

Appeal from a decision of the Nevada State Director, Bureau of Land Management, denying the protest of the failure to designate eight inventory units as wilderness study areas. 8500 (N-932.6).

Affirmed.

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

Organic Act Directive 78-61, Change 3 (July 12, 1979, at page 3), specifies that as a general rule the boundary of a wilderness inventory unit is to be determined based on an evaluation of the imprints of man within the unit.

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

In evaluating a unit's opportunities for solitude, BLM is directed by the Wilderness Inventory Handbook to 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. Factors or elements influencing solitude may include size, natural screening, and the ability of the user to find a secluded spot.

3. 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 judgment of the area's naturalness qualities and its subjective determinations as to whether the area possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation are entitled to considerable deference.

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

Organic Act Directive 78-61, Change 2 (June 28, 1979, at page 5), specifies that BLM must evaluate the cumulative effect of minor imprints of man on an inventory unit. When multiple imprints of man are considered to be substantially noticeable and the decision has been made to eliminate a group of these imprints, natural portions of the unit which are located between the individual imprints of man must not be automatically excluded.

APPEARANCES: David Hornbeck, Reno, Nevada; Howard Booth, Las Vegas, Nevada; Charles S. Watson, Jr., Carson City, Nevada; Roger Scholl, Reno, Nevada; and John Hiatt, Las Vegas, Nevada, for appellants. Dale D. Goble, Esq., Office of the Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Sierra Club, Great Basin Group, and the Nevada Wilderness Association 1/ appeal from a decision of the Nevada State Director, Bureau of Land Management (BLM), dated March 12, 1981, denying their protest of BLM's failure to designate all or parts of eight inventory units as wilderness study areas (WSA's). A list of those Nevada units designated as WSA's was published in the Federal Register on November 7, 1980. 45 FR 74070.

The State Director's designation of wilderness study areas 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 nonsuitability of each such area or island for preservation as wilderness.

1/ The notice of appeal indicates that appellants filed this appeal in their own names and also on behalf of the Sierra Club, Las Vegas Group, Red Rock Audubon Society, and Nevada Outdoor Recreation Association.

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 review process undertaken by the State Office pursuant to section 603(a) has been divided into three phases by BLM: Inventory, study, and reporting. The State Director's publication of those units designated as WSA's marks the end of the inventory phase of the review process and the beginning of the study phase.

Appellants present a number of arguments in their statement of reasons on appeal. To properly address these arguments, our decision is divided into sections corresponding to the units on appeal.

South Pequop (NV-010-035A)

Subunit NV-010-035A is a 4,700-acre parcel adjacent to the South Pequop WSA, but excluded by BLM from further wilderness review because of its size. Appellants maintain that this subunit, or a part thereof, should be included in the South Pequop WSA and that BLM has erred in separating this subunit along a substantially unnoticeable way. In his protest response, the State Director states that the access routes forming the boundary between the subunit and the WSA have been bladed and receive regular and continuous use by hunters during deer season. Maps accompanying BLM's intensive inventory report identify these access routes as roads.

[1] Appellants argue that the blading of a route which thereafter is in regular and continuous use is insufficient to qualify it as a road. This contention, when viewed against the accepted definition of what a road is in this context, requires some further analysis. Clearly, a route which was created and maintained solely by the passage of vehicles cannot qualify as a road. Similarly, a route which was opened and/or constructed by mechanical means, but which requires additional maintenance in order to keep it open to regular and continuous use cannot qualify as a road if such additional maintenance is not performed. But, on the other hand, if the route was initially opened by the passage of vehicles, or even by herds of bison or cattle, but

is thereafter mechanically maintained to insure regular and continuous use by vehicles, that would qualify as a road. Likewise, a route, or a segment of a route which was mechanically improved to permit the passage of vehicles, but which to date has not needed any further mechanical improvement or maintenance to facilitate the regular and continuous passage of vehicles, is also a road. To hold otherwise would be to say that once a road has been mechanically improved, in order to thereafter continue its status as such it must receive mechanical maintenance whether it needs it or not -- a ludicrous, impractical, and thoroughly unreasonable and unrealistic contortion of the accepted definition.

The routes in question have been bladed, and in consequence of this mechanical improvement are in regular and continuous use. They are, therefore, roads. Organic Act Directive No. 78-61, Change 2, states the proposition as follows, at page 4:

(1) Is a route a road if it has been improved to insure relatively regular and continuous use but has not yet required maintenance? Yes. Improvements and relatively regular and continuous use would be an indication that the road would be maintained if the need were to arise.

Rock Creek (NV-010-130)

The Rock Creek inventory unit was dropped from further wilderness consideration by the State Director, because it failed to possess outstanding opportunities for solitude or a primitive and unconfined type of recreation. This unit is 24,180 acres in size, and at its center is Rock Creek Canyon. While acknowledging the opportunities for backpacking, camping, horseback riding, cross-country skiing, hunting, fishing, and sightseeing, BLM's inventory report described these opportunities as good but not outstanding. Outstanding opportunities for solitude were absent, BLM maintained, because users would most likely be interested in Rock Creek Canyon and their presence would make difficult an opportunity to find a secluded spot there.

In protest arguments and on appeal, appellants charge error in the State Director's consideration of how Rock Creek Canyon might be used, arguing that future levels and patterns of use are the concerns of wilderness study and management. Appellants point out that data as to present levels and locations of use are lacking, as well as data supporting trends in use.

BLM's protest response characterized appellants' charges as objections to BLM's use of its professional judgment. The response maintained that an evaluation of how an area might reasonably be used by visitors is pertinent to an assessment of its opportunities for solitude. The probable visual contact with other recreation users and the topographic diversity of the terrain, the response concluded, combine to provide less than outstanding opportunities for solitude in the unit.

[2] The Wilderness Inventory Handbook (WIH) provides guidance to BLM on the issue of solitude:

In making * * * [the determination whether a unit has outstanding opportunities for solitude.] 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.

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.

(WIH at 13 (emphasis supplied)). If users of an inventory unit would tend to collect at one particular location, we believe that BLM is justified in finding that outstanding opportunities for solitude do not exist at that location. Indeed, the WIH acknowledges as much: "[A]n area may be so attractive for recreation use that it would be difficult to maintain [an] opportunity for solitude." Id. Appellants' contention that BLM has not provided supporting data for its finding that users will be concentrated in Rock Creek Canyon is largely justified. However, appellants themselves concede that "[a] canyon of this size, high scenic qualities, and possession of year-round water is in and of itself outstanding" (Statement of Reasons at 4 (emphasis in original)). Accordingly, we discern no error in BLM's finding that outstanding opportunities for solitude are lacking in the Rock Creek inventory unit.

[3] Appellants' argument that this unit possesses outstanding opportunities for a primitive and unconfined type of recreation does not point to any specific error in BLM's contrary finding. Appellants' argument is in effect an expression of their disagreement with BLM's contrary finding. Their contention that chukar hunting is outstanding is met by BLM's contention that excellent chukar hunting is not the norm over a period of years. In Sierra Club, 53 IBLA 159 (1981), we held that more than simple disagreement with BLM's subjective conclusions is required to reverse BLM's actions or place a factual matter at issue. A decision of the State Director will not be disturbed on appeal where appellant fails to meet its burden of pointing out specific errors of law or fact in the decision below. Sierra Club, 54 IBLA 31 (1981).

Hank's Creek (NV-010-197)

Like the Rock Creek inventory unit, the Hank's Creek unit was found by BLM to lack outstanding opportunities for solitude or a primitive and unconfined type of recreation. On appeal, appellants and BLM are once again at loggerheads as to whether the diversity of recreation activities available support a finding that outstanding opportunities for a primitive and unconfined type of recreation exist. No specific error is alleged in BLM's conclusion. Our resolution above of this identical issue is equally applicable to the Hank's Creek unit and need not be set forth again.

In protest arguments, appellants maintain that the topography of this unit offers numerous areas of total seclusion and overall outstanding opportunities for solitude. Appellants describe the topography as consisting of a central range of hills and low mountains, the major drainages of Hank's Creek, and many minor drainages. Relief in the unit is in excess of 2,000 feet. BLM's protest response notes that vegetative screening is low and topographic diversity moderate. A marginal degree of seclusion is available in some isolated areas away from the main drainage, but users would congregate along Hank's Creek thus reducing the opportunities for solitude, even in the canyon, to a moderate level.

Appellants' statement of reasons includes the same arguments voiced in their appeal of the Rock Creek unit. Our resolution of these issues is identical to our discussion above. We note that any lack of support in the file for BLM's statement that users will congregate along Hank's Creek is overcome by appellants' acknowledgement that Hank's Creek is the site of good fishing, backpacking, camping, and hiking.

Granite Mountain (NV-020-436)

BLM's reasons for dropping the Granite Mountain inventory unit are succinctly set forth in its response to appellants' protest: "Overpowering outside influences (primarily from mining activity), the area's small size and erratic configuration, marginal secluded spots and isolated localities, and limited points of interest and challenge are all contributing factors which prevent the unit from offering an outstanding opportunity for solitude and primitive recreation."

Appellants' contentions on appeal, contradicting each of BLM's conclusions, ably demonstrate the highly subjective judgments which BLM is called on to make during the inventory. We first addressed this subject in the context of a wilderness case in Richard J. Leaumont, 54 IBLA 242 (1981). Therein, we said at pages 245-46:

These evaluations are necessarily subjective and judgmental. BLM's efforts are guided by established procedures and criteria, and are conducted by teams of experienced personnel who are often specialists in their respective areas of inquiry. Their findings are subjected to higher-level review before they are approved and adopted. Considerable deference must be accorded the conclusions reached by such a process, notwithstanding that such conclusions might reach a result over which reasonable men could differ. As we observed in Rosita Trujillo, 21 IBLA 289, 291 (1975):

Appellant's contentions are neither erroneous nor unreasonable. They represent only another point of view; a different side of the ongoing controversy over the identification and priority of concerns which comprise the public interest. However, where the responsibility for making such judgments has

been exercised by an officer duly delegated with the authority to do so, his action will ordinarily be affirmed in the absence of a showing of compelling reasons for modification or reversal.

No error is established by BLM's consideration of sights and sounds outside the unit's boundary. Though it is unusual to do so, BLM may consider such items during the inventory where the imprint is adjacent to the unit and its impact is so extremely imposing that it cannot be ignored, and if not considered, reasonable application of inventory guidelines would be questioned (OAD 78-61, Change 3, at 4). BLM's finding that the impact of such items would be extremely imposing is entitled to our deference. Ruskin Lines, 61 IBLA 193 (1982).

Black Rock Desert (NV-020-620P)

Subunit NV-020-620P is a parcel of 124,929 acres adjacent to the Black Rock Desert WSA. The subunit has been separated from the WSA by a way which BLM describes as a substantially unnatural imprint of man. Appellants disagree with this finding and contend that a 6- to 8-mile portion of BLM's boundary bears no noticeable imprint of man on the ground. Although the parties agree that motorists have not traditionally restricted their vehicles to one route in this portion of the boundary, BLM parts company with appellants in finding that evidence of the passage of vehicles is quite visible during late summer and early autumn when this portion of the desert is at its driest. It further maintains that numerous vehicles use this crossing, an assertion disputed by appellants.

In National Outdoor Coalition, 59 IBLA 291 (1981), this Board held that BLM's determination as to whether or not a particular intrusion was a substantially noticeable imprint of man was entitled to great deference. This determination, we said, called for a highly subjective judgment by Bureau personnel whose reports evidence first-hand knowledge of the land. Assisting BLM are comments from numerous groups whose interests span a broad spectrum. Such deference, we held, would not be overcome by simple disagreement with these subjective conclusions. There appears no reason to depart from this holding.

Of this 124,929-acre subunit, BLM found that approximately 26,000 acres were in a natural condition but lacked outstanding opportunities for solitude or a primitive and unconfined type of recreation. Appellants maintain that approximately 85,000 acres of this subunit is natural and that outstanding opportunities do, in fact, exist. Our discussion above of the deference which we grant to BLM in such subjective determinations is again applicable. 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 would point out, however, that an appellant seeking to substitute its subjective judgments for those of BLM has a particularly heavy burden to overcome this deference. Nothing proffered by appellants in their pleadings rises to this level.

Virginia Mountains (NV-030-605C, F, L, and M)

Subunits C, F, L, and M of inventory unit NV-030-605 occupy 6,315; 22,220; 21,370; and 22,840 acres respectively in Washoe county. These subunits resulted from BLM's efforts to eliminate unnatural portions of land from the unit as a whole. The issue posed by appellants is once again whether outstanding opportunities for solitude or a primitive and unconfined type of recreation exists in these subunits.

BLM's protest response went to considerable length to describe the standards it uses to determine whether outstanding opportunities exist in a unit. We believe BLM has correctly applied the standards set forth in the WIH and affirm its findings. Set forth below is a portion of BLM's protest response which we quote with approval. The following discussion is applicable to the remaining units on appeal and is intended to apply to them without the need for repetition:

Whether or not an area contains outstanding opportunities for solitude * * * [or] a primitive and unconfined type of recreation is a difficult determination to make. It requires judgment and, in many respects, is a subjective evaluation. Each inventory report analyzed several factors or elements influencing solitude; the size and configuration of the area, topographic and vegetative screening, and the ability of the visitor to find a secluded spot. It was a combination of these and similar elements upon which an overall solitude determination was made. During the intensive inventory, these factors were considered only as they affect a person's opportunity to avoid the sights, sounds, and evidence of other people within the inventory unit.

* * * * *

We did not assume that simply because a portion of a unit was narrow or unvegetated, it automatically lacked an outstanding opportunity for solitude. Neither did we conclude that simply because a unit or sub-unit was relatively small, it did not have an outstanding opportunity for solitude. Consideration was given to the interrelationship between size, screening, configuration, and other factors that influence solitude. All of these factors exist in the protected units, but not to the degree where their interrelationships combine to provide outstanding solitude opportunities. * * *

* * * * *

While an outstanding opportunity for primitive and unconfined recreation can exist through a diversity in the number of activities possible in a unit, we do not believe that either the quality of the available activities or the number of these activities in the protested units is sufficient to justify stating that an outstanding opportunity is present due to a diversity of primitive recreation pursuits.

Goshute Canyon (NV-040-015B)

Subunit B is a parcel of approximately 64,000 acres to the north of unit NV-040-015. This parcel is separated from unit NV-040-015, a designated WSA, along a roadless corridor some 2 miles in length. Appellants charge error in BLM's separation of subunit B from the WSA, arguing that the boundary is artificial and unwarranted. The effect of this separation is to require BLM to evaluate the wilderness characteristics of subunit B independently of the Goshute Canyon WSA (NV-040-015). So evaluated, BLM found that subunit B lacked outstanding opportunities for solitude or a primitive and unconfined type of recreation.

In response to appellants' charge, the State Director notes that all but 400 or 500 feet of this 2-mile boundary is a way that causes a very significant intrusion in the area. OAD 78-61, Change 3, states:

As a general rule, the boundary of a unit is to be determined based on [an] evaluation of the imprints of man within the unit, and should not be further constricted on the basis of [an] opportunity for solitude or primitive and unconfined recreation. A unit is not to be disqualified on the basis that an outstanding opportunity exists only in a portion of the unit.

(OAD at 3).

There apparently is no imprint of man along a 400- or 500-foot portion of the boundary between subunit B and the Goshute Canyon WSA. To reverse BLM's action closing the boundary along this 400- or 500-foot span, however, is to cause the acreage of the subunit to be joined with the acreage of the WSA. Because BLM found that outstanding opportunities for solitude or a primitive and unconfined type of recreation were lacking in the subunit, the effect of the addition of this acreage to the WSA is to designate for study lands acknowledged by BLM to be unfit for study. Such an action is wholly contrary to the wilderness review process established by section 603 of FLPMA. Though appellants maintain that only the natural portions of the subunit would be studied (approximately 20,000 acres out of 64,000 acres), we believe that BLM has acted prudently in drawing the boundary between the subunit and the WSA along this 400- or 500-foot span.

South Fish Creek (NV-060-461)

The South Fish Creek unit was evaluated by BLM for outstanding opportunities after some 40,000 acres lacking in naturalness had been excluded from the unit. Appellants maintain that the bulk of this acreage was, in fact, in a natural condition and that BLM further erred in finding that outstanding opportunities for solitude or a primitive and unconfined type of recreation were lacking in the 59,955-acre remainder.

The gist of appellants' first charge is that BLM excluded needlessly large areas of land from the unit upon finding minor intrusions of man near

the original unit boundary. Minor boundary changes would have been sufficient, appellants contend, to remove whatever substantially noticeable imprints of man existed. In response, the State Director notes that the cumulative impact of the manmade intrusions in the northwest and southwest 2/ portions of the unit has created areas that fail to meet the naturalness criteria. These portions are roughly 3 to 4 miles wide, and several intrusions penetrate from 1 to 3-1/2 miles into these portions. While the State Director states that natural lands between individual imprints were not automatically excluded, there is no denying that lands bearing no significant imprint of man have been excluded as lacking in naturalness.

The apparent justification for the State Director's action is his finding that substantial imprints either occur or are visible throughout much of the areas. Hence these portions are said to have lost their primeval character.

[4] Though it is uncommon for BLM to exclude substantial areas of land based on multiple impacts, we cannot say that BLM has acted contrary to section 603 of FLPMA or established Department policy. OAD 78-61, Change 2, broadly suggests that a close group of even minor impacts may be excluded from a unit along with intervening land:

Minor imprints of man must be evaluated as to whether individually they are substantially unnoticeable in the overall unit. Such minor imprints must also be evaluated as to their cumulative effect on an overall unit, both in connection with major imprints or by themselves.

Boundary adjustments are not appropriate for individual, minor imprints which are determined to be substantially unnoticeable. Careful judgment must be used in deciding if close groupings of minor imprints and how much intervening land are appropriate for exclusion from a unit. [sic] * * *

* * * * *

When multiple imprints of man are considered to be substantially noticeable and the decision has been made to eliminate a group of those intrusions from the unit, caution must be used in relocating the boundary. Natural portions of the unit which are located between the individual imprints of man must not be automatically excluded. This would depend on the proximity of the individual imprints, their overall cumulative impacts, the kind of impact and severity. [Emphasis supplied.]

(OAD at 5).

2/ Maps in this case file place these intrusions on the northwest and southeast portions of the unit.

Appellants take exception to the State Director's finding that substantial impacts occur or are visible throughout much of the area. They point out that the northwest subunit is composed largely of rugged, parallel drainages and high ridges, such that intrusions in one drainage are not visible from adjacent drainages. As we held in Natural Outdoor Coalition, supra, whether or not an area possesses the quality of naturalness calls for a highly subjective judgment by BLM. This judgment has been entrusted to BLM personnel who, in response to appellants' protest, performed a second evaluation of the unit both on the ground and from the air. Though reasonable men may differ on the conclusions reached by BLM, we perceive no error in BLM's evaluation of this unit.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the protest response 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

