

MANVILLE SALES CORP.

IBLA 86-1652

Decided June 17, 1988

Appeal from a decision of the Vale District Office, Bureau of Land Management, rejecting a plan of operations for motorized access to mining claims in a wilderness study area. OR-MCP-6-04.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Plan of Operations -- Mining Claims: Plan of Operations

Designations as to areas and trails closed and limited to off-road vehicle use made under the authority of Exec. Order No. 11644, amended by Exec. Order No. 11989, and the regulations at 43 CFR Part 8340, are not determinative in reviewing a plan of operations which proposes to use such an area or trail for access to mining claims. Under the regulations, approval of a plan of operations will create an exception allowing use of an off-road vehicle in the area or on the trail.

2. Federal Land Policy and Management Act of 1976: Plan of Operations -- Mining Claims: Plan of Operations -- Public Lands: Administration

During the period a wilderness study area is being reviewed so that the Secretary may make his recommendation to the President as to the area's suitability or unsuitability for preservation as wilderness, and until Congress has reached its decision on the matter, BLM is required to manage the lands so as not to impair their suitability for preservation as wilderness. When a plan of operations is rejected by BLM because the proposed activity will impair the area's suitability for preservation as wilderness, the question on review is whether the decision was reasonable and is supported by the record. If so, absent some showing of error by the appellant, the decision will be affirmed.

APPEARANCES: Roger P. Twisselman, Esq., for appellant, Manville Sales Corporation.

## OPINION BY ADMINISTRATIVE JUDGE MULLEN

Manville Sales Corporation (Manville) has appealed a decision of the Vale District Office, Bureau of Land Management (BLM), dated July 18, 1986, rejecting a plan of operations filed by the company. Manville's plan was originally submitted as a letter dated April 4, 1986, addressed to the Northern Area Manager of the Vale District Office requesting permission to make four to five visits of 1 or 2 days each to a group of 100 mining claims held by the company in the Red Butte area of southeastern Oregon. Accompanying the letter were copies of BLM records showing that in 1983, Manville's mining claims were located in secs. 26, 27, 34, and 35, T. 25 S., R. 43 E., Willamette Meridian. Also accompanying the letter was a copy of a portion of a Geological Survey quadrangle map showing the road the company wished to use. As illustrated on the map, the road originates in sec. 14 branching from another road and extends through portions of secs. 14, 23, 24, 25, and 26, for a distance of approximately 2 miles. It terminates in sec. 26 on the northeast side of Red Butte.

By letter dated April 17, 1986, BLM informed Manville that the road it proposed to use was a "recently established unauthorized way" closed to vehicle use, and that the area was part of the Dry Creek Buttes Wilderness Study Area (WSA). The letter also informed Manville that the wilderness review program regulations at 43 CFR Part 3802 required the company to submit and obtain approval of a plan of operations prior to using the way, but stated that the company's letter would be accepted as a complete plan of operations.

As required by 43 CFR 3802.3-1(a), an environmental assessment (EA) of Manville's proposed access to its claim was undertaken. <sup>1/</sup> The EA reviewed Manville's proposed action and three alternatives: (1) no action at the site as a result of rejecting the plan of operations and not allowing access or geologic mapping and sampling, (2) non-motorized access to the site by

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<sup>1/</sup> The EA states that the road Manville proposes to use had been a jeep trail which aerial photographs show to have existed in 1976 but was not identifiable when the wilderness inventory was made in 1980, and which had been naturally reclaimed prior to Manville's use of it to establish its mining claims. Manville has provided copies of the 1976 aerial photographs with its statement of reasons. The EA also states that the purposes of Manville's proposed visits are to show its claims to prospective clients who might be interested in developing them and to conduct geologic mapping and sampling to satisfy annual assessment work requirements. The record before the Board contains only the EA without the supporting documentation on which the EA was based. As a result, we have no direct evidence as to either Manville's purposes in seeking access to its claims or the company's responsibility for re-establishing the jeep trail. Neither matter, however, is relevant to our review of the propriety of BLM's denial of Manville's plan of operations.

foot, horse, or other means, and (3) rotary wing access. The document notes that the first alternative is not realistic because denying access to the claims would violate the wilderness review program regulations. See 43 CFR 3802.4-2. It also notes that neither the second nor third alternatives require a plan of operations and can be undertaken upon filing a notice of intent. Thus, only the proposed action requires a plan of operations and an EA. As to the proposed action, the EA concluded that proper mitigation measures would be to establish water bars across vehicle tracks to prevent accelerated soil erosion and to scarify and seed the vehicle tracks.

Based on the EA, a Finding of No Significant Impact (FONSI)/Decision Record, dated the same day as the decision under appeal, was prepared. The document concludes that the proposed action would not have a significant adverse effect on the quality of the human environment, and also concludes that under the proposed action:

[I]mpacts albeit insignificant would be sufficient to affect the suitability of a portion of the Dry Creek Buttes Wilderness Study Area (WSA 03-56) for preservation as wilderness. Visual impacts from use of the proposed access route would impair suitability of the affected portion of the WSA, in that reclamation cannot be completed so that it would be substantially unnoticeable by 1990 when the Secretary of the Interior makes his recommendation to the President on the study area's suitability for inclusion in the wilderness system.

Following the findings of the FONSI/Decision Record, BLM issued its decision rejecting Manville's plan of operations. The decision states that it is based on two facts:

- (1) the proposed access route would be located in a Wilderness Study Area (WSA) that is partially closed to motorized vehicles and partially restricted to designated routes or ways and
- (2) [t]he route would not be reclaimable to a substantially unnoticeable condition within the allowed time limits established by the Interim Management Policy for Wilderness Study Areas.

On appeal Manville contends that its proposed use of the jeep trail will cause no further impairment than existed on October 21, 1976 and October 9, 1980; that it will cause no greater surface damage than has existed since 1963; and that the trail would be reclaimable within the applicable time limits. Additionally, Manville objects to BLM's decision "on the grounds that the preferred alternative according to the Appendix to Wilderness Environmental Impact Statement for Oregon, Dry Creek Buttes Wilderness Study Area (OR-3-56) is to 'recommend the entire Wilderness Study Area nonsuitable as wilderness.'"

As noted in the EA and referred to in BLM's decision, BLM's management of the area in which Manville located its mining claims is governed by two areas of the law. First, Exec. Order No. 11644 of February 8, 1972

(37 FR 2877 (Feb. 9, 1972)), amended by Exec. Order No. 11989 of May 24, 1977 (42 FR 26959 (May 25, 1977)), required BLM to develop regulations and instructions for designating areas of the public lands as to permissible use of off-road vehicles (ORV's). Under the regulations finally adopted, 2/ all public lands administered by BLM are to be designated as open, limited, or closed to ORV use 3/ applying criteria set forth in the regulations, including the prevention of impairment of the wilderness suitability of the area. 43 CFR 8342.1. Following a period of public review and comment, the Vale District Office published notice of the designations it had made in accord with the Northern Malheur Resource Area Management Framework Plan. 45 FR 67161 (Oct. 9, 1980). Secs. 25 through 27, and 34 through 36 of T. 25 S., R. 43 E., were closed to ORV travel and ORV use was limited to designated roads and trails in secs. 9 through 15, and 22 through 24. As correctly noted in BLM's decision, the road Manville proposes to travel lies partially in an area closed to ORV use and partially in an area limited to ORV travel on designated roads.

[1] The area designations, however, are not determinative in reviewing Manville's appeal. The regulations define "off-road vehicle" as "any motorized vehicle capable of, or designed for, travel on or immediately over land, water, or any other natural terrain, excluding, \* \* \* (3) any vehicle whose use is expressly authorized by the authorized officer, or otherwise officially approved \* \* \*." 43 CFR 8340.0-5(a). As noted in the prefatory comments to the regulations, under this exception, "[l]awful mining activities, including the use of off-road vehicles may be conducted in closed or limited areas" when the use is expressly authorized by the appropriate BLM official. 44 FR 34834 (June 15, 1979); see 43 FR 29412, 29414 (July 7, 1978) (preface to proposed regulations). Thus, approval of a plan of operations which includes use of a closed or limited area has the effect of excluding the vehicle from the definition of an ORV and, consequently, excepting it from the prohibition of, or limitation on, ORV use in the area.

The second area of law controlling BLM's management of the area is the wilderness review provision of the Federal Land Policy and Management Act of 1976 (FLPMA). The Act established a three-stage process for evaluating lands for possible inclusion in the National Wilderness Preservation System (see 16 U.S.C. §§ 1131-1136 (1982)). First, the Secretary of the Interior was directed to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values \* \* \* giving priority to areas of critical environmental concern." 43 U.S.C. § 1171(a) (1982).

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2/ Regulations were originally adopted effective May 15, 1974. 39 CFR 13612 (Apr. 15, 1974). They were nullified by a court decision finding them to be in violation of Exec. Order No. 11644 and to have been improperly promulgated under portions of section 102 of the National Environmental Policy Act (42 U.S.C. §§ 4332(2)(C)(iii), 4332(2)(D) (1982)). National Wildlife Federation v. Morton, 393 F. Supp. 1286 (D.D.C. 1975).

3/ Definitions of "open areas and trails," "limited areas and trails," and "closed areas and trails" are provided at 43 CFR 8340.0-5(f), (g), and (h).

Second, the Secretary is required to "review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory \* \* \* as having wilderness characteristics described in the Wilderness Act \* \* \*." Id. Section 1782(a); see 16 U.S.C. § 1131(c) (1982) (definition of wilderness). The roadless areas identified during the inventory stage as having wilderness characteristics are WSA's studied during the review stage. Third, based on the required review, the Secretary is to "report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness \* \* \*." 43 U.S.C. § 1782(a) (1982). Of particular importance, FLPMA requires that:

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness \* \* \*. [4/]

Id. § 1782(c).

As noted by Manville in its statement of reasons, BLM's management of WSA's under the mandate not to impair their suitability for preservation as wilderness ("nonimpairment") is governed by the "Interim Management Policy and Guidelines for Land Under Wilderness Review" (IMP). 44 FR 72014 (Dec. 12, 1979), modified, 48 FR 31854 (July 12, 1983). The IMP identifies two goals in managing lands under the nonimpairment standard:

(1) To ensure that any area that now satisfies the wilderness definition in section 2(c) of the Wilderness Act will satisfy that definition when the Secretary sends his wilderness recommendation to the President and thereafter until Congress acts, and (2) to ensure that, by the time the Secretary sends his wilderness recommendation to the President, the area's wilderness values have not been degraded so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendations with respect to the area's suitability or nonsuitability for preservation as wilderness.

Id. at 72016. Several provisions of the IMP apply to motor vehicle access to mining claims. The general management section provides that the use of motor vehicles "on existing access routes or elsewhere" does not by itself impair wilderness suitability, "so long as it does not cause impacts inconsistent with the reclamation requirements of the nonimpairment criteria." Id. at 72020. In regard to mining claims, the IMP specifically states: "Access to mining claims may be approved in the form of temporary activities or routes that satisfy the nonimpairment criteria." 48 FR 31856 (July 12, 1983). The nonimpairment criteria referred to in these provisions state, inter alia, that temporary impacts "must, at a minimum, be capable of being reclaimed to a condition of being substantially unnoticeable in the

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<sup>4/</sup> The Act permitted existing mining, grazing, and mineral leasing to continue in the same "manner and degree" as of the date of enactment, subject to management to prevent "unnecessary or undue degradation of the lands and their resources or to afford environmental protection." 43 U.S.C. § 1782(c) (1982). Manville's claims were located in 1983 and are not subject to the exception.

wilderness study area (or inventory unit) as a whole by the time the Secretary of the Interior is scheduled to send his recommendations on that area to the President." Id. at 72018, 72023-24. Similarly, the regulations governing plans of operations for activities in WSA's define "impairment of suitability for inclusion in the Wilderness System" as

taking actions that cause impacts, that cannot be reclaimed to the point of being substantially unnoticeable in the area as a whole by the time the Secretary is scheduled to make a recommendation to the President on the suitability of a wilderness study area for inclusion in the National Wilderness Preservation System or have degraded wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness.

43 CFR 3802.0-5(d). In its decision BLM stated that for lands in Oregon the recommendation to the President is expected to occur in 1990.

The question before us is whether BLM's decision rejecting Manville's plan of operations because such operations would violate the nonimpairment standard was reasonable and is supported by the record. See Golden Triangle Exploration Co., 76 IBLA 245 (1983); Halvah Group, 60 IBLA 349, 88 I.D. 1115 (1981). Specifically, the issue is whether the record provides a reasonable basis for BLM's decision to reject Manville's plan of operations because the road could not be reclaimed to be substantially unnoticeable in the area as a whole by the time the Secretary makes his recommendation to the President. "'Substantially unnoticeable' means something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being manmade or mancaused because of age, weathering or biological change." 43 CFR 3802.0-5(m); see 44 FR 72034 (Dec. 12, 1979).

Several portions of the EA support the conclusion of the FONSI/Decision Record that Manville's proposed action would impair the suitability of the area for preservation as wilderness and cannot be reclaimed so as to be substantially unnoticeable by 1990. The EA finds that vegetation covering the road would be adversely affected; that up to 25 percent of the road would be subject to accelerated erosion, particularly in steep areas with clay soils; that use of the unauthorized way had created a visual contrast influencing approximately 3,000 acres (6 percent of the WSA) and further use would cause a continuation of the visual contrast; and that, due to the

shallow soils and minimum precipitation of the area, "restoration may not be possible within the required time frame" (EA at 17-19). On the other hand, we note that in assessing cumulative effects, the EA finds that the proposed activity "would not produce an aggregate effect upon the area's wilderness characteristics and values that would constrain the Secretary's recommendation with respect to the area's suitability or nonsuitability for preservation as wilderness, considering the area in its expected condition at the time the Secretary sends his recommendation to the President" (EA at 20-21). Additionally, the EA finds that the proposal "would not significantly reduce the overall wilderness quality of the WSA" (EA at 21).

[2] From our review of the entire record, it appears that BLM's chief concern when rejecting appellant's plan of operations was the existing visual contrast created by prior unauthorized use of the closed road and the possibility that the road could not be reclaimed and made substantially unnoticeable by 1990. The record amply supports the legitimacy of this concern. The record less fully supports the conclusion that Manville's proposed use of the road would impair the area's suitability as wilderness, given the likely minimal impact of the proposed activity. Nevertheless, we conclude that the record supports BLM's decision. Manville has not disputed the EA's factual findings, offered any evidence or argument that BLM improperly evaluated its proposal, or otherwise attempted to show error in BLM's decision. Its arguments that its use of the road would not cause impairment over that existing in 1963, 1976, and 1980, has no bearing on the issue. As discussed above, the relevant time for evaluating an activity in a proposed plan of operations is the date the Secretary is to make his recommendation to the President. This was the date used by BLM in making its decision. Absent some showing of error, and finding the decision to be supported by the record and have a reasonable basis, we affirm BLM's decision. See Norman G. Lavery, 96 IBLA 294, 298-99 (1987); Golden Triangle Exploration Co., *supra*.

Manville has advanced two additional arguments. First, Manville claims that the road is reclaimable. However, Manville has neither tendered evidence in support of this assertion nor offered to undertake reclamation necessary to render the road substantially unnoticeable by 1990. <sup>5/</sup> Second, the language quoted by Manville from the environmental impact statement for the Dry Creek Buttes WSA is not relevant to the issue before us. The question whether the Red Butte area has the requisite wilderness characteristics to be included in the WSA was settled at the time the WSA designation was made and is no longer open to challenge. See Keith R. Kummerfeld, 72 IBLA 1, 4 (1983). The mineral potential of the area is recognized and noted in the appendix to the environmental impact statement. Mineral potential is a proper subject for consideration during BLM's review of the area and determination as to whether to recommend designation as a wilderness area.

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<sup>5/</sup> This option remains open should the company choose to file another plan of operations with BLM.

See Keith R. Kummerfeld, 74 IBLA 106, 109 (1983). Unless and until the Red Butte area is removed from the WSA, however, BLM must continue its management of the land under the nonimpairment standard established by statute. See generally State of Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979).

Accordingly, 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.

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R. W. Mullen  
Administrative Judge

We concur:

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Anita Vogt  
Administrative Judge  
Alternate Member

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John H. Kelly  
Administrative Judge