

CHURCHILL COUNTY BOARD OF COMMISSIONERS

IBLA 81-539

Decided February 17, 1982

Appeal from a decision of the Nevada State Director, Bureau of Land Management, denying a protest of wilderness study area designations. 8500 (N-932.6).

Affirmed.

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

"Roadless." H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976), provides a definition of "roadless" adopted by the Bureau of Land Management in its Wilderness Inventory Handbook. 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.

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

Sights and sounds outside a wilderness study area will be considered during the study phase of the wilderness review process absent a finding by BLM during the inventory phase that such impacts are adjacent to the unit and are so extremely imposing that they cannot be ignored, and and if not considered, reasonable application of inventory guidelines would be questioned.

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

The requirement in section 2(c) of the Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1976), that a wilderness possess, inter alia, outstanding opportunities for solitude or a primitive and unconfined type of

recreation is properly construed to require outstanding opportunities for either solitude or a primitive and unconfined type of recreation; both need not be present in an inventory unit to allow the unit to enter the study phase of the wilderness review process.

APPEARANCES: Beale E. Caan, Chairman, Board of Commissioners of Churchill County, Nevada; Dale D. Goble, Esq., Office of the Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Churchill County Board of Commissioners (County) appeals from a decision of the Nevada State Director, Bureau of Land Management (BLM), dated March 6, 1981, denying the County's protest of the designation of five wilderness study areas (WSA's). The areas at issue were identified as WSA's in an announcement published in the Federal Register on November 7, 1980. 45 FR 74070. These units are: NV-030-102 (Clan Alpine Mountains); NV-030-104 (Stillwater Range); NV-030-106 (Augusta Mountains); NV-030-110 (Desatoya Mountains); and NV-030-127 (Job Peak).

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 the wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131 (1976). The Secretary is further directed to report to the President from time to time 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. BLM's designation of the aforementioned units as WSA's 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 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.

In its statement of reasons on appeal, the County incorporates by reference its arguments voiced earlier during the protest and public comment periods. Our resolution of these arguments is aided by the detailed response of the State Director. The County's arguments reduce to three:

1. Roads are present in the subject WSA's contrary to the terms of section 603(a) of FLPMA.
2. Outstanding opportunities for solitude or a primitive and unconfined type of recreation are absent in the areas under appeal.
3. Lands designated as WSA's must contain outstanding opportunities for both solitude and a primitive and unconfined type of recreation.

During the comment and protests period, the County provided BLM with maps, aerial photos, and exhibits which, it alleged, showed the location of roads within the subject WSA's. In BLM's decision of March 6, 1981, the State Director acknowledged the County's submissions and stated that each photograph and map were examined and any roads or signs of man's activity about which there was a question were field checked. Many of the routes appearing on the County's maps were classified as roads by BLM and were noted as such on BLM inventory maps, the State Director maintains. The majority of the routes, however, were found by the State Director to be "ways," rather than "roads." A few routes were found by BLM not to exist.

[1] Much of the disagreement between the County and BLM focuses upon the definition of the word "roadless," as that term is used in section 603(a). Though FLPMA does not define this term, H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976), provides some guidance. 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." ^{1/} The County's efforts to designate by resolution certain routes

^{1/} 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 road to maintained recreation sites or facilities; or access roads to mining claims."

of travel as "public, non-county roads" do not alter BLM's duty to review roadless areas in accordance with the Congressional definition.

On appeal, the County fails to point to specific routes of travel that it contends BLM failed to recognize as roads. It similarly fails to provide specific information of the improvements and maintenance which are necessary elements of a determination that a route is in fact a road. The allegation that a route should have been recognized by BLM as a road must be supported by information as to who constructed and maintains the route and when such activities occurred. In the absence of such information, the County's argument must fail. Conoco, Inc., 61 IBLA 21, 30 (1981). A decision by the State Director will not be disturbed on appeal where the appellant fails to meet its burden of pointing out specific errors of law or fact in the decision below. Sierra Club, 54 IBLA 31, 37 (1981).

[2] The County's second argument on appeal is the contention that BLM erred in finding that each of the WSA's possessed outstanding opportunities for solitude or a primitive and unconfined type of recreation. 2/ In support of this argument, the County offers letters from the commanding officer, Fallon Naval Air Station, pointing out that three of the units on appeal are "under Military Operating Areas." As such, the air space above these units is used for low level, high speed flights to train pilots in combat maneuvers and radar detection avoidance. The noise from these flights, in the view of appellant and the commanding officer, is sufficient to destroy any solitude in the lands under military operating areas.

In response, BLM acknowledged the existence of military overflights but described their impact as "intense, but short-lived." It pointed out further that the inventory phase of the wilderness review process is designed to focus on factors that are within unit boundaries and on the ground. Airspace above a unit, BLM maintained, is technically outside a unit. BLM acknowledged further that its analysis of overflights was carried out in units NV-030-104 (Stillwater Range) and NV-030-127 (Job Peak) where flights are said to be most frequent and their impact most profound. Further analysis of overflights was postponed to the study phase of the wilderness review process.

Organic Act Directive 78-61, Change 3 (July 12, 1979), offers the following guidance to BLM in dealing with sights and sounds outside unit borders:

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

2/ BLM found that units NV-030-102, NV-030-104, NV-030-110, and NV-030-127 possessed outstanding opportunities for both solitude and a primitive and unconfined type of recreation. Unit NV-030-108 (Augusta Mountains) was found to possess outstanding opportunities for solitude alone.

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. [Emphasis in original.]

BLM's decision to postpone further analysis of overflights to the study phase is a tacit finding by it that the impact of such overflights is not so extremely imposing that it cannot be ignored. Commenting on overflights of the Job Peak and Stillwater Range WSA's, BLM stated:

Overflights by tactical aircraft involved in combat training are often at low levels and always at high speeds, resulting in extremely loud sonic disruptions of the otherwise silent atmosphere normally experienced within the unit. While the magnitude of individual disruptions should not be minimized, it should be noted that they are relatively infrequent, that they seldom occur at night, and that a visitor to the unit may never experience one during his travels in the area. Even if one does encounter such a situation, the experience is over within a matter of seconds.

In Ruskin Lines, 61 IBLA 193 (1981), this Board noted that it was inclined to defer to BLM's judgment as to whether an outside impact was so extremely imposing that it could not be ignored. Though not articulated therein, the justification for such deference is BLM's first-hand knowledge of the unit on the ground. Appellant's argument that overflights prevent outstanding opportunities for solitude does not provide sufficient information of the frequency of overflights to contradict BLM's findings that such flights are relatively infrequent. ^{3/} As in Ruskin Lines, we believe that BLM's subjective judgment as to whether an outside impact is so imposing that it cannot be ignored is entitled to considerable deference. Accordingly, we find that BLM properly postponed further consideration of such impacts to the study phase. During the study phase, appellant is urged to bring the subject of overflights to BLM's attention for further analysis. Appellant's participation in this phase is invited. 45 FR 75574, 75575 (Nov. 14, 1980).

Inasmuch as the County relied upon overflights to rebut BLM's finding that outstanding opportunities for solitude exist in the units, our approval of BLM's postponement of such impacts to the study phase amounts to a rejection of the County's argument. BLM's finding that each of the subject units possesses outstanding opportunities for solitude, therefore, will not be disturbed.

[3] Although the County also argues that outstanding opportunities for a primitive and unconfined type of recreation are lacking in the units on appeal, this argument need not be fully addressed. We reach this conclusion because an inventory unit qualifying as a WSA need only possess outstanding opportunities for either solitude or a

^{3/} A 1977 study of the Fallon Naval Air Station indicates that slightly over 100,000 "operations" were conducted each year during the period 1973-77. Excerpts from Air Installations Compatible Use Zones Study (Exhibit D). Information is not provided, however, as to how many of such operations represent low level, high speed flights over these WSA's sufficient to preclude outstanding opportunities for solitude.

primitive and unconfined type of recreation, inter alia. The County's contention that outstanding opportunities for both solitude and a primitive and unconfined type of recreation be present in a WSA was rejected by BLM below and now forms the basis for its third argument on appeal.

In support of this contention, the County states that BLM's interpretation ignores the spirit and intent of the Wilderness Act. It states further that to conceive of lands where one could enjoy a primitive and unconfined type of recreation without having an outstanding opportunity for solitude, and vice versa, would be extremely difficult. No citations to the legislative history are offered to substantiate the County's claim that BLM has misinterpreted the spirit and intent of the Wilderness Act. A cursory examination of section 2(c) of the Act, however, reveals that Congress used the disjunctive conjunction "or" in setting out the requirement that a wilderness area possess "outstanding opportunities for solitude or a primitive and unconfined type of recreation" (emphasis added). Though this conjunction has on occasion been interpreted to mean "and", its ordinary function is to connect alternative terms. In The Superior Oil Co., 12 IBLA 212, 218 (1973), this Board quoted with approval the following language from In re Rice, 165 F.2d 617, 619 (D.C. Cir. 1947): "In statutory construction the word "or" is to be given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to other provisions of the statute." No such repugnancy is apparent when construing "or" in its disjunctive sense, nor has appellant alleged otherwise. BLM's interpretation that an inventory unit qualifying as a WSA contain outstanding opportunities for either solitude or a primitive and unconfined type of recreation is accordingly affirmed, although the absence of one or the other might very well influence the conclusions reached during the "study phase."

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 Nevada State Director is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

Douglas E. Henriques
Administrative Judge

