

WILFORD COTHERN

IBLA 81-1066

Decided September 8, 1983

Appeal from decision of the New Mexico Acting State Director, Bureau of Land Management, denying protest with respect to Las Uvas Mountains wilderness study area (NM-030-065).

Affirmed in part; set aside and remanded in part.

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

"Roadless." H.R. Rep. No. 94-1163, 94th Cong., 2nd 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: Wilford Cothorn, pro se; Dale D. Goble, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

This appeal is taken from a decision dated February 6, 1981, by the Acting State Director, New Mexico, Bureau of Land Management (BLM), denying appellant's protest with respect to Las Uvas Mountains wilderness study area (WSA), NM-030-065. Section 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a), directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands, identified during the wilderness 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 (1976).

According to the Wilderness Inventory Handbook (WIH) (1978), page 5, "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." 1/

At issue in the case before us is whether the State Office properly designated the Rustler Fire Trail (within unit NM-030-065) as a way rather than a road.

In relevant part, the decision appealed from states:

After consideration of all intensive inventory data and public comment, as well as numerous site inspections, the BLM feels that once past Chivatos Tank in Section 20, T. 20 S., R. 3 W., the Rustler Fire Trail does not satisfy the road definition. The use and maintenance of the route as far as Chivatos Tank is apparent. However, the portion of the route north-northwest of the tank appears to be returning to a natural condition and there are no obvious signs of maintenance. That portion of the Rustler Fire Trail past Chivatos Tank is within the boundary of the WSA.

Appellant contends, however, that all of the Rustler Fire Trail is a road according to the criteria of the WIH and Change 2 of Organic Act Directive (OAD) 78-61. 2/ Appellant, a rancher, asserts that he discussed _____

1/ The WIH also offers definitions of the following related terms:

"Improved and maintained' -- Actions taken physically by man to keep the road open to vehicular traffic. 'Improved' does not necessarily mean formal construction. 'Maintained' does not necessarily mean annual maintenance.

"Mechanical means' -- Use of hand or power machinery or tools.

"Relatively regular and continuous use' -- Vehicular use which has occurred and will continue to occur on a relatively regular basis. Examples are: access roads for equipment to maintain a stock water tank or other established water sources; access roads to maintained recreation sites or facilities; or access roads to mining claims."

2/ OAD 78-61, Change 2, paras. 1, 3, and 5, provides in pertinent part:

"(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.

* * * * *

"(3) Is a route a road if past records are not available to verify improvement, even though it is being maintained and receives relatively regular and continuous use? Yes, if improvements can be documented through some reliable means.

* * * * *

"(5) The purpose of the use of a route is not a factor to consider in determining whether a route is a way or a road. If a route has been improved and maintained by mechanical means to insure relatively regular and continuous use, it is a road, regardless of the purpose of that use. It makes no difference whether the use is of a commercial or noncommercial nature."

the matter with BLM officials and refers to an affidavit on file in the Las Cruces District Office attesting to "mechanical construction, mechanical maintenance, and regular and continuous use of the route." Appellant states that it was agreed that he would perform mechanical maintenance on the route when and if the need should arise.

Appellant asserts that the route is used by his employees as well as hunters and recreationists and that it is not returning to a natural condition. Appellant states that maintenance is performed "as needed" and that the nature of the terrain is such that "subsequent maintenance done as little as a few months ago is usually indistinguishable from the original improvement work."

[1] The definition of the term "roadless," as adopted by BLM in the WIH, is taken from H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976). In view of these criteria, the Acting State Director's decision does not dispositively address the appellant's allegations. In his affidavit of December 11, 1979, to BLM, appellant stated that the route has been maintained by mechanical means by him and others at least four times. He makes the same claim on appeal and indicates that some maintenance work was performed a few months prior to his submission on appeal. No documentation of this, however, was supplied. In response to his affidavit, the district manager, by letter dated July 3, 1980, requested appellant to submit additional information listing eight specific questions related to appellant's maintenance and use of the route. Appellant did not respond. In his protest, he referred to his affidavit, and contends that the route is mechanically maintained. He also explained that he was away from home when the BLM letter arrived and upon his return he called BLM and was informed that it was too late to reply. Information as to the nature and time of actual maintenance operations would strongly support appellant's position that the route at issue is a road. (See OAD, Change 2, paras. 1, 3, and 5, supra note 2.)

On the present state of the record, it is not possible to determine whether the Acting State Director correctly found this route to be a vehicle way rather than a road. Accordingly, the Acting State Director's decision is set aside as to this issue, and the case file is remanded to the State Office for preparation of a new decision more responsive to the allegations made. Ken Brower, 67 IBLA 124 (1982). The State Office should give appellant the opportunity to respond to the question the Acting State Director considered critical in his letter of July 3, 1980. The new protest response shall grant a right of appeal in the event appellant or another party is adversely affected. See Sierra Club, 62 IBLA 367 (1982).

Any appeal taken by appellant must take into careful consideration each element of the "roadless" definition set forth above. Any effort to establish the existence of a road in the WSA should include allegations of who improved the route at issue by mechanical means; who maintains the route by mechanical means; and when such improvement and maintenance last occurred. If maintenance has been unnecessary because of recent improvements or stable soils, evidence to this effect is necessary.

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 Acting State Director is set aside and remanded in part for action consistent herewith.

Gail M. Frazier
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge

