjustified or contrary to the relevant statutes and policy guidelines. The Committee's difference of opinion does not demonstrate that BLM's analysis is unreasonable or invalid. Powder River Resource Council, *supra* at 91; Southwest Resource Council, Inc., 73 IBLA 39 (1983).

The Committee has also proffered arguments disputing the validity of Hamm's mining claim on the ground that the minerals on the claim are a "common variety" not locatable under the mining law. No issue as to the validity of the claim or as to whether the mineral is a common variety is before the Board in this appeal. Hamm's placer claim was legally located. BLM states at page 5 of the EA that in November 1992, the Idaho State Office Chief of Mining Law and Saleable Minerals determined that the mineral material was of an uncommon variety, having a distinct and special value, and was, therefore, locatable under the Mining Law.

To the extent not discussed herein, the Committee's other arguments 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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R. W. Mullen  
Administrative Judge

I concur:

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Bruce R. Harris  
Deputy Chief Administrative Judge