

Editor's note: Reconsideration denied by order dated March 17, 1983

COLORADO RIVER WATER CONSERVATION DISTRICT

IBLA 81-451

Decided September 28, 1982

Appeal from a decision of the Acting State Director, Colorado State Office, Bureau of Land Management, denying protest of the designation of the Cross Mountain Unit as a wilderness study area. CO-010-230.

Affirmed.

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

"Public Lands." Lands within a powersite withdrawal do not cease being "public lands" by virtue of such withdrawal and continue to remain subject to BLM's wilderness inventory process under the Federal Land Policy and Management Act of 1976, secs. 103(e) and 603(a).

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

"Roadless." H.R. Rep. No. 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.

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 judgments of the area's naturalness, opportunities for solitude, or opportunities for primitive and unconfined recreation, are entitled to considerable deference.

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

An appellant seeking reversal of a decision to include land in a wilderness study area must show that the decision appealed from was premised on either a clear error of law or a demonstrable error of fact.

APPEARANCES: Kenneth Balcomb, Esq., Glenwood Springs, Colorado, Robert L. McCarty, Esq., Dennis P. Donnelly, Esq., Washington, D.C., for appellant; Paul B. Smyth, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

The Colorado River Water Conservation District has appealed from a decision dated February 2, 1981, of the Acting Colorado State Director, Bureau of Land Management (BLM), denying a protest to the designation of the Cross Mountain Unit as a wilderness study area (WSA). CO-010-230. The designation was published in the Federal Register, 45 FR 75584 (Nov. 14, 1980).

The Acting State Director's designation of 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 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 Acting State Director's announcement of designated wilderness study areas marks the end of the inventory phase of the review process and the beginning of the study phase.

Appellant presents several arguments on appeal in opposition to the designation of the Cross Mountain Unit (CO-010-230) as a WSA. The first argument asserts that BLM may not designate as a WSA lands embraced in a previous powersite withdrawal. The record reveals that a portion of the lands in the unit were included in powersite withdrawal No. 121 of 1910. In February 1977, appellant was issued a 3-year preliminary permit for a hydroelectric project by the Federal Power Commission, now the Federal Energy Regulatory Commission (FERC). 1/

In the decision appealed, the Acting State Director held that a wilderness inventory and study must be completed on all "public lands" as defined in section 103(e) of FLPMA, 43 U.S.C. § 1702(e) (1976). 2/ He stated that

1/ As of Apr. 16, 1981, the application for a license for the project (Cross Mountain Project No. 2757) was pending before FERC (Appellant's memorandum for support of appeal at 2). The scope of a preliminary permit is described in 16 U.S.C. § 798 (1976):

"Each preliminary permit issued under this Subchapter shall be for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements. Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing. June 10, 1920, ch. 285 § 5, 41 Stat. 1067; Aug. 26, 1935, ch. 687, Title II, § 203, 49 Stat. 841."

2/ This section defines "public lands" as "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." 43 U.S.C. § 1702(e) (1976).

the powersite withdrawal did not remove the lands from the category of "public lands" and pointed out that section 204(1) (43 U.S.C. § 1714(1)), requires the Secretary to review withdrawals on all public lands to determine whether the withdrawals are "consistent with the statutory objectives of the programs for which the lands were dedicated and of the other relevant programs." He stated that the designation of a WSA did not constitute a withdrawal, modification, or revocation of an existing withdrawal, that no proposed uses of the unit had been denied, and that appellant had not been prevented from proceeding with its license application.

[1] Appellant's memorandum does not demonstrate any error in the analysis of this issue in the decision nor does appellant convincingly argue that the lands in question are not "public lands" subject to BLM administration. FERC's authority and functions are set forth in 16 U.S.C. § 797 (1976). That statute provides the regulatory and supervisory authority for the issuance of permits and licenses for electric power projects. It does not transfer the administration of the public lands out of the hands of BLM in the case of powersite withdrawals. With respect to power projects or power rights-of-way the jurisdiction of the Secretary of the Interior, and the interplay of that jurisdiction with the authority of the FERC is concisely set forth in section 501(a) of FLPMA:

(a) The Secretary, with respect to the public lands and, the Secretary of Agriculture, with respect to lands within the National Forest System (except in each case land designated as wilderness), are authorized to grant, issue, or renew rights-of-way over, upon, under, or through such lands for --

* * * * *

(4) systems for generation, transmission, and distribution of electric energy, except that the applicant shall also comply with all applicable requirements of the Federal Power Commission under the Federal Power Act of 1935;

43 U.S.C. § 1761(a) (1976).

As already indicated, the Secretary is entrusted with review of existing withdrawals under section 204 of FLPMA. While section 204(1)(1) excepts certain withdrawals from review, powersite withdrawals are not among the exceptions. 43 U.S.C. § 1714 (1)(1) (1976).

Appellant argues that the circumstances of this case are as those in Santa Fe Pacific Railroad Co., 64 IBLA 27 (1982). In that case the Board set aside BLM decisions designating WSA's because the appellant railroad company was found to have vested rights in the mineral estate of lands within the units. The "vested right" constituted the "severed mineral estate in fee simple." In Solicitor's Opinion M-36910 (Supplement) (Oct. 5, 1981), vested rights, valid existing rights and applications or proposals are discussed and distinguished. Vested rights obtained when all of the statutory requirements to pass equitable or legal title have been satisfied. A vested right, unlike an application or proposal, is independent of any secretarial discretion.

Appellant's permit and its application are not vested rights independent of the discretion of either the FERC or the BLM.

Finally, as pointed out in the decision, appellant has been deprived of no right by BLM or by BLM's designation of the lands as a WSA. We conclude that the lands are "public lands" subject to BLM administration under FLPMA.

Appellant's next arguments assert essentially that the unit lacks wilderness characteristics because of the presence of roads. Appellant also mentions an abandoned sheep camp and an abandoned mine. Appellant points out that it filed exhaustive comments with supporting data, including photographs documenting the existence of a road. The points brought up in appellant's commentary were considered by BLM, as is evidenced by these excerpts from the decision:

Naturalness - We have reviewed the additional information concerning roads submitted with your letter and respond as follows:

"Road to South Rim - The boundary adjustments made in the November 14 decision excluded the maintained portion of the road in the southern part of the unit. Beyond the point where the boundary now exists the "road" meanders through the pinyon-juniper and was "constructed" and is maintained by the passage of vehicles; thus, the northern end of the route is classified as a way. Tree cutting that occurred near the south rim was for incidental fence post and firewood purposes. Your pictures F through I are outside the adjusted boundary as shown on the topographic map contained in the inventory files. During the field trip of October 29, the Craig District Wilderness Coordinator acknowledged that the status of this road had been re-evaluated based upon your comments and others received during the public comment period. He did not say that "all kinds and types of vehicles and people had driven into the area."

"Road" beyond stock pond - This "road" leads to a spring development on the western slope of the mountain. The spring development and the use of a bulldozer to upgrade the trail leading to it are recent activities and were not authorized by BLM. The status of this activity including rehabilitation potential is being reviewed. If boundary adjustments are deemed to be appropriate, they will be made during the study phase.

As stated in the November 14 document, the imprints of man remaining in the unit after boundary adjustments are minor in nature and do not detract from the overall naturalness of the unit.

(Decision at 2-3).

Appellant maintains that its photographs do not depict areas outside the WSA boundary and that therefore an evidentiary hearing is necessary. Appellant says its photographs establish that man can drive and has many

times driven to the south rim of Cross Mountain, an area unquestionably natural, but nevertheless imprinted by man.

[2] Appellant's assertions are insufficient to demonstrate the existence of a road maintained by mechanical means and improvements within the unit. While it may be true that, as appellant asserts, the road shown in its photographs continues on into the unit, the photographs tend to depict a "way" not a "road" as these terms are understood in the inventory process. BLM has relied upon the following definition of a "road," quoted verbatim from the legislative history of FLPMA, H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976): "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." Arizona State Association of 4-Wheel Drive Clubs, 65 IBLA 126 (1982); P. N. Martin, 64 IBLA 307 (1982). The record reveals that appellant has made ample use of its opportunity to provide input and the benefit of its opinions to the inventory process. BLM has properly incorporated this information into its evaluation. No useful purpose would be served by a hearing to again consider appellant's opinions, and the request for one is therefore denied.

[3] In both its protest and the statement of reasons appellant has mentioned intrusions other than roads. All were considered by BLM. Congress did not require that a wilderness area be totally free of the imprints of man. Indeed the definition adopted by Congress specified that a wilderness be an area which "generally appears to have been affected primarily by the forces of nature, with the imprints of man's work substantially unnoticeable." 16 U.S.C. § 1131(c) (1976) (emphasis added). Carl W. Clark, 65 IBLA 153 (1982).

[4] An appellant seeking reversal of a decision to include land in a WSA must show that the decision appealed from was premised either on a clear error of law or a demonstrable error of fact. Union Oil Co. (On Reconsideration), 58 IBLA 166 (1981). Appellant's statement of reasons does not meet these criteria.

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.

Gail M. Frazier
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge

