

Editor's Note: 100 I.D. 15.

SOUTHERN UTAH WILDERNESS ALLIANCE Et AL.

IBLA 89-624

Decided February 5, 1993

Appeal from a decision of the Richfield District Manager, Bureau of Land Management, approving a mining plan of operations. UT-050-89-075.

Reversed and remanded.

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

In order to qualify under the "grandfathered uses" exception to the non-impairment standard applicable to lands within wilderness study areas, the use in question must have been in existence either on Oct. 21, 1976, or temporarily suspended on that date, and must have continued thereafter following the logical pace and progression of development.

APPEARANCES: Scott Groene, Esq., Salt Lake City, Utah, for the Southern Utah Wilderness Alliance; Gary Macfarlane, Conservation Director, Utah Wilderness Association; David K. Grayson, Esq., Office of the Regional Solicitor, Salt Lake City, Utah, for the Bureau of Land Management; Gregory Hunt, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Southern Utah Wilderness Alliance (SUWA) and the Utah Wilderness Association (UWA) have appealed from a decision of the Richfield District Office, Bureau of Land Management (BLM), dated July 3, 1989, approving a mining plan of operations on certain mining claims located in secs. 10, 11, and 14, T. 32 S., R. 10 E., Salt Lake Meridian, within the Mount Pennell Wilderness Study Area (WSA), to permit the construction of road extensions within the claims. For reasons set forth below, we reverse this decision and remand the matter for further consideration.

On February 8, 1989, the Estate of Kay L. Hunt, dba, Hunt Mining (Hunt), filed a mining plan of operations for various mining claims in the "Pennell-Wolverton" group of 38 mining claims, some of which are within and some of which are outside of the boundaries of the WSA, proposing to construct approximately 2 miles of road extensions for the purpose of intersecting mineralized trends and to gain access to old portals existing on the claims. These road extensions would emanate outward from an existing cherrystemmed road which runs parallel to Straight Creek across secs. 10 and 11 leading to a communications site. These new roads were to be constructed by a bulldozer, supplemented by blasting as necessary. An undetermined number of drill holes would be drilled along the roadways at intersections with veins and old workings. Included with the plan of operations was a summary of mining activities on the claims covering the period from 1956 through 1977.

Inasmuch as some of these claims were located within the Mount Pennell WSA, BLM prepared an Environmental Assessment (EA) of the impacts of the proposed activities. The EA noted that, as proposed, all of the activities would occur on claims within the WSA. The EA further noted that, while air quality would be adversely affected during road building and drilling, these impacts would be both negligible and temporary. With respect to the impacts to wilderness characteristics, however, the EA found that the impacts would not be temporary and that the proposed action would "constrain the Secretary's recommendation with respect to the area's suitability or non-suitability for preservation as wilderness" (EA at 13). Thus, the EA effectively found that the proposed action would violate the non-impairment standard generally applicable within WSA's. The EA concluded, nevertheless, that the activities could be allowed because the activities proposed were "grandfathered uses" within the scope of section 603 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1988). ^{1/} Pursuant to this EA, the Acting Area Manager decided to approve the plan of operations on June 2, 1989, which decision was approved by the Acting District Manager on July 3, 1989.

On the same date that the Acting District Manager approved the plan of operations, both SUWA and UWA filed objections to the proposed action. Both groups objected to the finding that the proposed road extensions were "grandfathered uses," as the EA concluded. Additionally, UWA challenged

^{1/} It is important to note that, because of its finding that the activities proposed constituted "grandfathered uses," the EA expressly declined to consider a no action alternative and two other alternatives (track-mounted drill rigs and staged exploration). See EA 2-3.

the failure of BLM to issue an Environmental Impact Statement (EIS), as well as the failure to consider other, non-impairing alternatives, including the no action alternative. SUWA also took issue with the failure of BLM to determine whether or not each of the claims was supported by a discovery of a valuable mineral deposit and further argued that BLM should, in any event, require the posting of an adequate bond to assure reclamation. Following receipt of the decision of the Acting District Manager, SUWA filed a notice of appeal on July 11, 1989, from the approval of the plan of operations. By letter dated July 12, 1989, the District Office informed Hunt that, pursuant to 43 CFR 4.21(a), approval of the plan of operations was suspended during the pendency of the appeal. On July 27, 1989, UWA also filed a notice of appeal from the decision approving the plan of operations.

On appeal, appellants reiterate the arguments originally submitted in response to the proposed approval of the plan of operations. In answer, BLM contended that, since BLM found, correctly, that the extension of the roads contemplated by the plan of operations constituted "grandfathered uses," the fact that the extension of the roads resulted in violation of the non-impairment standard was irrelevant because "grandfathered uses" were permitted even where such uses impaired the land's suitability for inclusion in the wilderness system. Further, BLM argued that there was no requirement that it perform a validity examination in order to approve a plan of operations since, absent an application for patent or an independent determination by BLM that it wishes to challenge the validity of the claim, "the existence of the discovery will be assumed upon the filing of the claim and the continuation of the filing of appropriate assessment work" (Answer

at 4). BLM also argued that, while it had concluded that the activities would impair the wilderness characteristics of the area, it had also properly concluded that such impairment would not constitute a significant impact on the quality of the human environment and, therefore, no EIS was needed.

As an initial matter, it is important to note that approval of the plan of operations was not premised on a finding that Hunt possessed valid existing rights within the meaning of section 701(h) of FLPMA, 90 Stat. 2786 (1976). Thus, a memorandum from Francis Rakow, a geologist with the Henry Mountain Resource Area (HMRA), to the Acting Area Manager, HMRA, dated March 17, 1989, noted that additional information would be needed in order to determine whether the claims or any of them were supported by a discovery. The memorandum explained that:

The information needed includes a base-map with locations of drill holes and assay results pinpointed. This information has been requested from the claimant and has not yet been received. Until we have this data I do not think that we can determine if there are valid existing rights on this claim group.

Not only was such information not submitted, but, in a subsequent memorandum to the State Director from the Acting State Director, Division of Renewable Resources, the Acting State Director noted that:

The BLM minerals people are unwilling to undertake an official validity examination, citing that it would be too much work and take too much time. Yet we think that a formal validity determination will be the only way to establish a position where we can rationally and legally defend ourselves.

BLM ultimately determined that it was unnecessary to resolve questions concerning the existence of valid existing rights because of its conclusion that the uses contemplated in the plan of operation were "grandfathered uses" within the scope of section 603 of FLPMA, 43 U.S.C. § 1782 (1988), and thus permissible even though they would impair the wilderness characteristics of lands within the WSA. It is, therefore, the interpretation of this concept which is central to resolution of the instant appeal.

[1] In adopting section 603 of FLPMA, 43 U.S.C. § 1782 (1988), Congress directed the Department to manage land included within WSA's "so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976 * * *." In defining the scope of the underlined proviso, which is generally described as the "grandfathered uses" provision, the Department provided that:

Manner and degree means that existing operations will be defined geographically by the area of active development and the logical adjacent (not necessarily contiguous) continuation of the existing activity, and not necessarily by the boundary of a particular claim or lease * * *. [A]n existing activity, even if impairing, may continue to be expanded in an area or progress to the next stage of development so long as the additional impacts are not significantly different from those caused by the existing activity. In determining the manner and degree of existing operations, a rule of reason will be employed. [Emphasis supplied.]

43 CFR 3802.0-5(j).

In our recent decision in Richard C. Behnke, 122 IBLA 131 (1992), we had occasion to examine some of the parameters of the "grandfathered uses" exception to the non-impairment standard. In that case, we noted that, while the critical date is October 21, 1976, the Interim Management Policy and Guidelines for Land Under Wilderness Review (IMP), 44 FR 72014 (Dec. 12, 1979), "also permits advertence to activities occurring during the preceding year which were 'temporarily inactive' at that date (see IMP I.B.6.b., 44 FR 72019) and which subsequently recommenced and continued to the present following the 'logical pace and progression of development' (see IMP I.B.6.c, 44 FR 72019)." Id. at 136-37. 2/

While the Behnke case involved the question of whether a use was existing as of the critical date, this case presents a different issue. Here, appellants generally admit that some road building activities may have been occurring on the critical date, but they argue that none of these activities were occurring on any of the claims in the WSA since, by definition, WSA's were required to be roadless 3/ and all intruding roads were cherrystemmed

2/ The citations in this decision to the IMP will be to the version appearing in BLM Handbook, H-8550-1. As we have noted, following the initial promulgation of the IMP in 1979 (see 44 FR 72014-34 (Dec. 12, 1979)), it was subsequently amended in 1983 (see 48 FR 31854-56 (July 12, 1983)). Thereafter, in 1987, BLM published the IMP in Handbook format, incorporating the 1983 revisions, and made it a permanent part of the BLM directives management system. See The Wilderness Society, 106 IBLA 46, 54-55, n.6 (1988).

3/ Within the context of the wilderness inventory, the term "roadless" was defined as referring to the absence of roads which have been improved and maintained by mechanical means to ensure relatively regular and continuous use. See, e.g., Phelps Dodge Corp., 76 IBLA 31 (1983); C & K Petroleum Co., 59 IBLA 301 (1981). While the IMP, itself, recognizes that rights-of-ways may be permitted within WSA's to the extent that they may be conformed to the non-impairment criteria (see IMP at III.C.3.), it is clear that, to the extent that the right-of-way qualifies as a road within the meaning of

out of a WSA. Further, they contend that any activity that was on-going in 1976 ceased in 1977 and had not been recommenced until the present time. Therefore, they argue, expansion of a road into a WSA could not constitute a continuation of the "logical pace and progression of development" as provided for under the "grandfathered uses" exception to the non-impairment standard. ^{4/}

The record, as it presently exists, supports appellants' factual contentions. Thus, while Hunt provided a detailed description of activities on the claims in question, this narrative has no entry beyond 1977. Moreover, the field examinations conducted by BLM personnel tend to corroborate appellants' assertions that no road building or similar activities occurred between 1977 and the present. Thus, in a memorandum to the file dated June 29, 1989, Rakow noted that he had told a representative of SUWA that "the disturbances that [were] present dated from the early part of the century through 1978 and that the majority or northern drill trails would originate on disturbed areas dating from 68 to 73 or so." Examination of the case file makes it clear that BLM personnel proceeded on the assumption that, because road-building activities on some of the claims were occurring

fn. 3 (continued)

the above definition, the construction of the road necessarily constitutes impairment of the WSA and can only be permitted either as an incident of a valid existing right or under the "grandfathered uses" exception to the non-impairment standard.

^{4/} The record indicates that Hunt performed some activities prior to receipt of an approved plan of operation which resulted in a charge of trespass. See Memorandum from Deputy State Director, Renewable Resources, to State Director, dated Apr. 13, 1989. Activities conducted in trespass may not, of course, be considered in determining the existence of "grandfathered uses."

on the critical date, all such activities with respect to such claims constituted "grandfathered uses." This, however, is not the case.

As the court noted in Rocky Mountain Oil & Gas Association v. Watt, 696 F.2d 734, 749 (10th Cir. 1982), "The purpose of the WSA management scheme is to maintain the status quo existing October 21, 1976, so that lands then suitable for wilderness consideration will not be rendered unfit for such consideration before the Secretary makes a recommendation and the Congress acts on the recommendation under section 603(a) and (b)." Yet, at the same time, Congress was concerned that then existing uses not be barred during the period of wilderness review. This was a substantial concern since all BLM land was subject to initial inventory and a total ban on any impairing activity which provided no exception for existing uses would have been wildly disruptive to a broad variety of endeavors. Maintenance of existing uses would, indeed, generally not be seen as inimical to wilderness preservation since, to the extent that such activities were of a nature so as to render the land unsuitable for wilderness preservation they would have presumably already made the land on which they were occurring unfit for inclusion in the wilderness system, while to the extent that such activities did not adversely impact on wilderness characteristics their continuation "in the same manner and degree" would not normally result in changing the status quo of lands which might then qualify for wilderness preservation.

There were, however, scenarios in which it was possible for on-going activities to adversely affect a parcel of land's suitability for inclusion in the wilderness system subsequent to the critical period even though such

activities had no such effect prior to the critical period. This could occur where activities, extant on October 21, 1976, were of such a nature that their cumulative effect would adversely impact the wilderness characteristics of the lands on which they were occurring even though they continued to be carried out "in the same manner and degree" as was occurring during the critical period. A similar result might occur where the logical progression "in the same manner and degree" of impairing activities would impact additional lands. An example of the former would be the on-going development of a mining claim where continued development on the parcel might result in cumulative effects which would deprive the land of its wilderness characteristics. An example of the latter might be the on-going development of an oil field where full-field development would necessitate the drilling of additional wells on lands not theretofore affected by development activities. It was in consideration of this second possibility that the Department provided that "an existing activity, even if impairing, may continue to be expanded in an area or progress to the next stage of development so long as the additional impacts are not significantly different from those caused by the existing activity." See 43 CFR 3802.0-5(j). The central question in this appeal is, therefore, whether the plan of operations proposed by Hunt involves either the continuation of a formerly non-impairing activity which now, because of cumulative effects, results in impairment of wilderness characteristics or the expansion or logical progression of impairing activities existing on October 21, 1976.

In analyzing this question, it is important to focus on the exact activity to which the "grandfathered uses" exception is being applied.

The record is quite clear that a number of the claims within the WSA have been prospected in the past using existing trails without adversely affecting the suitability of the land for inclusion in the wilderness system. There seems to be no question that the continuation of this prospecting "in the same manner and degree" in which it was occurring on October 21, 1976, would not violate the non-impairment injunction. This, however, is not the activity which is being "grandfathered." Rather, it is road construction, an activity which, by its nature, is inimical to WSA status, that is being recognized as a "grandfathered use" by the decision below.

In this sense, road-building activities are unique. Since, by definition, WSA's must be roadless, all road construction within a WSA automatically constitutes a violation of the non-impairment standard. Whether such activities may, nevertheless, be permissible is a function of (1) whether or not such road-building activities as were occurring on the critical date can be seen either as a necessary adjunct to other activities occurring during the critical period or as a logical progression of those activities, and (2) whether such use had continued in its logical progression since that time. Judged under these standards, we do not believe that the record establishes that road-building activities within the limits of the claims are "grandfathered uses" within the meaning of the regulations.

First of all, even leaving aside questions as to whether road-building activities were occurring within the critical period, 5/ there is

5/ Thus, we note that, while the chronology of claim development submitted by Hunt indicates that, during the period from Sept. 1, 1976, to Sept. 1, 1977, they "[b]ulldozed extension from existing road, from mine at head of

substantial doubt whether these activities could be seen as relating to prospecting of the claims which is the asserted purpose of the instant proposal. The record establishes that the road in question was built for the purpose of gaining access to the top of Bulldog Ridge for communication site purposes. While we do not doubt that the claimants constructed the road extension and that it did have an ancillary benefit to them in providing access to parts of the claims, it also seems relatively clear that the animating purpose in its construction was to provide access to the communication site, notwithstanding Gregory Hunt's assertion that "this road was constructed for mining purposes by mining people and the communications tower was a spin-off" (Letter of Aug. 7, 1980). 6/ To the extent,

fn. 5 (continued)

Straight Creek to top of Bulldog Ridge," this assertion is at odds with a statement in a letter dated Aug. 7, 1980, objecting to WSA status for the area, in which Gregory Hunt declared: "In 1978 my father gave the B.L.M. a document granting an approx. 50 x 150 ft. rectangular surface area for a communications site along Bulldog Ridge on our claims. Our road was then extended to the summit where the communications site now exists." If these road construction activities, as opposed to maintenance of existing roads, did not take place until 1978, they could not be "grandfathered uses" since they would not have occurred during the critical period. However, since the affidavit of labor filed in connection with these claims indicates that the work was, in fact, completed in the 1977 assessment year, we will assume, for purposes of this appeal, that it was conducted during the critical period.

6/ Thus, the road extension constructed to the top of Bulldog Ridge proceeds away from the bulk of Hunt's claims, proceeding from the mine face located on Mt. Pennell No. 3, trending in a generally westerly direction and passing through the Copper Virgin Nos. 6 and 7, with a slight intrusion into the Mt. Pennell No. 20. In contradistinction, all of Hunt's proposed road-building activities in the plan of operations under review are to the east of the mine face and involve none of the claims crossed by the road to the communications site. There is no indication of a desire by claimants to utilize any access which may have been provided to the western claims for exploration purposes. The dissent, for its part, fails to distinguish between the road to the adit, which was clearly constructed for mining exploration purposes but is not qualifying under section 603(c) since it was not being constructed during the critical period, and the segment from the rock face to the communication site upon which Hunt premises its claim to grandfathered uses.

therefore, that any benefit to claim exploration or development was clearly peripheral, at best, to providing access to the communication site, which access was accomplished upon the completion of the road segment, road building activities cannot be judged to be a necessary adjunct to other on-going activities occurring during the critical period or as a logical progression of those activities.

Moreover, even assuming arguendo that the road building activities occurring during the critical period were part of an on-going exploration of the claims, rather than for the primary purpose of obtaining access to the communications site, the approval of new road construction at the present time could not be justified under the "grandfathered uses" exception because such activities do not represent the "logical pace and progression of development," as required by the IMP. See IMP at I.B.6.c., 44 FR 72019 (Dec. 12, 1979). There is no evidence in the record that, subsequent to construction of the road during the critical period, any other road extensions from the cherrystemmed road were undertaken or proposed to BLM until that contemplated in the plan of operations under review herein. Based on the record before us, the 12-year hiatus between road construction activities simply fails to evince the prerequisite "logical pace and progression of development" necessary to validate an asserted "grandfathered use." Thus, the allowance of the road construction activities proposed in the plan of operations, as well as the failure of the EA to consider non-impairing alternatives, cannot be justified on the basis of "grandfathered uses" and BLM's decision on this point must be reversed.

We note, however, that Hunt has asserted that its activities could also be allowed in fulfillment of its valid existing rights. In the context of a mining claim, valid existing rights can be said to exist where the mining claim in question was supported by a discovery of a valuable mineral deposit as of the critical date (Oct. 21, 1976), and at the present time. See IMP at I.B.7.a. Even assuming that a mining claim is supported by a discovery, the non-impairment standard applies unless application of this standard "would unreasonably interfere with the claimant's rights to use and enjoyment of the claim." Id.

The mere fact that the claim was located prior to the critical date does not establish the existence of valid existing rights. ^{7/} Thus, this Board has expressly held that "it is not unreasonable to require a claimant to make a preliminary showing of facts which support a valid existing right." Havlah Group, 60 IBLA 349, 361, 88 I.D. 1113, 1121 (1981). This is in accord with the IMP, which expressly notes that "[b]efore the BLM will grant approval of operations that do not satisfy the nonimpairment criteria, the operator will be required to show evidence of a pre-FLPMA discovery." The IMP continues, "If warranted, BLM may verify data through

^{7/} Any inference in BLM's response that the mere location of a mining claim raises a presumption of validity, vis-a-vis the United States, is plainly wrong. The mere assertion of a claim to land is simply that. In all proceedings brought by the Government challenging the validity of a claim it is the claimant who is the proponent of the rule that the claim is valid and, as such, it is the claimant who must establish the validity of the claim. See, e.g., Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Strauss, 59 I.D. 129 (1945). And, as both this Board and the Federal Courts have consistently held, absent the discovery of a valuable mineral deposit, the mere location of a claim affords no rights as against the United States. See, e.g., Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963); United States v. White, 118 IBLA 266, 98 I.D. 129 (1991).

a field examination and, only if necessary, initiate contest proceedings." IMP at III.J.5.b.

In the instant case, the case file discloses that Hunt has yet to establish to BLM's satisfaction that a discovery exists within the limits of the claims. BLM failed to pursue this question, doubtless owing to its conclusion, reversed herein, that the proposed road construction involved a "grandfathered use." On remand, Hunt should be provided with an opportunity to establish both the existence of a discovery, on each claim which it seeks to sample (see IMP at I.B.7. "a valid existing right is tied to a particular claim"), and that a refusal to permit road construction "would unreasonably interfere with the claimant's rights to use and enjoyment of the claim." If Hunt is unable to establish, to BLM's satisfaction, the existence of a pre-FLPMA discovery on any or all of the claims involved, BLM may offer other, non-impairing, access to the claims which Hunt seeks to sample. Should this prove unacceptable to Hunt, BLM would be required to bring a contest against the claims in accordance with the IMP.

Insofar as the other issues pressed on appeal are concerned, in light of our resolution of the "grandfathered uses" question and the presently indeterminate status of Hunt's claim that it possesses valid existing rights, we must view these contentions as moot.

The dissent by the Chief Administrative Judge assails the disposition herein on a number of grounds, two of which may deserve a direct response. The dissent argues that the legislative history of section 603 of FLPMA

supports its conclusions that once a use has been shown to be in existence during the critical period, it is preserved, unrestricted, throughout the period of review, independent of any showing that evinces the logical pace and progression of development, as mandated by the IMP. The dissent further suggests that the majority's interpretation of section 603 and the IMP somehow infringes upon the "rights" of mining claimants and leaves open the question whether there has been a "taking" of such rights. Both of these assertions are simply wrong.

The basic position of the dissent with reference to the instant appeal is that appellant must be allowed, after a hiatus of all road-building activities over the last 12 years, and in the absence of any showing, whatsoever, that appellant has made a discovery of a valuable mineral deposit, to construct new roads into areas not heretofore disturbed by road-building, thereby rendering large areas of a WSA unsuitable for inclusion in the wilderness system and possibly irreparably damaging the suitability of the entire WSA for preservation. The majority, by comparison, holds that, since the road-building activities which are sought to be extended into the WSA have failed to evince the "logical pace and progression of development" as required by the IMP, they may not be allowed, in the absence of a showing that they are necessary to the exercise of valid existing rights. The dissent, relying on its interpretation of section 603 of FLPMA, suggests that the majority position constitutes an "automatic termination" of a grandfathered use in violation of that section. In our view, the dissent has misinterpreted both the legislative history of section 603 and the decision herein.

The legislative history as reviewed in the dissent is flawed by errors of both omission and commission. Thus, the dissent, after first noting that the language of section 603 of FLPMA is based on section 311(c) of H.R. 13777, 94th Cong., 2nd Sess., and quoting language from the legislative history thereof which is scarcely different from the language of the statute, itself, turns to the analogous provision from S. 507, 94th Cong., 1st Sess. 8/ See Rocky Mountain Oil & Gas Association v. Watt, *supra* at 747; Utah v. Andrus, 486 F. Supp. 995, 1004 (D. Utah 1979). After citing language from S. 507 that "[t]he preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change in the management or use of natural resource lands," the dissent proceeds to quote from the section-by-section analysis as follows:

The purpose of this statement is to insure that, under no circumstances, will the pattern of uses on the national resource lands

8/ We would point out, however, that section 102 of S. 507, upon which the dissent relies, is not the provision in S. 507 which is analogous to either section 311(c) of H.R. 13777 or to section 603(c) of FLPMA, as ultimately adopted. Section 102, as is obvious from a summary perusal of its terms, relates to the period of wilderness inventory, whereas section 311(c) of H.R. 13777 and section 603 relate to the period of wilderness study and review. These are totally discrete processes. See, e.g., Union Oil Co. (On Reconsideration), 58 IBLA 166, 170 (1981). Since the inventory period has long since passed, provisions relating thereto are clearly not relevant to management activities at the present time. The provision of S. 507 which is relevant herein is section 103(d) which provides that:

"Areas identified pursuant to section 102 as having wilderness characteristics shall be reviewed within fifteen years of enactment of this Act, pursuant to the procedures set forth in subsections 3(c) and (d) of [the Wilderness Act, 16 U.S.C. § 1131(c) and (d) (1988)]: Provided, however, That such review shall not, of itself, either change or prevent change in the management or use of the national resource lands."

The language of the proviso is, of course, the same as that set forth under section 102(a) and the legislative history of section 103(d) expressly cross-references the discussion under section 102(a) with respect to the interpretation of the proviso.

be frozen, or will uses be automatically terminated during the preparation of the inventory and the identification of areas possessing wilderness characteristics. Equity demands that activities or uses not be arbitrarily terminated or that the Secretary not be barred from considering and permitting new uses during the lengthy inventory. [Emphasis added in dissent].

The dissent, however, fails to include the language from the legislative history of S. 507 which appears immediately following the last quoted sentence:

On the other hand, the "of itself" language is not meant to be license to continue to allow or disallow uses as if no inventory and identification process were being conducted. The Committee fully expects that the Secretary, wherever possible, will make management decisions which will insure that no future use or combination of uses which might be discovered as appropriate in the inventory and identification processes--be they wilderness, grazing, recreation, timbering, etc.--will be foreclosed by any use or combination of uses conducted after enactment of S. 507, but prior to the completion of those processes.

We would suggest that the Congressional direction that this provision not be read as a "license to continue to allow" existing uses where such uses would foreclose "future uses" discovered to be appropriate is totally at odds with the dissent's implicit assertion that the Congressional desire to protect existing uses from automatically terminating upon the adoption of FLPMA means that such uses can never be terminated.

In any event, one need not make recourse to the complete text of the legislative history to divine that the interpretation espoused in the Chief Administrative Judge's dissent is unsupportable. An examination of the language which is included, though not emphasized, in the dissent leads to

the same conclusion. Thus, the legislative history as quoted by the dissent provides that "[t]he purpose of this statement is to insure that, under no circumstances, will the pattern of uses on the national resource lands be frozen or will uses be automatically terminated during the preparation of the inventory and the identification of areas possessing wilderness characteristics." The dissent emphasizes the language providing that uses will not be "automatically terminated" and interprets this to mean that uses will "never be terminated." Not only is this interpretation linguistically flawed, it contradicts the declaration in the same sentence that "under no circumstances, will the pattern of uses on the national resource lands be frozen." Under the dissent's analysis, past uses are not so much frozen in ice as embedded in concrete.

The legislative history of S. 507 never once states that past uses will not be terminated. On the contrary, it merely provides that the adoption of S. 507 should not be read as "automatically" terminating any use. Nothing in our decision even suggests that any existing use was "automatically" terminated upon the adoption of section 603 of FLPMA. Additionally, while S. 507 provides that uses not be "arbitrarily terminated," this language clearly recognizes that uses can be terminated so long as that action is not arbitrary. Requiring that an individual asserting the right to expand an impairing grandfathered use into a WSA not heretofore impacted show that such activities represent the "logical pace and progression of development," as mandated by the IMP, is not arbitrary. On the contrary, it is part and parcel of the Department's affirmative obligation to manage

WSA's during the period of wilderness review "so as not to impair the suitability of such areas for preservation as wilderness."

The conclusion is inescapable that there is nothing in the legislative history of either section 103(d) of S. 507 or section 311(c) of H.R. 13777 or section 603(c) of FLPMA which gives even a modicum of support to the dissent's interpretation that merely because a use happened to exist on the critical date that the land would be forever subject to that use. More importantly, this interpretation cannot be sustained by the plain meaning of section 603(c) of FLPMA. Thus, the critical phrase of the proviso states "subject to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on the date of approval of the Act." The dissent's interpretation reads out the word "continuation" and effectively rewrites the proviso to read "subject to existing mining and grazing uses and mineral leasing." The congressional utilization of the phrase "continuation of existing" uses shows that it was not only the existence of the use which gave rise to grandfathered rights but also the continuation of that use in the same manner and degree that was protected. And, it is on this concept that the IMP's "logical pace and progression of development" standard is premised.

The Chief Administrative Judge's dissent also asserts that "[t]he disposition of this appeal by the majority leaves open the questions of whether Congress in enacting the law (as interpreted by the majority) effected a taking of 'grandfathered' uses and whether sufficient administrative due

process has been provided to protect these uses." Infra at , n.1. Insofar as the dissent raises the spectre of a "takings" argument, its contention cannot be credited.

The Board has, in the past, used the term "grandfathered rights" as a shorthand abbreviation for the protection afforded by section 603 of FLPMA. And, in the sense that this section does grant certain rights to existing users, that terminology is correct. However, to the extent that this section is the sole source of claimed rights, it is elementary that the rights granted can be limited and circumscribed in any manner Congress deems appropriate. It is well settled that the mere location of a mining claim, unsupported by the discovery of a valuable mineral deposit, affords the claimant no rights as against the Government. See, e.g., Cameron v. United States, 252 U.S. 450, 459 (1920). Thus, absent the existence of valid existing rights, i.e., a discovery, (independently protected by section 701(h) of FLPMA, 90 Stat. 2786 (1976)), there is simply no theoretical basis upon which it could be concluded that any limitation in the protections afforded by section 603 to existing uses could constitute a taking since the only rights which such users possess are those affirmatively granted by this section.

Finally, a word should be said about the dissent's assertion that Hunt was not named by BLM as "an adverse party" in the decision under appeal, has never been made a party to this proceeding, and that, therefore, the decision "should not be binding" on him.

It is true, of course, that BLM did not name Hunt as an adverse party to this proceeding. This, however, is because the July 3, 1989, decision under review was addressed solely to Hunt and approved his plan of operations. Not only did BLM properly view it as unlikely that Hunt would appeal from its favorable decision, it would have been ludicrous for BLM to provide that if he did appeal he should serve himself. When, after having been apprised that the July 3, 1989, decision had issued, SUWA filed a notice of appeal, BLM immediately notified Hunt of this fact. See Letter dated July 12, 1989. Moreover, SUWA provided Hunt with copies of both its notice of appeal and statement of reasons in support thereof. Having been apprised of the appeal and having been duly served with copies of SUWA's statement of reasons, Hunt would be bound by our decision even if he had not actively participated. See Western Slope Gas Co. (On Reconsideration), 43 IBLA 259, 262-62 (1979).

The truth of the matter, however, is that the dissent's assertion that Hunt has never been made a party to this proceeding ignores the record in this case. Not only has Hunt frequently requested status reports on his appeal during the long period of its consideration, he has also submitted exhibits to support his claim to grandfathered "rights." See filing of June 16, 1991. The dissent's assertion that Hunt is not a party to this appeal is simply wrong.

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 reversed and the case file is remanded for further action not inconsistent with this opinion.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Deputy Chief Administrative Judge

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

David L. Hughes
Administrative Judge

Will A. Irwin
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE BYRNES DISSENTING:

I have serious misgivings about the majority opinion in this matter. For the reasons stated below, I believe that the majority opinion creates a new policy that is both contrary to congressional intent and founded on no authority hitherto enunciated by BLM. It is my view that the Board's function is to determine whether or not established policy is being followed within the Department. It is not our function to reformulate that policy.

My initial objection is to the majority finding that "the road in question was built for the purpose of gaining access to * * * [the] communication site * * *." The record establishes no such thing. To the extent the record establishes a purpose for the road, the BLM field reports verify that the road was built for mining purposes and that the construction met the time requirement to be a "grandfathered use." See Staff Report: Grandfathered Uses on the Mt. Pennell-Wolverton Claim Group, May 19, 1989, by Francis Rakow, Geologist.

If it were so apparent from the record that the road was primarily for a purpose which would not be a "grandfathered use," there is no basis for the majority to "assume for purposes of this appeal, that [the use] was conducted during the critical period." If there is any doubt as to the use or time of construction, the matter should be referred for a hearing or, at the very least, set aside and remanded to BLM.

The majority must also "assume" that the road must have been used for mining purposes during the critical period, i.e., around October 21, 1976, because there is no indication in the record as to how the road was used since the critical date. The majority infers from this absence of information that the road, and presumably the claims, have been dormant for the last "12 years." I conclude that there is an absence of such information because neither BLM, nor the claimholder, nor the appellant had any way of knowing it would have to show compliance with the heretofore unknown standard enunciated today by the majority. Neither does the majority provide BLM or the appellant any opportunity to submit such evidence as may be necessary to meet its new standard. The novelty of the majority's standard explains why BLM has never considered such evidence in all the years that the majority claims this requirement was contained in the Interim Management Policy (IMP), 44 FR 72014 (Dec. 12, 1979), as amended at 48 FR 31854 (July 12, 1983), regulations, and statute, and why BLM has never informed holders of "grandfathered" uses that their failure to "use" these rights will cause them to be lost. I am concerned about the effect on the rights of these individuals and the potential liability of BLM. 1/

The majority's conclusion that "in order to qualify as a 'grandfathered use' that use must have continued thereafter following the logical pace and progression of development," can only be justified as "implicit" in the statute. I disagree.

1/ The disposition of this appeal by the majority leaves open the questions whether Congress in enacting the law (as interpreted by the majority) effected a taking of "grandfathered uses" and whether sufficient administrative due process has been provided to protect these uses.

The language of the statute is clear.

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands * * * so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976 * * *.

43 U.S.C. § 1782(c) (1988). This section was added in the House-Senate conference committee and comes from the original House bill.

The original House committee section-by-section analysis states that:

The Committee expects the Secretary to establish priorities in a manner which will expedite the review process and which will cause minimum interference with existing multiple use management of the public lands. * * *

* * * While tracts are under review, they are to be managed in a manner to preserve their wilderness character, subject to continuation of existing grazing and mineral uses and appropriation under the mining laws. The Secretary will continue to have authority to prevent unnecessary and undue degradation of the lands, including installation of minimum improvements, such as wildlife habitat and livestock control improvements, where needed for protection or maintenance of the lands and their resources and for continuation of authorized uses. [Emphasis added.]

(H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976), reprinted in Committee on Energy and Natural Resources, Legislative History of the Federal Land Policy and Management Act of 1976 (Public Law 94-579), at 447 (1978)). The concept of "grandfathering" existing uses while public lands were being

reviewed for wilderness designation also has a legislative history in the Senate bill.

The language of the original wilderness inventory directive contained in section 102 of S. 507, states: "The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change in the management or use of national resource lands." (S. Rep. No. 583, 94th Cong., 1st Sess. 4 (1975), reprinted in Committee on Energy and Natural Resources, Legislative History of the Federal Land Policy and Management Act of 1976 (Public Law 94-579), at 69 (1978)).

The section-by-section analysis that accompanied the bill as it was reported out of the Senate Committee states that:

Section 102 also contains a statement that the "preparation and maintenance of such inventory or the identification of such areas [possessing wilderness characteristics] shall not, of itself, change or prevent change in the management or use of the national resource lands." The purpose of this statement is to insure that, under no circumstances, will the pattern of uses on the national resource lands be frozen, or will uses be automatically terminated during the preparation of the inventory and the identification of areas possessing wilderness characteristics. Equity demands that activities of users not be arbitrarily terminated or that the Secretary not be barred from considering and permitting new uses during the lengthy inventory and identification processes. [Emphasis added, brackets in original.]

Id. at 44, reprinted at 109. The obvious congressional intent was to have no automatic termination of uses or activities taking place on the date of passage of the act, through the inventory and wilderness evaluation process, until such time as Congress made a decision regarding the status

of the land. This approach not only diffused opposition to the bills, but it also postponed any legal challenges to the statute until it could be rationally considered in the context of a specific wilderness designation. The logical conclusion is that the intent of these sections carried over to the section that ultimately emanated from the conference committee.

The majority decision leads to automatic termination of "grandfathered uses" without notice or due process. It is not logical to conclude, as does the majority, that Congress intended "grandfathered uses" would terminate at some undefined point in time during the review process. Inferring this intent has the anomalous effect of requiring holders of mining claims and grazing rights to continue and expand their uses of the land in the very potential wilderness areas that were to be reviewed. Additionally, since the process of reviewing and recommending lands for wilderness status was to have been completed within a fixed period of time, why would Congress have intended an existing use to terminate when making explicit provisions for its continuation?

Nor can the majority find any solace in either the regulations or the IMP. In defining "manner and degree" from the statute, BLM provided:

Manner and degree means that existing operations will be defined geographically by the area of active development and the logical adjacent (not necessarily contiguous) continuation of the existing activity, and not necessarily by the boundary of a particular, [sic] claim or lease, and in some cases a change in the kind of activity if the impacts from the continuation and change of activity are not of a significantly different kind than the existing impacts. * * * It is the actual use of the area, and not the existence of an entitlement for use, which is the controlling factor. In other words, an existing activity,

even if impairing, may continue to be expanded in an area or progress to the next stage of development so long as the additional impacts are not significantly different from those caused by the existing activity. In determining the manner and degree of existing operations, a rule of reason will be employed. [Emphasis added.]

43 CFR 3802.0-5(j).

This regulation further articulates the clear wording of the statute and the congressional intent to provide for the continuation and expansion of any existing use, i.e., a use existing on the date of passage of the statute. The proposed roadbuilding is just such a use. There is no mention of the expiration of such a use in the regulation. Nor is there a requirement in the regulation for continuous and uninterrupted development of a "grandfathered use." There is no mention in the regulation of a penalty in the event of failure to undertake the use for any period of time. The only authority for such a restriction is invented by the majority opinion, an opinion issued some 16 years after the passage of the statute. This is clearly evident from the absence of a single citation of authority in the majority opinion on this point.

The majority makes much of the IMP. Suffice it to say, the entire intent of the IMP is to be inclusive of existing uses prior to the date of the passage of FLPMA. There is no mention of either expiration or automatic voiding of existing uses. The only way one is able to reach the conclusion desired by the majority is to read the IMP language allowing continuance of uses that were "temporarily suspended" on the date of passage of the act as exclusive of activities that were occurring, but have been dormant for an

undetermined period of time. This turns logic on its head. The fact BLM attempts to include dormant activities, i.e., to bring these uses under the "grandfather" provisions, does not mean the Bureau also intended to cause the same activities to expire after the passage of the act, by the application of some unstated, unilaterally applied standard.

I, additionally find serious fault with the majority's failure to recognize that the party most adversely affected by this decision, the owner of the mining claims, was never made a party to this proceeding. While he did initially submit a limited amount of information regarding his claims, BLM's failure to name him as an adverse party in its decision is a substantial failing by the Department. Beard Oil Co., 105 IBLA 285, 287 (1988). Not being a party to this action, the decision, including the finding of "abandonment," should not be binding on the claimant. 2/

The majority also misappropriates the burden of proof in this appeal. This is why they undertake such a strained reading of the statute to achieve their stated results. My review of the record discloses that the

2/ The obvious lack of concern regarding the fact that the claimant is not a party to the decision declaring his use "abandoned" emphasizes the majority's cavalier attitude about the onus now placed upon the user. From now on the holder of a grandfathered use must press forward with the use without regard to what one might believe to be a logical development plan. To do otherwise may well result in an unilateral finding that the user has abandoned the use because a record, as it may later exist, can be interpreted in a manner which would appear to indicate abandonment, without any suggestion that the user should be given notice and afforded an opportunity to show otherwise before the abandonment determination. This is exactly the type of automatic termination of existing uses that Congress was attempting to avoid.

appellants have not met their burden of proof in showing that the BLM decision was incorrect. Indeed, the majority admits that "appellants generally admit that some roadbuilding activities may have been occurring on the critical date * * *." While the appellants contend that none of these activities were occurring within the wilderness study area, they present no evidence to substantiate the allegation. BLM's analysis of the record and the on the ground examination rebuts these contentions.

Finally, the majority opinion will require BLM to make findings regarding "grandfathered uses" applying a vague standard, or in the alternative make a finding of valid existing rights. This approach is unduly burdensome and wasteful of Departmental resources. BLM may wish to amend its IMP to avoid such results.

Since neither the facts of this appeal nor the law support reversal of BLM's decision, I respectfully dissent.

James L. Byrnes
Chief Administrative Judge

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

I agree generally with the conclusion by the Chief Administrative Judge that the record before us adequately supports the finding by BLM that the Hunt mining plan of operations should be approved. This finding rests principally on the report by BLM staff geologist Francis Rakow, who found that the uses proposed by the Hunt plan "are existing uses on the claim group. They represent exactly the same types of physical and aesthetic impacts occurring on the area at the time of enactment of FLPMA and are a geographic extension of uses existing on that date. As such, the proposed activities are grandfathered" (Report dated May 19, 1989, at 2).

The majority opinion finds that a perceived 12-year gap in road construction on the claims so effectively undermines this finding that it cannot stand, because "the twelve-year hiatus between road construction activities simply fails to evince the prerequisite 'logical pace and development' necessary to validate an asserted 'grandfathered use'" (Draft at 12). The reason why this period is chosen to bring into operation a presumption of the sort described is not stated or explained. The record before us indicates that there was road building on the claims in 1978 and again in 1988. What happened in the interval is not known. Appellants have offered no evidence to show that there was no road building activity on the claims in that interval: it is simply not known whether there was or not. The majority avoids consideration of the facts of record by resorting to a presumption that a perceived "hiatus" in mining

activity had the effect of ending that activity. The issue before us therefore becomes whether such a presumption has any foundation in law or fact and whether it should be applied in the instant case.

The activity before us for review concerns the development of mining claims. There is evidence that development was sporadic but continuous for many years, was carried on by different miners and groups of miners, and that the Hunts were interested in the work since the late 1950's, long before either the National Environmental Protection Act or FLPMA were enacted. On the record of this development, which included mineral samples produced from the claims, BLM evaluated this case using evidence produced by staff study and volunteered by the Hunts to conclude that the Hunts had acquired a "grandfathered use" so that planned road construction to permit continued exploration should be allowed.

Appellants have not shown that this finding was made in error. They have offered no proof whatever concerning the "logical pace and development" needed to establish the existence of a grandfathered right. On the record before us there is nothing to indicate that BLM erred when it found that the Hunts had the right to propose the plan of operations that they did, considering their prior activity on their claims in the WSA. The record before us supports the finding made by BLM staff that the activity proposed in the mining plan was a "grandfathered use." The contrary conclusion by the majority is founded on an ad hoc presumption that lacks a foundation in fact.

In most cases before us where there is a challenge to a finding by BLM or by the Secretary's experts, we require that an appellant provide proof sufficient to overcome the agency finding by a preponderance of the evidence. A presumption can also be used as a device to reveal a defect in a record that will render it inadequate to support a finding in some cases. This, however, has not been shown to be such a case. Rather, this case presents a situation that ought to be evaluated on its merits, as it was by BLM. There is no such presumption as the "twelve-year" presumption relied upon by the majority to reverse BLM in this instance. There is no reason known to us why a 12-year (or 9-year, as seems closer to the facts of this case) lapse in a certain activity could not be part of the logical course of development for this project. I am not willing to assume that such a 12-year rule exists unless it be shown to be a valid rule to be applied in this case. There has been no such showing.

I must therefore respectfully dissent.

Franklin D. Arness
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING WITH DISSENTING OPINIONS:

I agree with Judges Byrnes and Arness.

Even the majority admits that Hunt had a grandfathered right. At the very least Hunt should be afforded an opportunity to defend that right.

R. W. Mullen
Administrative Judge

