

CHARLES J. WAAG ET AL.

IBLA 96-206

Decided December 30, 1997

Appeal from a decision of Bruneau Area Manager, Lower Snake River District, Bureau of Land Management, Boise, Idaho, denying request for right-of-way for geologic investigation within wilderness study area. IDI-31371.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way--Federal Land Policy and Management Act of 1976: Wilderness--Rights-of-Way: Generally--Wilderness Act

A request for a right-of-way to excavate along a fault line for geologic investigation within a wilderness study area is properly denied where the requestor does not overcome BLM's determination that the investigation will violate BLM's mandatory nonimpairment criteria.

APPEARANCES: Charles J. Waag, Professor, James E. Zollweg, Research Associate in Seismology, Gregg S. Beukelman, Graduate Research Assistant, Boise State University, Boise Idaho, pro sese; Signe Sather-Blair, Bruneau Area Manager, Lower Snake River District, Boise, Idaho, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Charles J. Waag, James E. Zollweg, and Gregg S. Beukelman (Appellants) of Boise State University (BSU), have appealed a Decision of the Bruneau Area Manager, Lower Snake River District, Bureau of Land Management (BLM), dated January 18, 1996, denying their request for a right-of-way for geologic investigation in SW¹/₄NW¹/₄, NW¹/₄SW¹/₄, sec. 7, T. 8 S., R. 3 E., Boise Meridian, Idaho. The proposed investigation would require the use of mechanized equipment to excavate a large trench approximately 100 feet long by 60 feet wide. The same mechanized equipment would require movement of approximately 1,000 feet to the excavation site over an area without roads.

In the January 18, 1996, Decision, the Bruneau Area Manager stated:

The site applied for lies within the Littles Jacks Creek Wilderness Study Area (WSA) established November 1, 1983 under

the authority of Public Law 88-577 September 3, 1964 (the Wilderness Act). Section 4(c) of the Wilderness Act prohibits certain uses within a WSA, including the allowance of temporary roads and motorized equipment.

The preservation of wilderness values is paramount and is the primary consideration in evaluating any proposed action or use within a WSA. Any action which compromises the wilderness values of roadlessness, solitude, naturalness, and the opportunity for primitive and unconfined recreation must therefore be rejected. The only exceptions to this rule are certain grandfathered uses in effect before the passage of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1994), in 1976, e.g., valid existing grazing, mineral rights, etc., which are allowed to continue, even though they may be impairing to some or all wilderness values.

The research proposed by BSU is not grandfathered and requires the use of mechanized equipment to excavate a large trench. This obviously incongruous man-made trench would impair the wilderness value of naturalness. Your application is therefore denied. (Decision at 1-2.)

In Appellants' Statement of Reasons (SOR) for appeal to this Board, filed February 26, 1996, they explain their reasons why their request to excavate a trench across the Halfway Gulch fault at that locality is important and timely and should be allowed:

1. Our investigation indicates that the Halfway Gulch fault is an important segment of the larger boundary fault system of the southwestern margin of the Snake River Plain.

2. Moreover and very importantly the fault scarp shows large displacement, (6-11 meters) along much of its length, and is relatively ungraded evincing its recent formation (figures 1 & 2). Recent recognition that large magnitude earthquakes may form short surface ruptures of large displacement such as that at Halfway Gulch demands a reevaluation of probable estimates of the Richter magnitude of the earthquakes which formed the Halfway Gulch scarp. Our current knowledge of the scarp and geology of the surrounding area strongly suggests that a range of magnitude from the mid sixes to the mid sevens and perhaps larger is appropriate. Earlier constraints on maximum magnitudes based on short segment length have been rendered suspect by the recent benchmark paper on large magnitude earthquakes related to short rupture length by Wells and Coppersmith (1994) that catalogs an important number of short length ruptures which were generated by large magnitude quakes. It is also important to recognize that many short length scarps may be only a portion of a more complex rupture network of associated coeval scarps.

3. Our current age estimates based upon nineteen ground surveyed transects (cross-profiles) of the scarp, (Figures 3, 4a & 4b) indicate Holocene to very late Pleistocene dates for the scarp. The age data tend to cluster about a Holocene age of @ 8,000 years. Age determinations based upon a diffusion model proposed by Mayer (1984) and regarded by us as more accurate suggests ages ranging from 2,000 to 12,000 years with the greatest concentration of ages at slightly greater than 2,000 years (figure 5). It should be noted here that because the scarp shows such large displacement, we believe it is most likely a composite scarp generated by several seismic events, and that these methods used on composite scarps commonly yield older age estimates than the actual scarp age.

4. The Halfway Gulch scarp lies entirely within the WSA. Thus, it is not possible to pursue this important seismic risk and recurrence interval study outside the WSA. However, the youthfulness of our age determinations of the scarp and our present best estimates of possible magnitudes ranging to the mid to upper sevens for potential earthquakes along the fault make it incumbent upon us to pursue excavating a trench across the fault. The site we propose is optimal. It has the best chance of yielding directly datable material and colluvial wedge deposits which are likely to contain recurrence interval information. Yet, our choice of a site is sensitive to the desire of all of the parties involved to keep environmental disruption to a minimum. The proposed site is relatively close to the boundary of the WSA, it is located along a vehicle track used by ranchers, hunters, and others in the area, and it is accessible by two-wheel drive vehicles (figure 6).

(SOR at 1-2.)

In her Answer to the Appellant's SOR, filed with the Board on March 11, 1996, the Bruneau Area Manager states:

While we may agree that valuable information could be obtained from the research proposed by the Boise State University, the Bureau of Land Management is required to manage Wilderness Study Areas under the Wilderness Act of 1964 and the implementing regulations. Lands under wilderness review must be managed so that their suitability for preservation as wilderness is not impaired.

The nonimpairment criteria is imposed to keep the land suitable for wilderness should the Congress of the United States impose wilderness status. These lands are currently before the Congress for determination.

The appellant has not shown that the Bureau of Land Management erred in its decision. Appellant has asked for a waiver of pertinent WSA restrictions. The Wilderness Act does not provide for such a waiver.

(Answer at 1.)

In response to the filing of the right-of-way application, BLM analyzed whether granting the right-of-way would satisfy the nonimpairment criteria governing development within a WSA in accordance with section 603(c) of FLPMA, as set forth in BLM's Interim Management Policy and Guidelines for Lands under Wilderness Review (Wilderness IMP). 44 Fed. Reg. 72014 (Dec. 12, 1979), reissued on July 5, 1995, as BLM Manual H-8550-1 (BLM Manual).

The WSA's are those areas identified "as having wilderness characteristics" pursuant to the inventory process recognized in section 603(a) of FLPMA, 43 U.S.C. § 1782(a) (1994). Under section 603(a) of FLPMA, WSA's must be reviewed by the Secretary of the Interior "[w]ithin fifteen years after October 21, 1976," so that he may make recommendations to the President "as to the suitability or nonsuitability of preservation of each such area * * * as wilderness." 43 U.S.C. § 1782(a) (1994); Sierra Club, 53 IBLA 159, 160 (1981). Section 603(c) of FLPMA further requires 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." (Emphasis supplied.) 43 U.S.C. § 1782(c) (1994); see Utah v. Andrus, 486 F. Supp. 995, 1003-05 (D. Utah 1979); International Silicon Corp., 124 IBLA 155, 157 (1992); Ralph E. Pray, 105 IBLA 44, 46 (1988), and cases cited. As stated in the Wilderness IMP, "the WSA's wilderness values must not have been degraded so as to constrain or preempt Congressional designation authority." The BLM Manual H-8550-1, I.B.6. (July 5, 1995).

The nonimpairment criteria were developed by BLM in order to ensure its compliance with the section 603(c) nonimpairment mandate. See Rocky Mountain Oil & Gas Association v. Watt, 696 F.2d 734, 739 (10th Cir. 1982); California Department of Transportation, 111 IBLA 251, 253 (1989). Under the criteria, BLM may not allow an activity within a WSA that would cause an impact that could not 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 recommendation to the President on the suitability of the area for preservation as wilderness. They also provide that BLM may not allow an activity within a WSA that, after termination of the activity and any needed reclamation, would degrade the wilderness values in the area so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness. See BLM Manual, I.B.6.; see also

44 Fed. Reg. 72018 (Dec. 12, 1979). "Geologic features" are expressly subject to the nonimpairment criteria. See BLM Manual, I.B.6.

The BLM also concluded that the proposed right-of-way, if granted, would degrade the wilderness value of naturalness in the area, and thus arguably constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness.

[1] The issue before us is whether BLM erred by declining to grant the subject right-of-way. We accept Appellants' representation that the proposed geological investigation could provide valuable information on the prediction of future earthquakes. However, we cannot say that BLM improperly denied the Appellants' request for a right-of-way because such grant would fail to satisfy BLM's nonimpairment criteria and, thus, BLM would violate the section 603(c) nonimpairment mandate.

In general, the Appellants contend that, in deciding whether to grant the subject right-of-way, the Department should balance the need for geologic investigation against the wilderness values in the area that would be affected by the right-of-way. However, that is not the Department's function during the review mandated by section 603(a) of FLPMA. Rather, the Department is required by that section to manage WSA's during the review period so as not to impair their suitability for preservation as wilderness. In conformance with that mandate, BLM may well be required to disallow a requested use even where there is a need and the impact of the use would not greatly impair the suitability of the affected area for preservation as wilderness.

The Department's duty to fulfill its obligation to prevent impairment during the review period is independent of the Secretary's authority to consider whether to recommend an area as suitable for preservation as wilderness. It is during that recommendation phase that the Secretary considers preservation of wilderness values with other uses to which the land could be put, including geologic study to determine and predict future seismic activity. See *Utah v. Andrus*, *supra*, at 1003; *Keith R. Kummerfeld*, 72 IBLA 1, 3-4 (1983); *Ruskin Lines*, 61 IBLA 193, 198 (1982); *Union Oil Co. (On Reconsideration)*, 58 IBLA 166, 170 (1981). At that time, the Secretary may determine that the need for geologic study outweighs the desirability of preserving the area as wilderness, and thus, may decide not to recommend the area as suitable for preservation as wilderness. Nevertheless, these facts do not mean that BLM is not required by FLPMA to ensure satisfaction of the nonimpairment criteria while the area is still subject to review.

Therefore, we conclude that the Bruneau Area Manager properly denied the Appellants' request for a right-of-way, as BLM concluded that the right-of-way would fail to satisfy BLM's nonimpairment criteria, and as the Appellants have not overcome that conclusion by a preponderance of the evidence. California Department of Transportation, *supra*, at 253-54; Eugene Mueller, 103 IBLA 308, 311 (1988); L.C. Artman, 98 IBLA 164, 168 (1987).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur.

C. Randall Grant, Jr.
Administrative Judge

