

PETROLEUM, INC.

IBLA 80-567

Decided January 18, 1982

Appeal from a decision of the Acting State Director, Wyoming State Office, Bureau of Land Management, denying a protest of Wilderness Study Area designation WY-040-110.

Affirmed.

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

BLM does not violate the terms of sec. 603(a), Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976), directing the Secretary to review those roadless areas of five thousand acres or more of the public lands, identified during the inventory required by sec. 201(a) as having wilderness characteristics, where BLM undertakes review of an area for wilderness characteristics prior to an inventory of all public lands.

2. Federal Land Policy and Management Act of 1976:
Wilderness--Wilderness Act

Where part of a unit designated as a wilderness study area appears not to possess outstanding opportunities for solitude or a primitive and unconfined type of recreation, BLM may consider this factor during its study phase and make any appropriate boundary adjustments. However, the lack of an outstanding opportunity for solitude or a primitive and unconfined type of recreation will not disqualify part of a unit from consideration during the study phase where other parts of the unit have been identified during the inventory phase as meeting the outstanding opportunity criterion.

APPEARANCES: C. M. Peterson, Esq., Poulson, Odell & Peterson, Denver, Colorado, for appellant; Nikki Ann Westra, Esq., Alice E. Herter, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Bureau of Land Management; Linda Ranier, Esq., Denver, Colorado, for Sierra Club.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Petroleum, Inc., appeals from a decision of the Acting State Director, Wyoming State Office, Bureau of Land Management (BLM), dated March 3, 1980, denying appellant's protest of the designation of unit WY-040-110 as a wilderness study area (WSA). Appellant's protest followed the Acting State Director's designation of unit WY-040-110 and two other areas as WSA's on December 14, 1979. 44 FR 72659. The lands at issue in the present appeal are located within the Overthrust Belt in western Wyoming, T. 27 N., Rs. 114, 115 W., Sublette County, Wyoming, and occupy approximately 13,970 acres.

On May 27, 1980, the Sierra Club sought leave to intervene in the instant appeal, alleging that its members use the lands at issue for hiking, photography, and other forms of recreation. Sierra Club further alleged that it has been an active participant in BLM's wilderness review process. No objections appearing of record, the Board granted Sierra Club's petition to intervene by order of September 19, 1980. Briefs have been filed by appellant, the Bureau of Land Management, and Sierra Club.

[1] Section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976), directs the Secretary of the Interior to review those roadless areas of 5,000 acres or more and roadless islands of the public lands which were identified during the inventory required by section 201(a) of the Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131 (1976). In addition, the Secretary is directed to report from time to time to the President his recommendation as to the suitability or unsuitability of each such area or island for preservation as wilderness.

The review process undertaken pursuant to section 603(a) has been divided into three phases by BLM: Inventory, study, and reporting. The Acting State Director's designation of unit WY-040-110 as a WSA marks the end of the inventory phase of the review process and the beginning of the study phase.

Key to the inventory conducted by BLM is the definition of "wilderness," as found 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 untrammeled 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 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.

Petroleum, Inc., alleges that it holds an oil and gas lease within the boundaries of unit WY-040-110, also known as the Lake Mountain WSA. In its statement of reasons on appeal, appellant presents two arguments in opposition to the designation of this unit as a WSA:

1. BLM has not conducted the wilderness review in the manner prescribed by Congress.
2. Although the WSA designation is improper as to the entire Lake Mountain WSA, the eastern portion of the WSA is particularly devoid of wilderness characteristics.

We shall address these arguments in order.

[2] The gist of appellant's first argument is that BLM has undertaken a "crash" wilderness inventory program as a result of certain interim management policies and guidelines which limit activity on lands undergoing review. Because such limitations would have serious effects in an area within the Overthrust Belt, counsel argues that BLM undertook an accelerated inventory in an effort to reduce the amount of acreage subject to interim management guidelines. Appellant contends that the Secretary's wilderness review program should have followed a comprehensive inventory of all public lands. In this way, counsel argues, the Secretary would have available more comprehensive and balanced information regarding the various values of the lands within the Lake Mountain area and of all public lands.

Counsel's argument is based on the language of section 603(a) wherein the Secretary is directed to review "those roadless areas of five thousand acres or more * * * of the public lands, identified during the inventory required by section 201(a) of this Act as having wilderness characteristics." Section 201(a) states as follows:

The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of

critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.

A careful reading of sections 201(a) and 603(a) convinces us that FLPMA does not contain language which would require the Secretary to inventory all of the public lands before undertaking the first wilderness review. This finding is consistent with the language of section 201(a) requiring an inventory to be maintained on a continuing basis and kept current. Given the ongoing nature of the inventory process, postponement of wilderness review during the pendency of the inventory is tantamount to elimination of wilderness review altogether.

Counsel's concern that the Secretary have comprehensive and balanced information regarding the various values of the WSA will be met during the study phase of the review process. During the study phase, BLM will consider all values, resources, and uses of the lands considered for wilderness preservation. During this phase, the potential of the Lake Mountain unit for oil and gas development will be a proper factor to be balanced against the area's wilderness potential.

Appellant's second argument on appeal is directed to the physical characteristics of the lands within the Lake Mountain unit. Appellant notes that a 2-mile route, designated by BLM as a way, runs along the bottom of Long Hollow in the western portion of the unit. Three miles of ways are acknowledged by BLM to exist in the southeast corner of the unit in Pine Hollow and Graphite Hollow. Graphite Hollow also contains a 1/2-mile road which does not appear to have been eliminated from the unit by the "cherrystemming" practice which BLM has employed elsewhere. ^{1/} Buck and pole fencing runs for 2 miles along the banks of Rock Creek in the central portion of the unit. Appellant points to these ways, road, and fencing to establish that the unit contains the imprint of man's work in substantially noticeable form, contrary to the terms of 16 U.S.C. § 1131(c) (1976), quoted above, setting forth the definition of wilderness. That definition requires a wilderness area to be undeveloped Federal land retaining its primeval character and influence without permanent improvements or human habitation. In addition, a wilderness must generally appear to have been affected primarily by the forces of nature with the imprint of man's work substantially unnoticeable. Congress further required that a wilderness area have outstanding opportunities for solitude or a primitive and unconfined type of recreation.

^{1/} For a discussion of BLM's cherrystemming practice, see National Outdoor Coalition, 59 IBLA 291 (1981). BLM has employed this practice in the instant unit to eliminate a 40-acre tract of private land and accompanying road from wilderness consideration.

Appellant's strongest argument focuses upon the unit's opportunities for solitude or a primitive and unconfined type of recreation. While appellant maintains that the unit as a whole possesses neither of these opportunities, counsel for appellant directs our attention to the eastern portion of the unit as particularly devoid of outstanding opportunities for solitude or a primitive and unconfined type of recreation. Counsel describes this area as largely open slopes with sagebrush and grass vegetation and minimal topographic or vegetative screening. Visitors to the area can therefore be viewed for long distances, counsel maintains, making the opportunity for solitude difficult.

BLM's response to a similar argument in appellant's protest was the following:

It has been determined that steep topography and vegetation in portions of the unit offer adequate screening to give 'outstanding' opportunities for solitude. As long as outstanding solitude exists in a portion(s) of the unit, the entire unit qualifies as a Wilderness Study Area (WSA) under the outstanding solitude criteria defined in Organic Act Directive No. 78-61, Change 3. [2/]

Counsel's contention that the eastern portion of the unit is largely open slopes with sagebrush and grass vegetation and minimal topographic or vegetative screening is the basis for his further argument that the eastern portion lacks outstanding opportunities for a primitive and unconfined type of recreation. Lands of such description, counsel argues, can hardly be described as an outstanding site for hiking, ski touring, or sightseeing.

A similar argument by Petroleum, Inc., in its protest drew the following comment from BLM: "It is acknowledged that freedom of movement may be restricted within the Rock Creek drainage. However, due to the diversity of terrain and vegetation present throughout the unit, outstanding opportunities for primitive and unconfined recreation could still be obtained by visitors to the unit."

Throughout the record, BLM acknowledges a distinction between lands in the eastern portion of the WSA and those located elsewhere within the unit. The narrative of the unit, entitled Staff Specialist Synopsi, contains the following observations:

The unit lies within the foothills of the Wyoming Range. It is typified by an irregular series of steep-sided ridges ranging in elevation from 7,400 feet to over 9,600 feet. Four main drainages are found within the unit. In the western and central portions are Long Hollow and Rock Creek, respectively. Both of these contain steep

2/ Organic Act Directive No. 78-61, Change 3, was issued on July 12, 1979, by the Associate Director, Bureau of Land Management.

slopes of talus material and forest cover. Rock Creek contains essentially pure strains of Colorado River cutthroat trout, a species designated "rare" by the Wyoming Game and Fish and "sensitive" by the BLM.

The southeast portion contains Pine and Graphite Hollows. These retain the steepness of the other drainages but are found in a drier area and therefore lack extensive vegetative cover. Numerous smaller drainages serve to further break up the terrain throughout the unit.

Forest cover is found throughout most of the unit. This cover is broken by areas of a sagebrush-grass association and bare talus slopes. These open areas range in size from a few acres to several hundred acres.

* * * * *

A 2-mile way runs along the bottom of Long Hollow in the western portion of the unit. The steepness of this drainage would prevent the way from being visible to most points in the surrounding area. Only from exposed slopes or points along the ridges would portions of the way be seen.

Pine Hollow and Graphite Hollow, in the southeast corner of the area, contain a total of 3 miles of ways. These ways are visible over a greater distance due to less vegetative screening along the slopes. The terrain is irregular and steep and provides a degree of screening.

A 1/2-mile road running from the Graphite Hollow way up a steep, bare slope is quite visible due to its cut banks. This road offers the most widely visible intrusion in this portion of the unit.

* * * * *

The high topographic variance and wide-spread vegetative cover within the unit enable it to offer an outstanding opportunity to experience solitude. The unit is characterized by steep mountain slopes broken by four main drainages. Numerous smaller drainages function to further break up the terrain. This broken terrain, with its densely scattered forest cover, supplies many opportunities to avoid the sights and sounds of other users.

Steep slopes with broken forest cover make up the majority of the unit. The eastern extension of the area is typified by these same steep slopes, but is lacking the same degree of vegetative cover. These steep slopes

throughout the unit create a psychological [sic] feeling of vastness greater than acreage figures might indicate.

Long Hollow and Rock Creek are the primary drainages in the western and central portions of the area. Lake Mountain lies between these two drainages. This area contains the most rugged and broken terrain within the unit. Steep, forested slopes are interspersed with open areas of sagebrush and grasses. This offers a diverse topography with abundant screening and many opportunities for isolation. Rock Creek is the only perennial water flow within the unit. Because of this, use might concentrate along this drainage, decreasing the opportunity to experience solitude in this location.

Screening in the eastern portion of the unit would result from topography. Pine Hollow and Graphite Hollow supply the major topographical relief in this area. This area is steep and rugged, but lacks the screening available from vegetation, as in the majority of the unit. Chances for isolation would not be as great here but would still be available as a result of the topographic diversity. The area is classified as Class A scenery with a Visual Management Class II. [Emphasis supplied.]

The narrative set forth in part above supports appellant's contention that the eastern portion of the unit is largely open slopes with sagebrush and grass vegetation. It further supports appellant's contention that vegetative screening in the eastern portion of the unit is minimal. Topographic screening in this portion of the unit, however, appears to be indistinguishable from that of the remainder of the unit. The narrative further distinguishes the two areas by noting that the eastern portion of the unit is a drier area than the remainder. The remaining area includes Rock Creek, site of a rare population of Colorado River cutthroat trout.

On the basis of the record before us, it is difficult to ignore the distinctive characteristics between the eastern portion of the unit and those in the western portion. Although both portions appear to have been affected primarily by the forces of nature with the imprint of man's work substantially unnoticeable, ^{3/} we cannot say that both areas have outstanding opportunities for solitude or a primitive and unconfined type of recreation. Indeed, if we were making the initial determination, we probably would have drawn the WSA boundaries quite differently.

^{3/} One exception to this statement would be the 1/2-mile road which BLM acknowledges to exist in the eastern portion of the unit near Graphite Hollow. This road could be cherrystemmed to remove this intrusion from the unit. See National Outdoor Coalition, supra at n.1, for a discussion of cherrystemming.

If we consider the eastern portion of the unit and the remainder to the west as distinct areas, we are inclined to agree with BLM that the so-called remainder area possesses wilderness characteristics sufficient to designate it a wilderness study area. No roads appear in this area which meet BLM's definition for a road. ^{4/} The imprint of man's work, including the 2 miles of buck and pole fencing near Rock Creek, appears from the record to be substantially unnoticeable. Appellant has not offered sufficient evidence to rebut BLM's finding that the steep slopes with broken forest cover provide outstanding opportunities for solitude in the area. Similarly, appellant has not sufficiently rebutted BLM's finding that the terrain and vegetation of the remainder area provide outstanding opportunities for a primitive and unconfined type of recreation, such as hiking, hunting, or wildlife observation.

Having acknowledged these outstanding opportunities for solitude or a primitive and unconfined type of recreation, we now examine the eastern portion of the unit for these same characteristics. In so doing we are mindful of BLM's characterization of the eastern portion as "a drier area" which is "lacking the same degree of vegetative cover" as the remainder to the west, thus making the chances for isolation "not * * * as great" as in the remainder. ^{5/} These distinctions made

^{4/} BLM provides a definition of a "road" in its Wilderness Inventory Handbook. The definition is taken verbatim from H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976):

"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."

BLM has subsequently adopted the following definitions of terms found in the House definition:

"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. Wilderness Inventory Handbook (1978) at 5.

^{5/} "Isolation" is one of the definitions provided by BLM for the term "solitude." Other definitions include "1. the state of being alone or remote from others; * * * 2. a lonely or secluded place." In discussing the task of determining whether outstanding opportunities for solitude exist, the Wilderness Inventory Handbook states at 13:

"In making this determination, consider factors which influence solitude only as they affect a person's opportunity to avoid the sights, sounds, and evidence of other people in the inventory unit.

by BLM lead us to conclude that outstanding opportunities for solitude do not exist in the eastern portion of unit WY-040-110. In so concluding, we are guided by BLM's definition of the term "outstanding" as it appears in the Wilderness Inventory Handbook. ^{6/} Therein, "outstanding" is defined at 15 to mean: "1. Standing out among others of its kind; conspicuous; prominent; 2. superior to others of its kind; distinguished; excellent." Having acknowledged outstanding opportunities for solitude in the western portion of the unit and lesser opportunities for solitude in the eastern portion, we cannot find that the eastern portion possesses outstanding, i.e., superior, opportunities for solitude. Outstanding opportunities for solitude cannot possibly exist in both areas without redefining this key term.

We conclude similarly with respect to opportunities for a primitive and unconfined type of recreation. Opportunities for recreation, such as hiking, hunting, or wildlife observation, are affected by features similar to those affecting opportunities for solitude. Opportunities for a primitive and unconfined type of recreation are superior in an area of broken forest than in a drier area of open slopes covered only by sagebrush and grassy vegetation. Having acknowledged the distinctions in terrain and having found outstanding opportunities for a primitive and unconfined type of recreation to exist in the western remainder, we cannot find that similar opportunities exist in the eastern portion of the unit.

fn. 5 (continued)

"Factors or elements influencing solitude may include size, natural screening, and ability of the user to find a secluded spot. It is the combination of these and similar elements upon which an overall solitude determination will be made.

"It may be difficult, for example, to avoid the sights and sounds of people in a flat open area unless it is relatively large. A small area, however, may provide opportunities for solitude if, due to topography or vegetation, visitors can screen themselves from one another."

OAD 78-61, Change 3, cautions at 3: "It is erroneous to assume that simply because a unit or portion of a unit is flat and/or unvegetated, it automatically lacks an outstanding opportunity for solitude."

^{6/} During the pendency of this appeal, the District Court for the District of Wyoming held Solicitor's Opinion, M-36910 (Sept. 5, 1978), 86 I.D. 89 (1979), to be clearly erroneous. This opinion was entitled "Interpretation of Section 603 of the Federal Land Policy and Management Act of 1976-- Bureau of Land Management (BLM) Wilderness Study." Rocky Mountain Oil and Gas Ass'n v. Andrus, 500 F. Supp. 1338 (D. Wyo. 1980), appeal docketed, No. 81-1040 (10th Cir. Jan. 5, 1981). Therein, Judge Kerr found the Wilderness Inventory Handbook to have been issued in accordance with the Solicitor's opinion. Our reading of Judge Kerr's opinion suggests that Judge Kerr's objection to the Handbook would be limited to its discussion of interim management policies. Since these policies form no part of our decision herein, we continue to rely on the Handbook for its information regarding BLM inventory procedures.

Our holding that the eastern portion of this WSA appears not to possess outstanding opportunities for solitude or a primitive and unconfined type of recreation should not be considered to mean that water and vegetation are necessary elements of every WSA. Nor, we might add, is topographic relief. A flat, unvegetated desert could well possess the outstanding opportunities required by the wilderness definition, 16 U.S.C. § 1131(c) (1976). We hold here only that the eastern portion of this WSA appears not to possess outstanding opportunities for solitude or a primitive and unconfined type of recreation. A contrary holding would ignore the distinctions existing in the eastern portion and the western remainder. Such a holding does not require that we overturn the BLM decision designating the entire unit as a WSA. The BLM decision must stand. As we have stated previously, outstanding opportunities need not be available at all times and at all places within a unit in order for the unit to meet the outstanding opportunity criterion. Tri-County Cattleman's Association, 60 IBLA 305, 309 (1981).

However, in its study of this WSA, we suggest that BLM consider the lack of outstanding opportunities for solitude or a primitive and unconfined type of recreation in the eastern portion and then consider the possibility of redrawing the boundaries of the WSA. Key to our recommendation has been the disparity in vegetation and moisture in the eastern and western portions of the WSA. We see no reason why these factors cannot provide a useful standard in the redrawing of new boundaries.

We do observe that deference must be given to BLM's special responsibility, experience, and expertise in the administration of the wilderness program, and find that appellant has not shown clearly and convincingly that there is any error of law or fact in the designation of WSA WY-040-110.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

