

NATIONAL OUTDOOR COALITION

IBLA 80-274

Decided October 30, 1981

Appeal from a decision of the State Director, California State Office, Bureau of Land Management, denying in substantial part a protest of wilderness study area designations. 8500; C-933.4.

Affirmed.

1. Federal Land Policy and Management Act of 1976: California Desert Conservation Area -- Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

Sec. 603(a) of the Federal Land Policy and Management Act of 1976 directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands, identified during the inventory required by sec. 201(a) as having wilderness characteristics described in the Wilderness Act of Sept. 3, 1964, and from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. BLM's practice of designating lands occupied by roads or other intrusions as nonwilderness corridors (cherrystems), thereby excluding such lands from wilderness review and permitting adjacent lands, otherwise possessing wilderness characteristics, to be studied for their uses, values, and resources, is not an unlawful practice or contrary to any established Department policy.

2. Federal Land Policy and Management Act of 1976: California Desert Conservation Area -- Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

Where the record evidences BLM's firsthand knowledge of the lands within an

inventory unit and contains comments from the public as to the area's fitness for wilderness preservation, BLM's subjective judgments of the area's naturalness qualities are entitled to great deference.

APPEARANCES: Mark S. Allen, Esq., Washington, D.C., for appellant; Dale D. Goble, Esq., Nikki Ann Westra, Esq., Chewanney A. Brown, Esq., Washington, D.C., for the Bureau of Land Management; Julie E. McDonald, Esq., Laurens H. Silver, Esq., San Francisco, California, for Sierra Club.

#### OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The National Outdoor Coalition (NOC) appeals from an undated decision 1/ of the California State Director, Bureau of Land Management (BLM), rejecting in substantial part the protests of appellant filed on May 10 and May 16, 1979. Appellant's protests were directed to the State Director's designation of 21 areas within the California Desert Conservation Area (CDCA) 2/ as wilderness study areas (WSA). Appellant is a coalition of four-wheel drive associations, rockhounds, and motorcyclists.

In section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976), Congress provided the statutory basis for the review of the public lands for wilderness values. Prior to this time, wilderness review was limited by the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131 (1976), to "primitive" areas in the national forests and to areas in the national parks system, wildlife refuges, and game ranges. 16 U.S.C. § 1132(b) and (c) (1976). 3/ Section 603(a) states:

Sec. 603. (a) Within fifteen years after the date of approval of this Act, the Secretary shall review those roadless areas of five thousand acres or more and roadless

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1/ Appellant's notice of appeal identifies this decision as bearing the date of Aug. 17, 1979.

2/ Section 601 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1781 (1976), established the 25-million acre California Desert Conservation Area and directed BLM to prepare a comprehensive plan for the management, use, development, and protection of the lands therein.

3/ Former Solicitor Krulitz wrote: "Despite the lack of express statutory authority, the Secretary set aside by administrative action certain public lands as 'primitive areas,' and management of these areas was virtually the same as for lands formally a part of the National Wilderness Preservation System." (Footnote omitted.) Solicitor's Opinion, M-36910, 86 I.D. 89, 94 (1979). By order of Nov. 7, 1980, Judge Ewing T. Kerr found Solicitor's Opinion M-36910 to be clearly erroneous and ordered that it be vacated and set aside. Rocky Mountain Oil and Gas Association v. Andrus, No. C78-265K (D. Wyo. Nov. 7, 1980), appeal docketed, No. 80-1040 (10th Cir. Jan. 5, 1981).

islands of the public lands, identified during the inventory required by section 201(a) of this Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness: Provided, That prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas: Provided further, That the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act.

The wilderness characteristics alluded to in section 603(a) are defined in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976):

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped [sic] Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

The wilderness review program ordered by section 603(a) of FLPMA has been divided into three phases by BLM:

1. Inventory -- The inventory phase consists of BLM's identification of those roadless areas of the public lands possessing wilderness characteristics.
2. Study -- Of those lands identified in the inventory as possessing wilderness characteristics, BLM studies the uses, values, and

resources therein to determine which areas will be recommended as suitable for wilderness designation and which will be recommended as nonsuitable.

3. Reporting -- The reporting phase involves the actual forwarding or reporting of recommendations as to the suitability or nonsuitability of an area for preservation as wilderness through the Secretary of the Interior to the President. Mineral surveys, as required by section 603(a) of FLPMA, will accompany the Secretary's recommendations for lands deemed to be suitable for inclusion.

The inventory phase itself is a two step process. In the initial inventory phase, the State Director will identify lands that clearly and obviously do not possess wilderness characteristics and identify others which may possess such characteristics. The latter lands will be subject to an intensive inventory. The former lands will be subject to a 90-day public review period at the conclusion of which the State Director will issue a decision to return such lands to the District Manager for intensive inventory or to exclude them finally from further consideration as wilderness.

Because of the Secretary's statutory obligation to complete a comprehensive, long-range plan for the management of the CDCA by September 30, 1980, the wilderness review timetable was accelerated for lands therein. Section 601(d), FLPMA, 43 U.S.C. § 1781 (1976). On March 30, 1979, the State Director of California published a list of those areas which were designated Wilderness Study Areas in the CDCA. 44 FR 19044 (Mar. 30, 1979). Such designation marked the end of the inventory phase and the beginning of the study phase. Appellant NOC protested the inclusion of 21 areas as WSA's from among the 138 areas so designated. BLM's undated decision rejected in substantial part NOC's protest. This appeal followed.

By order of December 11, 1980, this Board dismissed NOC's appeal with respect to areas 137A, 271, 305, 343, and 376. This dismissal was in response to a motion by BLM pointing out that appellant had failed to file a statement of reasons for areas 137A, 343, and 376. NOC's appeal with respect to areas 271 and 305 was dismissed after NOC voluntarily withdrew its appeal as to such areas. The instant appeal, therefore, concerns the following 16 areas of the CDCA:

117	217	263	299	
	136	221	264	325
	156	222	265	334
	158	242	266	348

By order of August 11, 1980, the request of the Sierra Club to intervene in this appeal was granted. Oral argument was heard on September 15, 1981, with representatives from appellant, BLM, and

Sierra Club in attendance. Briefs have been submitted by each of these groups. <sup>4/</sup>

Counsel for appellant has summarized the issues presented by this appeal in this way:

1. Whether an area which contains roads in nonwilderness corridors (cherrystems) within the outside perimeter of the wilderness study area is permissible under FLPMA. This is an issue of law which may be resolved solely by the Board and applies to these areas:

AREAS

136		264	
156		265	
	158		266
221		299	
222		325	
242		348	
263			

2. Whether certain areas designated by the Bureau of Land Management ("BLM") as WSA's contain roads, permanent improvements or substantially noticeable intrusions of man which disqualify the areas from further wilderness study. This is an issue of fact requiring the appointment of an Administrative Law Judge to make findings of fact regarding each of the following areas:

AREAS

117	325
156	334
217	348
222	

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<sup>4/</sup> During the pendency of this appeal, BLM issued its Final Environmental Impact Statement (EIS) and Proposed Plan (Sept. 1980). An Appendix to the EIS and Proposed Plan, Volume B, contains BLM's recommendations for wilderness designation. Units 117, 156, 217, 263, 266, and 334 were recommended as suitable for wilderness designation. Portions of units 158 (two thirds suitable), 222 (15 percent suitable), 325 (35 percent suitable), and 348 (one third suitable) were similarly recommended. Units 136, 221, 242, 264, 265, and 299 did not receive a "suitable" recommendation. On Aug. 7, 1981, BLM requested that the instant appeal be dismissed as to those units and portions of units not recommended as suitable for wilderness. Our action herein disposes of this request.

[1] The first issue posed by counsel focuses upon BLM's practice of designating certain lands as "nonwilderness corridors." These lands are occupied by roads or other intrusions which would seemingly disqualify a parcel from wilderness consideration. This practice is commonly employed when a road enters, but does not bisect, an area otherwise possessing wilderness characteristics. In such a case, the area occupied by the road is designated a nonwilderness corridor. Such corridors frequently appear on inventory maps in the shape of a cherrystem. The boundaries of an inventory unit "containing" a cherrystem are drawn around the intrusion so as to exclude it from the area being considered for wilderness values.

Appellant points out that section 603(a) of FLPMA requires the Secretary to review roadless areas for inclusion in the National Wilderness Preservation System. In NOC's view, Congress was specifically telling the Secretary that roaded areas were an important indication of man's existence and could not be considered wilderness areas. NOC asserts that BLM's practice of drawing WSA boundaries to exclude a road or other intrusion resembles the practice of gerrymandering.

Gerrymandering of a wilderness study area, in NOC's view, violates the intent of the Wilderness Act of 1964 and FLPMA's section 603(a). A visitor to a gerrymandered wilderness area would be likely to encounter the evidence of man at regular intervals, counsel maintains. A visitor seeking solitude or a primitive and unconfined type of recreation, counsel alleges, would have difficulty avoiding a cherrystem running through the interior of an area. NOC contends that Congress intended wilderness study areas to be integral, reasonably shaped units, in contrast to the shape of a number of the units on appeal.

In response, counsel for BLM argues that section 603(a) of FLPMA requires the Secretary to review roadless areas of 5,000 acres or more without restriction as to the shape or compactness of the resulting area. The geometrical shapes urged by appellant, BLM maintains, find no support in the statute. All that is required, counsel maintains, is that a WSA be a roadless area of at least 5,000 acres of contiguous public land possessing wilderness characteristics. 16 U.S.C. § 1131(c) (1976). It is counsel's position that cherrystemming is a reasonable method of drawing boundaries to accomplish the dual purpose of section 603(a), viz., to study only those areas possessing wilderness characteristics and to study all such areas possessing wilderness characteristics. The actual drawing of boundaries is left to the discretion of BLM on whom the Secretary has necessarily relied. Counsel also notes that BLM's cherrystemming policy is consistent with those of the Forest Service, National Park Service, and Fish and Wildlife Service.

Sierra Club as intervenor is in general agreement with BLM's actions in this matter. The details of the inventory process were necessarily left to the discretion of the Secretary, Sierra Club argues, and so long as the Secretary acted reasonably, not arbitrarily, his

inventory decisions must be affirmed by the Board. As evidence of congressional intent, the intervenor offers the record of oversight hearings of the House Subcommittee on Public Lands, Committee of Interior and Insular Affairs (November 27 and 29, 1979). Therein, BLM's cherrystemming practice was approved by Subcommittee Chairman Seiberling, and examples of designated wilderness areas containing cherrystems were set forth. *Id.* at 55.

Sierra Club reiterates BLM's argument that the shape of a WSA is irrelevant and points out that BLM's designation of an area as a WSA is only the first step in the three-step wilderness review process. It reasons that BLM's practice of cherrystemming permits all potentially qualifying lands to progress to steps two and three in the review process and thereby prevents administrative and congressional options from being prematurely foreclosed. It further notes that cherrystemming can facilitate wilderness management by providing access to the scientific and recreational values of wilderness areas.

Although appellant's argument, based on a common sense reading of the terms of section 603(a), is initially attractive, we cannot say that BLM has acted contrary to law or to any established Department policy in recognizing nonwilderness corridors occupied by roads or other man-made intrusions. We agree with BLM and the intervenor that section 603(a) does not specify any particular shape for an area which may eventually be recommended by the Secretary and the President for inclusion in the National Wilderness Preservation System. What is important in the inventory stage is that there exist roadless areas of the public lands which meet the requirements of 16 U.S.C. § 1131(c) (1976) for naturalness and provide an outstanding opportunity for solitude or a primitive and unconfined type of recreation.

While we recognize the danger of placing undue weight on testimony at oversight hearings, we note that Congress has on several occasions included areas containing cherrystems in the National Wilderness Preservation System. Representative Seiberling, commenting on the cherrystem practice during the House oversight hearings, made this point: "Now, I would also note that there are many, many existing wilderness areas that have so-called 'cherrystem' boundary configurations. I would mention the Wenaha-Tucannon, the Gospel Hump, the Absaroka Beartooth, the Organ Pipe Cactus, the Pusch Ridge, and the Chiricahua" (p.55).

NOC argues that Congress is free to designate any area it desires as wilderness but that this fact does not change the statutory authority of the Secretary to recommend only roadless areas possessing wilderness characteristics. While Congress may reject the Secretary's recommendations, we regard the past practice of including areas containing cherrystems in the National Wilderness Preservation System as evidence of its intent in drafting section 603(a). Given the past practice of the Congress and the lack of language specifying the shape of a wilderness area, we cannot say that BLM has acted contrary to law or any Department

policy in carving nonwilderness corridors from an area otherwise meeting the statutory requirements of section 603(a) and 16 U.S.C. § 1131(c) (1976). 5/

[2] In its second argument on appeal, NOC charges that there exist roads, permanent improvements, and substantially noticeable intrusions of man in a number of the WSA's so designated by BLM. NOC refers specifically to areas 117, 156, 217, 222, 325, 334, and 348. Appellant argues that such roads, permanent improvements, and intrusions disqualify an area from further wilderness consideration. Appellant's argument is based upon the terms of section 603(a) of FLPMA and upon the definition of wilderness as set forth at 16 U.S.C. § 1131(c) (1976). 6/

Section 603(a) requires the Secretary to review roadless areas of 5,000 acres or more and roadless islands of the public lands for wilderness characteristics. In each of the seven WSA's mentioned above, NOC charges that there exist roads which meet the definition of a road as set forth in H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976). Therein it is stated: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." 7/ BLM's response to similar charges by NOC in its protest was to state that the "road" found by NOC is actually a "way." NOC specifically alleges that graded or maintained roads exist in areas 217, 325, and 334, but does not suggest who improved or maintains these routes or when such activities may have occurred.

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5/ On Oct. 17, 1980, appellant filed a motion for partial summary judgment and request for oral argument addressing BLM's practice of cherrystemming. Our action herein may be construed as a denial of this motion for partial summary judgment.

6/ Section 103(i) of FLPMA, 43 U.S.C. § 1702 (1976), provides that the term "wilderness" as used in section 603 shall have the same meaning as it does in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976), quoted supra.

7/ BLM has adopted this definition in its Wilderness Inventory Handbook, setting forth policy, direction, guidance, and procedures for conducting wilderness inventory on the public lands. This handbook, issued Sept. 27, 1978, also offers definitions of the following related terms:

"'Improved and maintained' -- Actions taken physically by man to keep the road open to vehicular traffic. 'Improved' does not necessarily mean formal construction. 'Maintained' does not necessarily mean annual maintenance.

"'Mechanical means' -- Use of hand or power machinery or tools.

"'Relatively regular and continuous use' -- Vehicular use which has occurred and will continue to occur on a relatively regular basis. Examples are: access roads for equipment to maintain a stock water tank or other established water sources; access roads to maintained recreation sites or facilities; or access roads to mining claims."

NOC further alleges that there exists evidence of mining activity in areas 117, 156, 217, 222, 325, 334, and 348. Such evidence, NOC maintains, establishes that such areas do not possess the naturalness characteristics required by 16 U.S.C. § 1131(c) (1976). With respect to areas 117, 156, 217, and 348, the State Director responded to NOC's contentions by stating that scattered mining activity was not considered to be substantially noticeable or a significant mark of man when considered in relation to the area as a whole. With respect to NOC's contentions of mining activity in areas 222 and 334, the State Director stated that BLM field teams could not locate the activities alleged to exist using the information provided by NOC.

In addition to evidence of mining activity, NOC points to a house in area 117 which BLM describes as an abandoned structure substantially unnoticeable and not degrading to the overall naturalness of the area. Other intrusions, including a tramway, are cited by NOC as evidence of the substantially noticeable imprint of man's work throughout the seven areas previously mentioned. 8/ NOC asks this Board to order a hearing to permit appellant to establish its allegations.

BLM argues that a hearing should not be ordered to resolve the factual questions posed by NOC because the decisions made by BLM were arrived at only after a thorough on-the-ground investigation and exhaustive public input. BLM points to some 57 public meetings or workshops and extensive public comment periods as evidence of its diligence. The decision of the State Director, counsel maintains, must therefore be accorded the presumption of validity.

We concur with BLM's assessment of the situation. In the absence of specific allegations setting forth who improved and maintains a vehicle route by mechanical means and when such activities occurred, 9/ we believe that BLM's determination that a vehicle route does or does

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8/ H.R. Rep. No. 95-540, 95th Cong., 1st Sess. 6-7 (1977) provides some guidance for interpreting the terms of section 2(c) of the Wilderness Act. This report was prepared to accompany H.R. 3454, a bill later enacted as the Endangered American Wilderness Act of 1977, 16 U.S.C. § 1132 (Supp. II 1978). BLM has relied upon H.R. Rep. No. 95-540 in listing certain "impacts on naturalness" which, it feels, could be allowed in a WSA. See Wilderness Inventory Handbook, p. 12-13 (Sept. 27, 1978).

Additional guidance is provided by recently promulgated regulations found at 43 CFR Subpart 3802. Definitions of terms such as "substantially unnoticeable" appear at section 3802.0-5.

9/ We note that OAD 78-61, Change 2, states that a route which is being maintained and receives relatively regular and continuous use may be designated a road despite the unavailability of records verifying improvement. In such case, a route may be designated a road if improvements can be documented through some reliable means.

not meet the definition of a road is entitled to great deference. A similar holding, we believe, is appropriate where BLM finds that a particular intrusion is not a substantially noticeable imprint of man's work. Naturalness is present in a WSA if the area generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable. The underscored language, taken verbatim from section 2(c), 16 U.S.C. § 1131(c) (1976), illustrates the highly subjective judgment that BLM must make in determining whether an area possesses the quality of naturalness. This judgment is entrusted to Bureau personnel whose reports evidence first-hand knowledge of the land. Assisting BLM are comments from numerous groups and individuals whose interests span a broad spectrum. BLM's judgment in such matters, we hold, is entitled to great deference. Such deference will not be overcome by an appellant expressing simple disagreement with subjective conclusions of BLM. This is not to suggest that we abdicate our duty to review BLM's subjective wilderness judgments. We do point out, however, that an appellant seeking to substitute its subjective judgments for those of BLM has a particularly heavy burden to overcome the deference we accord to BLM's expertise in such matters. Appellant's submissions on appeal do not rise to this level. Appellant's request for a hearing is accordingly denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Director is affirmed.

Douglas E. Henriques  
Administrative Judge

We concur:

James L. Burski  
Administrative Judge

Edward W. Stuebing  
Administrative Judge

