

UNION OIL CO.
(ON RECONSIDERATION)

IBLA 81-454

Decided September 28, 1981

Petition for reconsideration of Board decision which set aside a decision of the Arizona State Office of the Bureau of Land Management fixing the boundaries of wilderness study area unit AZ-020-059.

Petition granted en banc; prior Board decision, 56 IBLA 206, vacated; State Office decision affirmed.

1. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Review--Appeals--Federal Land Policy and Management Act of 1976: Inventory and Identification--Federal Land Policy and Management Act of 1976: Wilderness--Wilderness Act

The extent to which ongoing activities outside of a wilderness study area are impinging upon adjacent areas inside a wilderness study area so as to deprive them of wilderness characteristics is properly the subject of determination during the inventory process of the wilderness program; the effect of future or potential activities is properly analyzed in the study phase.

2. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Review--Appeals--Federal Land Policy and Management Act of 1976: Inventory and Identification--Federal Land Policy and Management Act of 1976: Wilderness--Wilderness Act

An appellant seeking reversal of a decision to include or exclude land from a wilderness study area must show that the decision appealed was premised either on a clear error of law or a demonstrable error of fact.

APPEARANCES: John C. Lacy, Esq., Tucson, Arizona, for Union Oil Co.; Dale D. Goble, Esq., Office of the Solicitor, U.S. Department of the Interior, for the Bureau of Land Management

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision of July 22, 1981, styled Union Oil Co., 56 IBLA 206, a panel of this Board reversed a decision of the Arizona State Office fixing final boundaries for proposed wilderness study area (WSA) AZ-020-059. ^{1/} The appeal, brought by Union Oil Company (Union Oil), had alleged that past and future activities at a large open pit mining site, known as the Anderson Mine, adjacent to the boundaries of the WSA, would negatively impact on certain areas within the WSA and thus deprive these areas of wilderness characteristics. Union Oil had originally protested the State Director's decision designating unit 2-59 as a WSA on this same basis, asking that the southern boundary be moved north of Santa Maria River. The State Director's decision had denied its protest.

Union Oil's appeal to this Board was based on a number of considerations. First, while recognizing that the situs of the mine was, itself, excluded from the WSA, it pointed out that a number of intrusions into the WSA, associated with the mine, existed. It specifically referenced various stations established to monitor both surface and ground water activity (a total of 13 stations) as well as a single station to monitor soil and vegetation and two for air quality. While recognizing that the Wilderness Inventory Handbook (WIH) made specific reference to the allowability of such stations within a WSA in certain circumstances, appellant argued that, in this specific case: "It is difficult to conceive of a wilderness in the shadows of an open pit mining operation with the sights and sounds that are related to the operation, and being further intruded on a regular basis by personnel employed by the mineral operation visiting monitoring sites" (Statement of Reasons at 7).

Additionally, appellant argued that inasmuch as the bed of the Santa Maria River constituted a regular means of access to the stations, that, when taken as a whole, including two access roads to the river, the river should have been treated as a road and thus excluded from the WSA.

Union Oil also argued that the visual impact of the mine was so great as to constitute "an imprint of man that is so extremely imposing that it cannot be ignored," referencing exhibits, originally provided

^{1/} As our original decision noted, the appeal was actually brought by Minerals Exploration Company, a wholly owned subsidiary of Union Oil Company of California.

with its protest, as indicative of the visual impact. ^{2/} Thus, Union Oil argued that the perimeter of the proposed WSA near and adjacent to its mining properties lacked naturalness, a precondition for inclusion in a WSA.

Finally, appellant objected to the boundary adjustment made in response to its protest which changed the description to one of aliquot parts and actually increased the area of the WSA in potential conflict with its activities. Union Oil argued that this move created a direct conflict with areas proposed for waste dumps and tailing ponds.

In its decision of July 22, 1981, the panel noted the traditional deference with which this Board has approached decisions which have their basis in the technical expertise of Departmental officers. See, e.g., Richard J. Leaumont, 54 IBLA 242, 245, 88 I.D. (1981); Save the Glades Committee, 54 IBLA 215 (1981); cf. Jerry D. Reynolds, 54 IBLA 300 (1981). However, the decision then went on to note:

Appellant has provided us with several detailed maps and photographs showing the areas affected by the open-pit mine and its incidental operations, and we are convinced that appellant's mining operations will invade, visually and aurally, the proposed WSA to such an extent as to disqualify it as "wilderness" as that term is described in the controlling Wilderness Act, 16 U.S.C. § 1131(c): It is not "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." Moreover, the mining operation represents an "imprint of man's work" which is substantially noticeable. We note also that the present detractions from the wilderness quality of the area will be exacerbated as appellant pursues its plan to expand mining operations. We hold that

^{2/} The quoted phrase is found in Change 3 to the WIH, also referred to as OAD (Organic Act Directive) 78-61, issued July 12, 1979. Change 3 analyzed the impact of off-unit imprints on land within a unit. Thus, it stated:

"Assessing the effects of the imprints of man which occur outside a unit is generally a factor to be considered during study. Imprints of man outside the unit may be considered during inventory only in situations where the imprint is adjacent to the unit and its impact is so extremely imposing that it cannot be ignored, and if not used, reasonable application of inventory guidelines would be questioned. Imprints of man outside the unit, such as roads, highways, and agricultural activity, are not necessarily significant enough to cause their consideration in the inventory of a unit. However, even major impacts adjacent to a unit will not automatically disqualify a unit or portion of a unit."

Change 3, l.g.

the existing boundary of WSA unit AZ-020-059 (Arrastra Mountains) includes within it lands not suitable for designation as wilderness, and it will now be incumbent upon BLM to establish a boundary for this WSA which abates the defects of the existing proposal.

56 IBLA at 209.

Following the rendition of this Board's decision, the Office of the Solicitor moved for reconsideration or clarification of the decision. In essence, it argued that the Board's decision was premised on factual and legal errors which fatally flawed the conclusion reached. In the event that reconsideration was denied, the Board was requested to "draw the line" itself, rather than remand the case files to BLM for that action. Union Oil filed a brief in opposition to these various requests.

Because of the importance of some of the questions presented, the petition was considered en banc. It was determined both that reconsideration was warranted and that, for reasons which we will set forth infra, the original decision should be vacated and the decision of the State Director affirmed.

[1] In its petition for reconsideration, the Solicitor's Office argued that the Board was factually mistaken in that it had assumed that there was a large ongoing mining operation occurring at the Anderson Mine. ^{3/} The Solicitor's Office pointed out that such was not the case, and that, inasmuch as this misperception served as an essential predicate of the Board's decision, the decision must fall.

The panel, however, was well aware of the fact that the mine was not presently operative. Indeed, in its statement of reasons for appeal, Union Oil had admitted as much, stating that the licensing of

^{3/} We do wish to note that an errant phrase in the Board's original decision apparently gave rise to a misapprehension on the part of the Solicitor's Office. The Board's decision had stated that "[a]ppellant has provided us with several detailed maps and photographs." The Solicitor's Office interpreted this as meaning that Union Oil had submitted these maps and photographs with its appeal. Since the Solicitor's Office had not received a copy of such a filing, it moved to dismiss the appeal for failure to adequately serve the Office of the Solicitor as required by 43 CFR 4.413.

The maps and photographs to which the Board was referring, however, were part of the exhibits filed with BLM in Union Oil's protest. Thus, they were part of the case record properly before the Board. While it is regrettable that a misinterpretation may have resulted from the Board's language, this misinterpretation cannot, of course, serve as a basis for dismissing Union Oil's appeal.

its activities "is presently suspended pending engineering changes and because of the depressed market for uranium ores." Rather than being premised on a view that the mine was ongoing and thereby aurally and visually affecting the adjacent WSA areas, as a present fact, the decision was premised on what was then seen as the likely result of future activities. It is here, however, that, on reconsideration, we believe error was committed.

We think it is of particular importance that the distinctions between the nature and aims of the inventory phase, vis-a-vis the study phase, be kept clearly in mind. As the WIH notes, wilderness review involves three distinct phases: (1) inventory, (2) study, and (3) reporting. The inventory phase was designed to determine and demarcate those areas of the public lands which were possessed of the wilderness criteria established by Congress. Upon the determination that such characteristics were presently existent (or could, in certain circumstances be developed by natural forces or manual means), the areas were to be designated as WSA's, which would then be studied for possible inclusion in the wilderness system.

During this study phase, BLM would endeavor to analyze each WSA's suitability for wilderness designation in conjunction with the whole range of other public land uses that Congress has authorized. Thus, the mineral potential of any tract would be examined in the study phase to determine the impact that a permanent wilderness designation might have on such values. Moreover, this analysis is not limited to only mineral values, but embraces the full range of public uses, including grazing and recreational use, with an aim to determining the relative merits of a specific parcel's inclusion in the wilderness system. Indeed, the entire purpose of the study phase is the generation of data sufficient to make informed choices between competing claims to the land.

We feel, in retrospect, that our initial decision in the instant case misapplied these concepts. The extent that ongoing mining activities are impinging upon adjacent areas so as to deprive them of wilderness characteristics is properly the subject of determination during the inventory process. The extent, however, that future mining activities might adversely affect adjacent areas is properly a matter for analysis during the study phase.

[2] Then, too, with respect to existing intrusions, such as the visual impact of the open pit mine and the effect of the monitoring stations, we feel that our decision failed to give sufficient weight to the initial findings of BLM. It is, of course, axiomatic that "considerable deference" is not tantamount to "absolute deference." Yet, the findings of BLM with respect to the wilderness character of adjacent lands was premised on expressed provisions of the WIH, which noted that water quality and quantity measuring devices and air quality monitoring devices were allowable within WSA's in certain circumstances. (WIH at 12-13.) Moreover, these sites are of post-FLPMA origin, and in section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), the Secretary was

affirmatively required to manage the lands pending ultimate determination of suitability, so as not to impair such suitability. Clearly, a finding that these lands were not suitable for wilderness designation based on these monitoring sites would be implicit recognition that the Department had failed of its obligations. Such a finding must have a clear and convincing basis in fact -- a basis which is not manifest in the present record.

Similarly, to the extent that Union Oil's argument concerning the Santa Maria River was premised on utilization of these monitoring sites, it must also be rejected. Insofar as appellant relies on any future right of access to the claims we would note first, that this, too, is more properly determined in the context of the study phase and second, that while access may be guaranteed, no one has a right to demand specific routing across Federal land, and, thus, future use of the river is not an unfettered right of appellant.

With regard to the visual impact of the Anderson Mine on the adjacent land, we feel that appellant's submissions, which BLM reviewed prior to the decision here appealed, are insufficient to overcome the great weight which we should accord opinions of BLM officials which are premised by visual inspection in addition to photographic review. It is not enough to show an arguable difference of opinion. Richard J. Leumont, supra. An appellant seeking reversal of a decision to include or exclude land from a WSA must show that the decision below was premised either on a clear error of law or a demonstrable error of fact. This was not done in the instant case. Accordingly, it was error for us to reverse the decision of the Arizona State Director.

This does not mean, however, that the concerns of the appellant were groundless. We do not so find them. Indeed, we expect the study phase to examine rigorously the impacts generated by the present existence of the Anderson Mine, or any future mining activity on lands within the WSA. It is because we feel that these impacts are best examined in the context of the study phase, that we have set aside our prior decision and affirmed the inclusion of the subject land into the WSA. 4/

4/ To the extent that the new aliquot description may actually impinge areas presently within appellant's mining and mill site claims, we note that there is one simple solution available to appellant. Should appellant obtain patent to those claims they would no longer be public lands within the meaning of BLM's wilderness program, and thus not subject to any of the interim guideline rules. We do not, of course, express any opinion as to the validity of the claims or the propriety of patent issuance herein.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted, the decision of the Board, reported at 56 IBLA 206, is vacated, and the decision of the State Director is affirmed.

James L. Burski

Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

Edward W. Stuebing
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE PARRETTE AND ADMINISTRATIVE JUDGE HENRIQUES
DISSENTING:

We respectfully dissent for the reasons set forth in the original decision.

Bernard V. Parrette

Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE GRANT CONCURRING:

Although I was originally convinced that the boundary of the wilderness study area improperly included certain land not possessing wilderness characteristics, I am persuaded on reconsideration that my colleagues are correct that the impacts which I initially perceived to be disqualifying are not of such a nature at the present time. Because they are essentially potential future impacts as opposed to present impacts, these potential impacts may be appropriately considered during the wilderness study phase.

The most critical conflict in this case, in my view, is that between the wilderness study area boundary and appellant's millsite claims associated with the mine. To the extent that these claims have not been contested, are not clearly spurious, and are associated with a mining operation which has undergone significant development, my opinion was that the subject land did not qualify as wilderness. I now believe that a distinction is properly drawn between present and future development and that such legal claims, to the extent there is no present activity or development thereon do not bar wilderness consideration of the subject land even though there are plans for future development of the tract. I am persuaded that the wilderness inventory process requires a decision based on the present state of the tract in question in terms of whether there is any development thereon or adjacent thereto which would preclude consideration of the tract as wilderness.

The significance which I attributed to the presence within the wilderness study area of the monitoring sites was not that the sites themselves represented disqualifying intrusions, but rather that they indicated the scope of magnitude of the anticipated impact of the mining operation. Once this distinction between present impact and potential development is made, the sites lose their significance. The visual impact of the mine pit located outside the wilderness study area when considered alone as a factor becomes less compelling and I cannot find error in reserving a determination of suitability to the wilderness study phase of consideration.

C. Randall Grant, Jr.

Administrative Judge

