

SQUARE BUTTE GRAZING ASSOCIATION

IBLA 81-607

Decided September 7, 1982

Appeal from a decision of the Montana State Director, Bureau of Land Management, denying the protest of the designation of inventory units MT-065-266 and MT-066-256 as wilderness study areas. 8500 (931)

Affirmed in part; reversed in part; set aside and remanded in part.

1. 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.

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

Sec. 2(c) of the Wilderness Act of Sept. 3, 1964, 16 U.S.C. § 1131(c) (1976), requires, inter alia, that an area designated for wilderness preservation generally appear to have been affected primarily by the forces of nature with the imprint of man's work substantially unnoticeable. The underscored language, taken verbatim from the statute, is ample support for the proposition that a

wilderness study area (WSA) need not be free of all intrusions.

3. 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.

APPEARANCES: Russell Lafond, secretary, Square Butte Grazing Association, Big Timber, Montana; Dale D. Goble, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The Square Butte Grazing Association, by Russell Lafond, secretary, appeals from a decision of the Montana State Director, Bureau of Land Management (BLM), dated March 13, 1981, denying its protest of the designation of inventory units MT-065-266 and MT-066-256 as wilderness study areas (WSA's).

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(a) (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.

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.

Unit MT-065-266, known as Antelope Creek, consists of approximately 21,500 acres of land of which 9,400 acres have been designated a WSA by BLM. In its protest, appellant identified a road passing through secs. 28 and 33, T. 23 N., R. 23 E., Principal meridian, and described this road as well traveled with noticeable vehicle scars. BLM acknowledged the presence of this road in its protest response and explained that it formed part of the eastern boundary of the WSA. Appellant does not pursue this issue further in its appeal.

[1] BLM's use of this road as part of the WSA boundary is not improper. The effect of this action, however, is to cut off some 2,340 acres east of this boundary from the WSA. Though BLM's narrative summary states that these 2,340 acres will receive further wilderness review by virtue of their contiguity with the Charles M. Russell National Wildlife Refuge WSA, recommended by the Fish and Wildlife Service, such further review is not authorized by section 603(a) of FLPMA. In Tri-County Cattlemen's Association, 60 IBLA 305 (1981), this Board held that section 603(a) limited wilderness review to areas of 5,000 acres or more (or roadless islands), even though the area might be contiguous to a parcel under wilderness review by an agency other than BLM. Although the 2,340-acre area may not be designated a WSA under section 603(a), Tri-County points out that BLM is not precluded from managing this area in a manner consistent with wilderness objectives. See also State of Nevada, 63 IBLA 153, 157 (1982).

BLM's protest response addressing the Antelope Creek unit is affirmed; its decision to study the aforementioned 2,340-acre parcel under section 603(a) is reversed.

Unit MT-066-256, known as the Cow Creek unit, borders the Antelope Creek unit in T. 23 N., R. 22 E., Principal meridian. In BLM's announcement of final intensive inventory decisions on November 14, 1980, 45 FR 75589, 36,200 acres of the Cow Creek inventory unit were designated a WSA and 34,913 acres were dropped from further wilderness review. Appellant's protest of the WSA designation was denied in substantial part by the State

Director's decision of March 13, 1981. Appellant's statement of reasons is almost identical to its protest and consists of a list of intrusions in the WSA that appellant believes disqualify the unit from further wilderness review.

Appellant's list is composed of vehicle routes and other intrusions such as dams, fences, well sites, remains of a cabin, two barns, corrals, sheds, hay bunks, and troughs. In its protest response, BLM acknowledged the "site specific disturbances from the reservoirs, dry gas wells, fences, old homesites, and vehicular ways" in the unit, but concluded that their overall effect did not preclude the area from possessing naturalness and receiving further wilderness review. BLM cited the size of the unit and its topographic and vegetative screening in support of its conclusion.

[2] Essential to an understanding of BLM's conclusion is the definition of naturalness set forth in section 2(c) of the Wilderness Act, quoted above as 16 U.S.C. § 1131(c) (1976). That section requires that a wilderness area generally appear to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable, inter alia. The underscored language, taken verbatim from section 2(c), is ample support for the proposition that a WSA need not be free of all intrusions.

H.R. Rep. No. 540, 95th Cong., 1st Sess. 6-7 (1977), provides further guidance for understanding the concept of naturalness. This report, prepared to accompany H.R. 3454, a bill later enacted as the Endangered American Wilderness Act, 16 U.S.C. § 1132 (Supp. II 1978), contains examples of impacts on naturalness that may be allowed in certain cases in a wilderness area. Among these are: Trails, trail signs, bridges, fire towers, firebreaks, fire suppression facilities, pit toilets, fisheries enhancement facilities, fire rings, hitching posts, snow gauges, water quantity and quality measuring devices, and other scientific devices. Based on this guidance, BLM published a list of intrusions on the public lands that, it found, could be allowed in a wilderness area. These include research monitoring markers and devices, air quality monitoring devices, fencing, and spring development. Wilderness Inventory Handbook at 12-13 (Sept. 27, 1978).

The question whether an inventory unit possesses naturalness calls upon BLM to make a highly subjective judgment. This judgment is entrusted to Bureau personnel whose reports evidence firsthand knowledge of the land. Assisting BLM are comments from numerous groups and individuals whose interests span a broad spectrum. BLM's judgment in such matters, we feel, is entitled to considerable deference. Such deference will not be overcome by an appellant expressing simple disagreement with subjective conclusions of BLM. This is not to suggest that we have abandoned our review of subjective wilderness judgments. We do mean to suggest, however, that an appellant seeking to substitute its subjective judgments for those of BLM has a particularly heavy burden to overcome the deference we accord to BLM in such matters. C & K Petroleum Co., 59 IBLA 301 (1981); National Outdoor Coalition, 59 IBLA 291 (1981); Richard J. Leaumont, 54 IBLA 242, 88 I.D. 490 (1981). Appellant's submissions on appeal do not rise to this level.

[3] Appellant's protest allegation that roads exist within the WSA was consistently answered by BLM's statement that such roads were in fact vehicle ways of minor impact. The distinction is important on appeal because section 603(a) of FLPMA directs the Secretary to review roadless areas for wilderness characteristics, but does not prohibit vehicle routes other than roads from remaining in a WSA. 1/ In determining whether a particular vehicle route is a road or a way, BLM has relied upon a definition of the term "roadless" set forth in H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976). 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."

In secs. 7, 18, 19, 30, 31, T. 25 N., R. 22 E., and sec. 7, T. 24 N., R. 22 E., appellant alleges the existence of a BLM road built with caterpillars and road graders and repaired in 1975 or 1976 by BLM with the use of caterpillars and road graders. This road is said to traverse Hay Coulee, Squaw Creek, Cow Creek, and Cabin Coulee. Appellant states that the road is used for fence maintenance and repair, livestock surveillance and management, and for hunting.

BLM acknowledged that part of this vehicle route was indeed a road and, accordingly, cherrystemmed that part of it in secs. 7, 8, 19, and the northernmost portion of sec. 30. It found, however, that beyond this cherrystemmed length the road was no more than an old trail continuing into Squaw Creek. This trail, BLM stated, has not been maintained and does not receive regular use.

Appellant's statement that the subject route is a BLM road constructed by mechanical means and maintained by BLM by mechanical means indicates that the resolution of this issue is within the knowledge of BLM and appellant. BLM's protest response is, accordingly, set aside as to this issue for preparation of a new protest response addressing this disputed vehicle route. Inasmuch as appellant and BLM disagree primarily on the issue of maintenance, BLM is directed to review its records to determine whether all or any part of this route has been maintained by mechanical means. 2/ If all or part of this route has been maintained by mechanical means, BLM shall identify this length and state when maintenance was last performed mechanically and by whom. BLM shall also respond to appellant's statement that BLM performed mechanical maintenance on this route in 1975 or 1976. Justification for the

1/ If a vehicle route other than a road as, e.g., a way, were found by BLM to be a substantially noticeable imprint of man, Organic Act Directive (OAD) 78-61, Change 2, requires BLM to consider adjusting the unit's boundary to exclude this imprint of man.

2/ Worksheet A, found in BLM's Cow Creek inventory file, indicates that the route traversing secs. 7, 18, 19, and 30 has been improved but has not been maintained. Absent information demonstrating that maintenance is unnecessary, Sierra Club, 62 IBLA 367, 369 (1982), a finding of mechanical maintenance is necessary to characterize a vehicle route as a road. Worksheet A appears to contradict BLM's characterization of part of this route as road.

cherrystemming of any route, or portion thereof, shall be clearly set forth. If part of a route satisfies BLM's "road" definition but another part lacks an essential element of the definition, only that part satisfying each element of the definition qualifies as a road. BLM may properly cherrystem such part. National Outdoor Coalition, *supra*; *see also* Sierra Club, *supra*, for a discussion of roads on which maintenance is shown to be unnecessary.

BLM's protest response shall provide a right of appeal to appellant. This protest response will not be disturbed on appeal if appellant fails to meet its burden of pointing out specific errors of law or fact in BLM's decision, Sierra Club, 54 IBLA 31, 37 (1981).

A second dispute focusing again on the issue of maintenance occurs over a vehicle route traversing secs. 14, 15, 22, 27, 34, T. 24 N., R. 22 E., and secs. 3 and 4, T. 23 N., R. 22 E. BLM acknowledged that this route was a road up to a reservoir in sec. 27; beyond this point, BLM found, the route failed to meet the road definition criteria. ^{3/} Appellant alleges that this route was made by a caterpillar and is well maintained. Appellant adds that this route has been used as a fire control road by trucks and heavy equipment and receives present use.

To allow the parties to readdress the question whether this route is a road or a way, we set aside BLM's protest response on this issue and remand the file for BLM's preparation of a protest response addressing this disputed vehicle route. BLM shall support its decision to cherrystem all or any part of the disputed route by careful reference to the road definition used herein. It shall respond to the allegation that this route is constructed and maintained mechanically. Its protest response shall provide for a right of appeal to appellant. Any appeal taken by appellant must take into consideration the following language from Conoco, Inc., 61 IBLA 23, 35 (1981): "In the absence of specific allegations setting forth who improved and maintains a vehicle route by mechanical means and when such activities occurred, we believe that BLM's determination that a vehicle route does or does not meet the definition of a road is entitled to great deference."

The remaining allegations of roads within the Cow Creek unit are lacking in at least one essential element of the road definition. Consistent with our holding above in Conoco, Inc., *supra*, we believe that BLM's characterization of the remaining vehicle routes as ways is entitled to our deference.

^{3/} Worksheet A, found in BLM's Cow Creek inventory file, indicates that the route traversing secs. 14, 15, 22, and 27 has been improved but has not been maintained. Absent information demonstrating that maintenance is unnecessary, Sierra Club, 62 IBLA 367, 369 (1982), a finding of mechanical maintenance is necessary to characterize a vehicle route as a road. Worksheet A appears to contradict BLM's characterization of this route as a road through the reservoir in sec. 27.

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

Anne Poindexter Lewis
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge

