

STATE OF NEVADA ET AL.

IBLA 81-541, 81-1095

Decided March 5, 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 in part; set aside and remanded in part; reversed in part.

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

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: Inventory and Identification -- Federal Land Policy and Management Act of 1976: Wilderness

Where, in assessing the wilderness characteristics of a unit during the intensive inventory, the Bureau of Land Management determines that a unit possesses a certain wilderness characteristic only in conjunction with contiguous lands administered by agencies other than BLM, the method of assessment is improper. BLM is required to assess whether the unit itself has the requisite characteristic.

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

While the Bureau of Land Management may inventory and identify areas of the public

lands of less than 5,000 acres as having wilderness characteristics, it may not properly designate such areas as wilderness study areas under sec. 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976), because that section only mandates review of roadless areas of 5,000 acres or more and roadless islands of the public lands. However, such areas may be managed under the general management authority of sec. 302, 43 U.S.C. § 1732 (1976), in a manner consistent with wilderness objectives, and such areas may also be recommended for wilderness designation.

APPEARANCES: Joyce Hall, Administrator, Division of Mineral Resources, Department of Conservation and Natural Resources, State of Nevada, Carson City, Nevada, for appellant; Dale D. Goble, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management; Julie E. McDonald, Esq., San Francisco, California, for Sierra Club; Robert G. Carrington, pro se.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Division of Mineral Resources, Department of Conservation and Natural Resources, State of Nevada, appeals from a decision of the Nevada State Director, Bureau of Land Management (BLM), dated March 4, 1981, denying its protest of the designation of 56 wilderness study areas (WSA's). The units so designated were announced in the Federal Register on November 7, 1980, 45 FR 74070. Robert G. Carrington appeals from the State Director's decision to designate unit NV-030-104 as a WSA. Although Carrington's appeal must be dismissed for procedural reasons, 1/ the State and Carrington each charge error in BLM's decision to designate unit NV-030-104 as a WSA. These appeals, although resolved differently, are joined for purposes of procedural convenience.

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1/ The Federal Register notice of Nov. 7, 1980, provided that all persons wishing to protest a proposed WSA designation must do so by Dec. 15, 1980. Carrington did not file a protest during this period. On Apr. 16, 1981, however, he filed a notice of appeal. As set forth in 43 CFR 4.410, the right of appeal is limited to a party to a case who is adversely affected by a decision of BLM. Having never filed a protest, Carrington was not a party to the case within the meaning of 43 CFR 4.410. Elaine Mikels, 41 IBLA 305 (1979). Accordingly, he may not invoke this Board's jurisdiction, and his appeal is properly dismissed. Conoco, Inc., 61 IBLA 23 (1981). Appellant's notice of appeal was apparently prompted by a Federal Register announcement on Mar. 18, 1981, granting a right of appeal to those persons adversely affected by BLM's protest response. 46 FR 17266. Appellant's continued participation in the wilderness review process is invited during the study phase. 45 FR 75574, 75575 (Nov. 14, 1980).

The State Director's action designating the units on appeal as WSA's was taken pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976). That section directs the Secretary 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(c) (1976). Following review of an area or island, the Secretary shall from time to time report to the President his recommendation as to the suitability or unsuitability of each such area or island for preservation as wilderness.

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 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 process undertaken by the State Office has been divided into three phases by BLM: inventory, study, and reporting. The State Director's announcement of wilderness study areas marks the end of the inventory phase of the review process and the beginning of the study phase.

The State makes two arguments on appeal:

1. Forty-six WSA's contain roads in nonwilderness corridors (cherry stems) contrary to section 603 of FLPMA. 2/

2/ These units are: NV-010-027, NV-010-033, NV-010-035, NV-010 103A, NV-010-106, NV-010-132, NV-020-007, NV-020-014, NV-020-014A, NV-020-019, NV-020-200, NV-020-201, NV-020-406Q, NV-020-600, NV-020-603, NV-020-606, NV-020-620, NV-020-621, NV-020-622, NV-020-827, NV-020-859, NV-030-102, NV-030-104, NV-030-108, NV-030-110, NV-030-127, NV-030-407, NV-030-430, NV-030-525A, NV-040-015, NV-040-086, NV-040-154, NV-040-197, NV-050-0401, NV-050-0414, NV-060-019, NV-060-059, NV-060-112, NV-060-142/162, NV-060-158/199, NV-060-163, NV-060-190, NV-060-191, NV-060-231, NV-060-428, NV-060-541.

2. Eleven WSA's do not possess wilderness characteristics when considered independently of contiguous areas managed by agencies other than BLM. 3/

The State's arguments regarding cherrystemming are remarkably similar to those voiced by a prior appellant, National Outdoor Coalition. The cherrystemming practice complained of refers to BLM's practice of designating as nonwilderness corridors (cherrystems) lands occupied by roads or other intrusions that would seemingly disqualify a parcel from wilderness consideration. The boundaries of an inventory unit containing a cherrystem are drawn around the intrusion by BLM so as to exclude it from the area being considered for wilderness values.

[1] In National Outdoor Coalition, 59 IBLA 291, 296 (1981), we held that BLM did not act contrary to law or any established Department policy in recognizing nonwilderness corridors occupied by roads or other man-made intrusions. Though the boundaries of a WSA "containing" a nonwilderness corridor might be irregular as a result of such corridors, we agreed with BLM and intervenor Sierra Club 4/ that section 603(a) did not specify any particular shape for an area that may eventually be recommended for wilderness preservation. No additional arguments have been advanced on appeal by the State. Our decision in National Outdoor Coalition must therefore dispose of the State's first argument.

In its second argument on appeal, the State contends that 11 WSA's do not possess wilderness characteristics when considered independently of contiguous areas managed by agencies other than BLM. The contiguous lands referred to are described as "wilderness proposals" by appellant and presumably possess wilderness characteristics. Thus, appellant's charge is that each of the 11 WSA's at issue cannot stand on its own, but instead must rely upon its neighbor to justify its WSA status.

In response to this argument in appellant's protest, the State Director referred appellant to earlier correspondence between the parties involving accelerated inventory units. 5/ The State Director acknowledged that although the 11 WSA's at issue were not part of this accelerated inventory, this earlier correspondence would be applicable to the instant case.

In this earlier correspondence with the State, the State Director found that wilderness characteristics existed in each of the accelerated inventory units. We understand the State Director to be saying that each of these

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3/ These units are: NV-020-637, NV-030-430, NV-030-432, NV-050-0131, NV-050-0154, NV-050-0165, NV-050-0368, NV-050-0369, NV-050-0370, NV-050-03R-22, NV-060-166. We note that unit NV-030-430 is in common with both groups of WSA's raised by the State on appeal.

4/ Sierra Club's motion to intervene in the instant appeal was granted by order of Oct. 1, 1981.

5/ This correspondence, dated July 24, 1980, is a letter to the Director, Division of Mineral Resources, Department of Conservation and Natural Resources, State of Nevada, from the BLM State Director.

accelerated inventory units possessed wilderness characteristics of its own. If that is the State Director's holding which we are to apply in the instant case, we are at a loss to understand why the narrative description of a number of the units on appeal indicates that outstanding opportunities for solitude or a primitive and unconfined type of recreation exist only when considered in conjunction with a contiguous area administered by an agency other than BLM. Other units on appeal are said to share the same outstanding wilderness character identified in the contiguous wilderness proposal. If each of the 11 WSA's possesses wilderness characteristics of its own, the language of the narrative description seems particularly inappropriate.

[2] Two recent cases of this Board set forth, we believe, the applicable law. In Don Coops, 61 IBLA 300 (1982), we held that it was improper for BLM to assess a unit's wilderness characteristics "in association with" a contiguous area managed by the Forest Service. During the inventory phase, BLM is required to assess whether a unit, by itself, has the requisite wilderness characteristics. Id. at 306. The basis for our holding in Coops is the requirement of sections 603(a) and 201(a) of FLPMA that the Secretary inventory and review the public lands for wilderness characteristics. For purposes of its use in FLPMA, the term "public lands" means "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership \* \* \*." (Emphasis supplied.)

The record before us is unclear as to whether each of the 11 WSA's at issue possess wilderness characteristics independently of its contiguous neighbor. Our holding in Coops is a clear statement that each unit must be assessed on its own merits. Accordingly, we set aside BLM's protest response as to those 11 units and direct that it determine in unequivocal language whether each of these units possesses wilderness characteristics of its own. If a unit does not possess such characteristics of its own, it may not be properly designated a WSA.

[3] The Federal Register notice announcing the Nevada WSA designations states that units NV-030-432, NV-050-0165, and NV-050-03R-22 are each less than 5,000 acres in area. The Secretary's authority to review roadless areas for wilderness characteristics under section 603(a) is, however, limited to roadless areas of 5,000 acres or more and roadless islands of the public lands. 43 U.S.C. § 1782 (1976). Although we acknowledge that section 2(c) of the Wilderness Act of 1964, supra, requires a wilderness area to have "at least five thousand acres or [be] of sufficient size as to make practicable its preservation and use in an unimpaired condition," the Secretary's review authority under section 603(a) is not coextensive with this language from section 2(c). Our holding to this effect is set forth in Tri-County Cattlemen's Association, 60 IBLA 305 (1981).

In Tri-County, this Board examined in some detail the legislative history of section 603 and found that the authority to designate an inventory unit as a WSA is derived from section 603(a). That section directs the Secretary to review only those areas of 5,000 acres or more. Thus, we concluded that section 603(a) established a minimum acreage requirement for WSA's. Id. at 312.

The impact of Tri-County on the instant case is to reverse the State Director's WSA designation pursuant to section 603(a) of any parcel under 5,000 acres in area. As Tri-County points out, however, BLM has the authority to pursue wilderness review of these areas under other provisions of FLPMA, specifically, 43 U.S.C. §§ 1712 and 1732 (1976). The nonimpairment standard set forth in section 603(c) would not apply to such an area under 5,000 acres. See also Don Coops, supra at 305-06.

To summarize our multiple holdings in IBLA 81-541: The State Director's decision rejecting the State's protest of 46 cherrystemmed WSA's is affirmed; the State Director's decision rejecting the State's protest of 11 WSA's contiguous with wilderness proposals of other agencies is set aside and remanded for action consistent herewith; and the State Director's designation of three inventory units under 5,000 acres as section 603 WSA's is reversed.

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 in part, set aside and remanded in part, and reversed in part.

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Edward W. Stuebing  
Administrative Judge

We concur:

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Bernard V. Parrette  
Chief Administrative Judge

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Douglas E. Henriques  
Administrative Judge

