

KENNECOTT CORP.

IBLA 81-810

Decided August 17, 1982

Appeal from decision of Arizona State Director, Bureau of Land Management, denying the protest of the designation of inventory unit AZ 2-187 as a wilderness study area.

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 BLM 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

BLM's practice of designating lands occupied by roads or other intrusions as non-wilderness 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.

3. Federal Land Policy and Management Act of 1976:  
Wilderness--Rules of Practice: Appeals: Generally

Where the definition of "road," utilized in the Wilderness Inventory Handbook, cannot be said to be contrary to the

statutory language of legislative intent manifested in sec. 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782 (1976), decisions employing such definition will not be set aside on appeal unless it can be shown that it was applied improperly.

4. Administrative Procedure: Adjudication--Administrative Procedure: Administrative Review--Appeals--Federal Land Policy and Management Act of 1976: Inventory and Identification--Federal Land Policy and Management Act of 1976: Wilderness--Wilderness Act

The extent to which ongoing activities outside of a wilderness study area are impinging upon adjacent areas inside a wilderness study area so as to deprive them of wilderness characteristics is properly the subject of determination during the inventory process of the wilderness program; the effect of future or potential activities is properly analyzed in the study phase.

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

Where the record evinces 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 as to whether an inventory unit possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation are entitled to considerable deference.

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

BLM's practice of examining the mineral potential in the study phase of the wilderness review process, rather than the inventory phase, does not violate sec. 603 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(c) (1976).

7. Administrative Procedure: Administrative Procedure Act--Federal Land Policy and Management Act of 1976: Wilderness

Sec. 310 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1740 (1976), does not require that the policy and procedures of the Wilderness Inventory Handbook be promulgated as rules and regulations pursuant to sec. 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976).

APPEARANCES: Douglas K. Miller, Esq., Phoenix, Arizona, for appellant; Dale Goble, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Kennecott Corporation appeals from a decision of the Arizona State Director, Bureau of Land Management (BLM), dated March 12, 1981, denying its protest of the designation of inventory unit AZ 2-187 as a wilderness study area (WSA). A list of those lands designated as WSA's appeared in the Federal Register on November 14, 1980, at 45 FR 75577.

The State Director's action establishing 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.

Appellant raises the following issues in its statement of reasons filed May 11, 1981:

1. Whether BLM violated the procedures applicable to the wilderness inventory process by first removing from the proposed wilderness study area, then reincluding, a substantial portion of Unit 2-187.

2. Whether the Director incorrectly found Unit 2-187 to be natural and failed fully to recognize existing roads.

3. Whether the Director erred in finding that Unit 2-187 provides an outstanding opportunity for solitude or primitive and unconfined recreation.

4. Whether the Director's failure to consider the mineral potential of Unit 2-187 is unreasonable or in violation of the Federal Land Policy and Management Act.

5. Whether the wilderness inventory is void for failure to promulgate regulations governing the inventory process as required by the Federal Land Policy Management Act and the Federal Administrative Procedure Act.

6. Whether the Interior Department's wilderness inventory and interim management policy are contrary to FLPMA (the Federal Land Policy and Management Act).

BLM responded to these arguments in its answer filed December 11, 1981. <sup>1/</sup>

We do not find that BLM violated the procedures applicable to the wilderness inventory process by first removing from the proposed WSA, then reincluding, a substantial portion of the unit. On the contrary, we find

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<sup>1/</sup> The Department counsel on behalf of BLM moved this Board for an extension of time in which to file an answer to appellant's statement of reasons. The motion was granted, but near the expiration of the extended period counsel filed a second motion for extension which was not acted upon by the Board. Appellant, on Dec. 11, 1981, filed a response in opposition to the allowance of any further extension. Coincidentally, on that same date BLM's answer was filed. Although the answer was tardy, and therefore subject to being disregarded, the pleading may be received and considered at the discretion of the Board. As it appears that the procedural discrepancy has not operated to the prejudice of appellant, the answer will be received as though filed timely.

that such a change reflects concern for proper application of the guidelines set forth in the Wilderness Inventory Handbook (WIH) issued by BLM on September 27, 1978. <sup>2/</sup> These guidelines provide for public involvement at all stages of the process with opportunity for comment, participation and review (WIH at 5). Specifically, the WIH states that the intensive inventory phase of the wilderness review process shall require the greatest possible public involvement throughout, including direct participation in inventories, meetings, mailings, etc. The purpose of this participation is to obtain information necessary to make a determination as to whether a unit (all or part) meets the criteria for a WSA (WIH at 11). Obviously, there would be no need for such participation during this phase if no changes could be made as a result of public comment following the initial inventory.

Appellant's second contention centers on whether or not unit 2-187 meets the naturalness criterion of a WSA. In its protest, appellant referred to "roads" maintained and used by appellant for access to mining claims for the purpose of drilling, surveying claims and maintaining claim monuments, establishing survey networks, performing geologic mapping, and conducting geophysical tests. Appellant identified these "roads" on maps and described and documented road construction, road maintenance, and drilling activities within and adjacent to the WSA since 1970.

In its response to appellant's protest dated March 12, 1981, BLM commented on the "roads" as follows:

Information provided during the intensive inventory comment period, including invoices for maintenance, related that some routes in question had been improved by mechanical means on one or more occasions. After careful field review we contended that these routes did not appear to be maintained for relatively regular and continuous use. This contention was corroborated by your own information that these routes, (primarily "n") were bladed on two occasions to access drill sites. The one-time use of a drill site does not imply relatively regular and continuous use.

The protest letter, however, does provide ample additional information regarding the use of the drill site for "access to mining claims for purposes other than drilling, such as surveying claims, maintaining claim monuments, establishing survey networks, mapping geology, and conducting geophysical tests." The protest thus implies that these routes have been maintained for relatively regular and continuous use. Therefore, these routes should be considered roads and the unit boundary redrawn to exclude them. A boundary adjustment has been made. The new boundary omits 700 acres.

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<sup>2/</sup> This handbook is Organic Act Directive 78-61.

On appeal, appellant contends that the Director should also have excluded another road, which it describes and identifies on a map, <sup>3/</sup> and the area south of it, for the same reasons he made the other exclusions.

[1] The significance of appellant's allegation that certain routes have been improved and maintained by mechanical means is to be found in the WIH. Therein, BLM quoted from H.R. Rep. No. 94-1163 at page 17, which sets forth the definition of a road adopted by BLM: "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." Additional guidance has been provided by BLM in Organic Act Directive (OAD) 78-61, Change 2, in response to the question whether a route is a road if it has been improved to insure relatively regular and continuous use but has not required maintenance as yet. Therein, BLM replies that improvements and relatively regular use would be an indication that the road would be maintained if the need were to arise.

Although appellant's protest did contain allegations relating to the fact that the route had been improved and maintained by mechanical means, its contentions on appeal do not respond to the statements made in BLM's decision. In particular, appellant does not even address BLM's statement that after careful field review, BLM contended that the routes in question did not appear to be maintained for relatively regular and continuous use. Appellant only asserts that yet another route should have been excluded. We have no reason to believe that this field check did not include the route to which appellant refers on appeal. Appellant does not show any specific error in BLM's decision, only disagreement with it. BLM's decision will be affirmed when appellant fails to meet its burden of pointing out specific errors of law or fact in the decision below. Gilbert W. Daily, 62 IBLA 223 (1982); Sierra Club, 54 IBLA 37 (1981).

[2] Appellant contends that areas which contain cherrystemmed roads are not "roadless" areas within the meaning of section 603(a) of FLPMA. The focus of this argument is BLM's cherrystemming practice whereby BLM designates 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 an intrusion by BLM so as to exclude it from the area being considered for wilderness values.

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

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<sup>3/</sup> Appellant describes this "road" as follows:

"[T]hat route which departs from the road forming the eastern boundary of Unit 2-187 at the southeast one-quarter of the northwest one-quarter of Section 26, Township 3 South, Range 12 East, and travels west a distance of approximately 0.3 miles where it joins route '1' in the southwest one-quarter of the northeast one-quarter of Section 27, Township 3 South, Range 12 East."

recognizing nonwilderness corridors occupied by roads or other manmade intrusions. Though the boundaries of a WSA "containing" a nonwilderness corridor might be irregular as a result of such corridors, we agreed with BLM that section 603(a) did not specify any particular shape for an area that may eventually be recommended for wilderness preservation. This decision has been followed in several subsequent cases, none of which are materially different from the case on appeal. See, e.g., Asarco, Inc., 64 IBLA 50 (1982); State of Nevada, 62 IBLA 153 (1982); and C & K Petroleum Co., 59 IBLA 301 (1981).

[3] Appellant asserts that the Director, applying the definition of roadless in the WIH, supra, included within the WSA routes which, in normal understanding, would be considered roads. Appellant contends that the Department's definition of "roadless" is invalid to the extent that it conflicts with the commonly understood meaning of the word. The definition of road utilized in the WIH is taken from the legislative history of FLPMA. See H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976). The definition was included in the report at the urging of Congressman Steiger of Arizona who wished to differentiate "ways" created by the mere passage of vehicular traffic, from roads which were maintained and improved by various mechanical means. 4/

It is impossible for us to find that the definition of "road" set forth in the WIH, and utilized herein, is contrary to the legislative intent of Congress or to the specific terms of FLPMA. Decisions employing this definition will not be set aside on appeal unless it can be shown that it was improperly applied. California State Lands Commission, 58 IBLA 213 (1981). Appellant has made no such showing.

Next, appellant contends that the Director erred in finding that AZ 2-187 provides an outstanding opportunity for solitude or primitive and unconfined recreation. Appellant argues that existing and future mineral development in nearby areas does and will substantially diminish opportunities for solitude and unconfined recreation. Appellant explains that it has an existing open pit mine at Ray, located barely 2 miles from the WSA; that a preliminary mining plan has been developed for the Copper Butte ore body, located outside the WSA, with mining operations scheduled to commence as the silicate ore at the Ray mine is depleted; and that drilling at the Buckeye deposit, also located outside the WSA, indicates sufficient tonnage and grade of ore to eventually develop a mine. Appellant states that OAD No. 78-61, Change 3, at page 4 (July 12, 1979), suggests that imprints of man outside an inventory unit should be considered if they are so extremely imposing that they cannot be ignored. Appellant asserts that the kind of development it describes meets this criterion.

Besides mineral exploration and planned mining operations within the area immediately adjacent to AZ 2-187, appellant listed other activities which do or will detract from the naturalness and solitude demanded by the wilderness definition. These activities include the Southern Pacific Railway Line which is visible from the southern portion of the area; blasting operations from the Ray open pit mine can be heard in the WSA; the copper mine and

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4/ See Transcript of Proceedings, Subcommittee on Public Lands of the House Committee on Interior and Insular Affairs, Sept. 22, 1975, at 329-33.

waste dump at Ray, which are located little more than 2 miles from the WSA, and the smelter stacks at Hayden, which can be observed from the upper elevations of the northern portion of the WSA.

[4] The fact that sights and sounds of activities allegedly intrude into the unit does not preclude designation of the unit as a WSA. In this regard, OAD 78-61, Change 3 at page 4 (July 12, 1979), states:

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 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.]

The extent that ongoing mining activities are impinging upon adjacent areas so as to deprive them of wilderness characteristics is properly the subject of determination during the inventory process. The extent, however, that future mining activities might adversely affect adjacent areas is properly a matter for analysis during the study phase. Union Oil Co. (On Reconsideration), 58 IBLA 166, 170 (1981).

With the exception of the present mining operations at the Ray mine, the mining activities to which appellant refers are future activities and will be appropriately considered during the study phase. Responding to appellant's arguments concerning the present activities at Ray mine and other outside impacts, BLM stated in its Final Decision Report of November 1980, that these outside impacts are mitigated by the unit's extreme terrain, isolation, and distance from the impacts.

In its narrative in the intensive inventory findings, BLM stated that the unit offers an outstanding opportunity for solitude. BLM explained that the complexity and the topographic and vegetative screening provide the visitor with opportunities to avoid the sights, sounds, and evidence of other people in the unit. BLM also found that there are outstanding opportunities for several forms of primitive recreation within the area including hiking, backpacking, horseback riding, botanical and zoological sightseeing, and photography.

[5] BLM's determination of the presence of outstanding opportunities calls for a highly subjective judgment on its part. Because of its expertise gained from its firsthand knowledge of the lands and the comments of interested persons, we believe that BLM's judgment is entitled to considerable deference. By this statement, we do not mean to imply that BLM's determination is immune from review. To the contrary, BLM's documentation for its

judgment has been carefully studied, as will the documentation of an appellant. An appellant does, however, have a particularly heavy burden to support a reversal of BLM's subjective conclusions. We cannot say that appellant has met this burden on the issue of the unit's outstanding opportunities for solitude or a primitive and unconfined type of recreation. Asarco, Inc., supra; Conoco, Inc., 61 IBLA 23 (1981).

Appellant contends that the Director's failure to consider the mineral potential of AZ 2-187 in determining whether to designate the unit as a WSA is unreasonable and violates section 603 of FLPMA, 43 U.S.C. § 1782 (1976). Appellant asserts that where it is shown during the inventory process that a particular area has a high potential for mineral development, the area should be excluded from further wilderness study at an early stage rather than delaying consideration of mineral values until the extensive mineral surveys envisioned by section 603(a) of FLPMA are conducted. Appellant urges that early consideration of mineral potential is important because, under current BLM policies and regulations, designation of a WSA effectively withdraws such areas from mineral exploration and development, except to the extent that they can be shown not to exceed "the manner and degree" of the activities that existed on October 21, 1976, the date FLPMA was approved. 5/

[6] In considering the issue of when the mineral potential of a unit should be examined, it is important to stress the distinctions between nature and aims of the inventory phase as distinct from the study phase. The inventory phase was designed to determine and demarcate those areas of the public lands which were possessed of the wilderness criteria established by Congress. Upon the determination that such characteristics are present (or could, in certain circumstances, be developed by natural forces or manual means), the areas are to be designated as WSA's, which are then to be studied for possible inclusion in the wilderness system.

During the study phase, BLM will endeavor to analyze the suitability of each WSA for wilderness designation in conjunction with a whole range of other public land uses that Congress has authorized. Thus, the mineral potential of any tract is to be examined in the study phase to determine the impact that a permanent wilderness designation might have on such values. This analysis is not limited only to mineral values, but embraces the full range of public uses, including grazing and recreational use, with an aim to determining the relative merits of a specific parcel's inclusion in the wilderness system. Indeed, the entire purpose of this study phase is the generation of data sufficient to make informed choices between competing claims to the land. Union Oil Co. (On Reconsideration), supra at 170.

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5/ Appellant contends that BLM's policies and regulations are contrary to section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1976), which states that "[u]nless previously withdrawn from appropriation under the mining laws, [lands under wilderness review] shall continue to be subject to such appropriation [under the mining laws] during the period of review unless withdrawn by the Secretary under the procedures of Section 204 of this Act for reasons other than preservation of their wilderness character." (Emphasis supplied).

Appellant's argument echoes that of the Cotter Corporation in Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979). Therein at page 1,003, Judge Anderson addressed the merits of this argument:

Cotter contends that BLM must take all potential values into account when it designates an area as a WSA. The statute, however, envisions a dynamic process, not a static one-time-only decision. FLPMA is addressed in part to solving the problem of the lack of a comprehensive plan for the use, preservation and disposal of public lands. The purpose of the inventory and the wilderness review is to enable BLM to ascertain the character of the lands within its jurisdiction, and the best use to which particular portions of land can be put--given such things as wilderness characteristics, mineral values, and the nation's needs for recreation, energy, etc. BLM is entitled to address this problem one step at a time. [Citations omitted; emphasis in original.]

\*\*\* BLM is not required to immediately balance the mineral values against the wilderness values of a particular piece of land prior to designating the land a WSA. BLM may, consistent with FLPMA, look first at potential wilderness characteristics and then proceed to study the area for all its potential uses prior to formulating its final recommendations to the Executive. [Emphasis added.]

In Petroleum Inc., 61 IBLA 139 (1982), this Board reached a result consistent with that of Judge Anderson. Therein at 142, we noted that the concern of appellant 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 this phase, BLM will consider all values, resources, and uses of the lands considered for wilderness preservation. This same statement is equally appropriate in the instant appeal. No argument presented by appellant in its statement of reasons compels a different result.

[7] Appellant contended in his protest that the policy and procedures of the WIH and the additional guidelines and policies used by the Director in the wilderness process are invalid for failure to comply with section 310 of FLPMA, 43 U.S.C. § 1740 (1976), and section 4 of the Administrative Procedure Act, 5 U.S.C. § 553 (1976). In response to appellant's protest, the Director stated that policies and procedures of the WIH are exempt from the requirement that they be promulgated as formal regulations because they are designed for "internal management purposes" and are within the exception of section 4(a) of the APA which provides: "Except when notice or hearing is required by statute, this subsection does not apply -- (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; . . . 5 U.S.C. § 553(b)(3)(A)."

On appeal, appellant asserts that this exception is not applicable because section 310 of FLPMA states: "The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands \*\*\*. (Emphasis added.) Appellant argues that this section requires that all

policies and procedures used by the Secretary in carrying out his responsibilities under FLPMA shall be promulgated as rules and regulations. Appellant contends that the statement in section 310 that "[t]he promulgation of such rules and regulations shall be governed by the provisions of [the Administrative Procedures Act]" does not carve out an exception to this mandate but means that in promulgating regulations, the procedures of the APA shall be observed.

In its answering brief BLM properly points out that appellant's argument is contrary to congressional guidance. BLM refers to the legislative history for section 310 which states: "The Secretaries of the Interior and of Agriculture are authorized to promulgate rulemaking provisions of the [APA]." (Emphasis added). H. R. Rep. No. 1163, 94th Cong., 2d Sess. 16-17 (1976) reprinted in Senate Comm. on Energy and Resources, 95th Cong., 2d Sess., Legislative History of the Federal Land Policy and Management Act of 1976, 431, 446-47 (Comm. Print 1978). BLM argues that Congress clearly recognized the discretion accorded to the Secretary under existing case law and indicated that all of the APA was applicable. Based on the legislative history of FLPMA we find BLM has discretion as to whether or not to promulgate certain policies and procedures by formal rule and that the exception in the APA, that such policies and procedures need not be promulgated as regulations, is applicable. 5 U.S.C. § 553(a) (1976).

Finally, appellant contends that the Department's Wilderness Inventory Review and Interim Management Policy are contrary to FLPMA and void. Appellant has made no showing that it has been affected by an interim management plan, and therefore, we find that this issue is not ripe for review.

The decision to designate an area as a WSA will be affirmed in the absence of compelling reasons for modification or reversal. The burden of showing error is on one challenging the decision. Richard J. Leaumont, 54 IBLA 242, 88 I.D. 490 (1981); Sierra Club, 54 IBLA 31 (1981). In the present case, appellant has failed to offer compelling reasons for disturbing the State Director's assessment of the wilderness characteristics of the unit. It has not shown that he failed to consider adequately all of the factors involved. Tri-County Cattlemen's Association, 60 IBLA 305 (1981).

Therefore, 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.

Edward W. Stuebing  
Administrative Judge

We concur:

Anne Poindexter Lewis  
Administrative Judge

Gail M. Frazier  
Administrative Judge

