6-7-1984

Wilderness and the Public Lands

John D. Leshy

Follow this and additional works at: http://scholar.law.colorado.edu/federal-land-policy-and-management-act

Part of the Administrative Law Commons, Constitutional Law Commons, Courts Commons, Environmental Law Commons, Forest Management Commons, Land Use Planning Commons, Law and Economics Commons, Legal History, Theory and Process Commons, Legislation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Oil, Gas, and Mineral Law Commons, Property Law and Real Estate Commons, Public Policy Commons, Recreation, Parks and Tourism Administration Commons, and the State and Local Government Law Commons

Citation Information

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.
WILDERNESS AND THE PUBLIC LANDS

John D. Leshy, Professor of Law
Arizona State University
Tempe, Arizona 85287

Federal Land Policy and Management Act

A short course sponsored by the
Natural Resources Law Center
University of Colorado School of Law
June 6-8, 1984
I. The Statutory Background:


B. Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-1782. (Most pertinent sections are set out below.)

1. § 201(a), 43 U.S.C. § 1711(a):

§ 1711. Continuing inventory and identification of public lands; preparation and maintenance

(a) The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.

2. § 302(b), 43 U.S.C. § 1732(b) (in pertinent part):

EXCEPT AS PROVIDED IN SECTIONS 1744, 1781(f), AND 1782 OF THIS TITLE AND IN THE LAST SENTENCE OF THIS PARAGRAPH, NO PROVISION OF THIS SECTION OR ANY OTHER SECTION OF THIS ACT SHALL IN ANY WAY AMEND THE MINING LAW OF 1872 OR IMPAIR THE RIGHTS OF ANY LOCATORS OR CLAIMS UNDER THAT ACT, INCLUDING, BUT NOT LIMITED TO, RIGHTS OF INGRESS AND EGRESS. IN MANAGING THE PUBLIC LANDS THE SECRETARY SHALL, BY REGULATION OR OTHERWISE, TAKE ANY ACTION NECESSARY TO PREVENT UNNECESSARY OR UNDUE DEGRADATION OF THE LANDS.

3. § 603, 43 U.S.C. § 1782:

§ 1782. Bureau of Land Management Wilderness Study

(a) Lands subject to review and designation as wilderness

Within fifteen years after October 21, 1976, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and 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: Provided, That prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the Geological Survey and the Bureau of Mines to determine the mineral values, if any, that may be present in such areas: Provided further, That the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act [16 U.S.C.A. § 1132(d)].
(b) Presidential recommendation for designation as wilderness

The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.

(e) Status of lands during period of review and determination

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, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 1714 of this title for reasons other than preservation of their wilderness character. Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act [16 U.S.C.A. § 1131 et seq.] which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area, including mineral surveys required by section 4(d)(2) of the Wilderness Act [16 U.S.C.A. § 1133(d)(2)], and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

4. Various possibly relevant disclaimer clauses in § 701, 43 U.S.C. § 1701 note:

Savings Provisions. Section 701 of Pub.L. 94-579 provided that:

"(a) Nothing in this Act (see Short Title note set out above), or in any amendment made by this Act, shall be construed as terminating any valid lease, permit, patent, right-of-way, or other land use right or authorization existing on the date of approval of this Act (Oct. 21, 1976).

"(c) All withdrawals, reservations, classifications, and designations in effect as of the date of approval of this Act (Oct. 21, 1976) shall remain in full force and effect until modified under the provisions of this Act or other applicable law.

"(f) Nothing in this Act shall be deemed to repeal any existing law by implication.

"(g) Nothing in this Act shall be construed as limiting or restricting the power and authority of the United States or—

"(b) All actions by the Secretary concerned under this Act shall be subject to valid existing rights.
II. Background Information

A. On Wilderness Preservation Generally


B. On Section 603 in particular, the most comprehensive review, I can say in all immodesty, is mine, "Wilderness and Its Discontents - Wilderness Review Comes to the Public Lands," 1981 Ariz. St. L.J. 361. While it could scarcely, and did not, anticipate a number of specific issues that have arisen, it does provide an overview of the legislation, its history and the beginnings of its implementation, and addresses several interpretive issues. Other discussions of § 603 are found in Due, "Access, Rare II and Other Fables," 25 Rocky Mountain Min. L. Inst., 10-1, 10-17 to 10-29 (1979); Ferguson, "Forest Service
III. THE INVENTORY OF ROADLESS BLM LANDS WITH WILDERNESS CHARACTERISTICS

A. Introduction: With few exceptions (the major ones noted below) the inventory process has been completed. Thus the issues discussed here are largely of academic and historical interest.

B. The results of the inventory, with the current schedule for completion of suitability studies and recommendations for
legislation, are found at 48 Fed. Reg. 57060-57087 (1983). Each identified wilderness study area (WSA) is listed, by state, along with the fiscal year in which the draft environmental impact statement containing preliminary agency recommendations on wilderness suitability or nonsuitability will be released. So-called "instant" study areas (see § 603(a), last proviso) are listed separately at pp. 57085-86. The following is a statistical summary of the inventory process to date. About 174 million acres in the lower 48 states were reviewed in the inventory process.
## T A B L E I

**STATISTICAL SUMMARY**

Bureau of Land Management Wilderness Study Area (WSA) Acreage Studied by State as of December 1, 1983

<table>
<thead>
<tr>
<th>Contiguous Western States</th>
<th>Wilderness Study Areas 1/</th>
<th>Instant Study Areas 2/</th>
<th>Total Number of WSA's</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td># of Areas</td>
<td>Acres</td>
<td># of Areas</td>
</tr>
<tr>
<td>Arizona</td>
<td>91</td>
<td>2,237,660</td>
<td>7</td>
</tr>
<tr>
<td>California</td>
<td>178</td>
<td>6,698,516</td>
<td>4</td>
</tr>
<tr>
<td>Colorado</td>
<td>40</td>
<td>705,157</td>
<td>15</td>
</tr>
<tr>
<td>Idaho</td>
<td>58</td>
<td>1,534,116</td>
<td>3</td>
</tr>
<tr>
<td>Montana</td>
<td>26</td>
<td>363,442</td>
<td>13</td>
</tr>
<tr>
<td>Nevada</td>
<td>72</td>
<td>4,335,878</td>
<td></td>
</tr>
<tr>
<td>New Mexico</td>
<td>38</td>
<td>812,035</td>
<td>2</td>
</tr>
<tr>
<td>Oregon</td>
<td>78</td>
<td>2,298,072</td>
<td>2</td>
</tr>
<tr>
<td>Utah</td>
<td>67</td>
<td>2,915,010</td>
<td>4</td>
</tr>
<tr>
<td>Wyoming</td>
<td>34</td>
<td>538,044</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>682</td>
<td>22,437,930</td>
<td>48</td>
</tr>
</tbody>
</table>

1/ Wilderness Study Areas being studied under Sections 202 and 603 of the Federal Land Policy and Management Act of 1976 (FLPMA). Certain inventory decisions have been appealed to the Interior Board of Land Appeals; there may be changes as a result of this Board's decisions.

2/ Includes the status of 53 Instant Study Areas (ISA's) along with contiguous lands within each State. See Tables II (Section 202 and 603 of FLPMA WSA's) and III (ISA's) for a complete listing of each wilderness study area and their respective acreage and study schedule status.
C. What must be inventoried? [Note: BLM lands in Alaska were generally exempted from mandatory review under § 603 by the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1784, 94 Stat. 2371, 2487 (1980).]


3. What about areas under 5000 acres? There are two categories here; first, tracts of BLM land under 5000 acres with wilderness characteristics which are contiguous to federal lands with wilderness characteristics managed by another agency (typically, Forest Service lands reviewed in its Roadless Area Review and Evaluation (RARE) process); and second, tracts of BLM land under 5000 acres with wilderness characteristics which are freestanding; i.e., not contiguous to any other federal land areas with wilderness characteristics.

   a. Both subcategories were excluded by Secretary Watt's 1982 "Christmas present," approving and implementing previous decisions of the Interior Board of Land Appeals and affirmed by his solicitor. See 47 Fed. Reg. 58372 (1982). The IMP prepared in the Carter/Andrus Administration had acknowledged that areas under 5000 acres were not required to be studied by § 603, but had recognized that the broader
inventory mandate of FLPMA's § 202 allowed the BLM to inventory and study such areas for possible preservation as wilderness. See BLM's Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), published at Fed. Reg. 72013-34 (1979); supplemented and modified by 48 Fed. Reg. 31854-55 (1983) § 1(A)(5), p. 10. Under the Carter/Andrus approach, the only difference was in the degree of protection to be afforded such lands in the interim; that is, areas under 5000 acres would be subject only to the general "unnecessary or undue degradation" standard of FLPMA's § 302(b), rather than the more stringent "no-impairment" standard of § 603(c). Id. The Watt decision ignored this distinction. Subsequently, the Reagan/Watt Administration retreated a bit from its own decision by restoring to the wilderness review certain areas under 5000 acres. See, e.g., 48 Fed. Reg. 20508, 20509, 21000, 33056 (1983).

The Sierra Club sued and has obtained a preliminary injunction preventing BLM from allowing development of these areas inconsistent with wilderness preservation. Sierra Club v. Watt (doesn't that read 'like a headline?), 14 Env. L. Rptr. 20102 (E.D. Cal. Oct. 21, 1983). A decision on the merits is pending.
4. What about tracts of land over 5000 acres with wilderness characteristics where BLM owns everything but the mineral estate? Such ownership patterns resulted from various reacquisitions of formerly federal land by BLM, mostly pursuant to exchanges. Santa Fe Industries retains the mineral rights on the bulk of lands in this category.

   a. Once again, these lands were inventoried by BLM in the Carter/Andrus Administration, and disqualified by Secretary Watt in December 1982, as part of the "Christmas present" package referred to in #3, above. They are also covered by the preliminary injunction issued by the federal district court cited in #3.

   b. Here the issue turns on § 603 and the definition of "public lands" in FLPMA § 103(e), 43 U.S.C. § 1702(e), which defines public lands for purposes of FLPMA, including § 603, as "any land or interest in land" owned by the United States and managed by BLM. (emphasis added).

   But see Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585 (9th Cir. 1981) (excluding from FLPMA definition of public lands those lands to which "claims or other rights have attached.") (Citations omitted).

5. Beyond these technical matters, numerous IBLA decisions on appeal of BLM inventory decisions have addressed various questions concerning what are "wilderness characteristics" and what kinds of intrusions exclude an area from wilderness study. In the most prominent of these, the IBLA remanded BLM exclusions of about 750,000 acres of land in Utah (though it affirmed, in the same appeal, about 100,000 acres of exclusions).
The massive appeal, which IBLA disposed of in a 71 page opinion, had been filed by several environmental groups. See Utah Wilderness Ass'n, 72 IBLA 125, GFS (Misc.) 125 (1983). Upon remand, the BLM has decided to include about 500,000 acres in the inventory, but stuck by its guns on the remaining 250,000 acres. Public Lands News, August 4, 1983, p. 10.

With few other exceptions, BLM has prevailed regardless of whether environmentalists or wilderness opponents (miners, graziers, ORV enthusiasts, local governments) appealed.

The following is a partial list of these decisions:


For a decision requiring exhaustion of the available administrative remedy for appealing inventory decisions (see 45 Fed. Reg. 74070, 74071 (1980)) before challenging inventory decisions in court, see Humboldt County v. United States, 684 F.2d 1276, 1284 (9th Cir. 1982).
IV. Management During the Study and Legislative Consideration Phase

A. These are the most crucial issues in the process leading up to legislative consideration. For an overview, see the IMP; see also Solicitor's Opinion, 86 Interior Decision (I.D.) 89 (1979); supplemented by Palmer Oil/Prairie Canyon Opinion (August 7, 1979); Further Guidance on FLPMA's § 603, GFS (Min) and SO-1 (Feb. 12, 1980); "The BLM Wilderness Review and Valid Existing Rights," 88 I.D. 909 (1981).

B. Generally, § 603(c) requires that these areas be preserved from impairment of their "suitability for preservation as wilderness" until Congress acts.

1. This is not crystal clear in precise application, though it's easy to get the general idea--Congress did not want the agency mucking up, or allowing others to muck up, these areas until Congress makes its own, jealously-guarded decision on wilderness designation. But the Wilderness Act itself contained some general allowance for developments which were inconsistent with wilderness as Congress there defined it; e.g., mining, mineral leasing and water projects. Fitting these two together is not easy, but the IMP makes a good stab at it. See 1981 Ariz. St. L. Rev. at 388-95. For a somewhat ethereal discussion of the fine points here, see 1981 Ariz. St. L. Rev. at 395-99.
2. One particular point of contention has been the relationship between this general non-impairment standard and the sentence later in § 603(c) which provides that study areas shall remain open to appropriation under the mining laws unless withdrawn for reasons other than preservation of wilderness. See 1981 Ariz. St. L. Rev. at 388-98.

3. A recurring question here is whether BLM can allow activities which, if unmitigated, would impair an area's suitability for preservation as wilderness, but which can be mitigated so as not to impair. If these activities are to be allowed, by what date must the mitigation be completed? The IMP discusses these issues, and concludes it's O.K. to allow these activities, so long as they are mitigated by the date the Secretary's recommendations go to the President. IMP, § 1(B)(2)pp.10-11. For IBLA decisions upholding this approach and BLM's application of the no-impairment standard generally, see John Loskot, 71 IBLA 165, GFS (Min) 72 (1983); Keith R. Kummerfeld, 72 IBLA 1, GFS (Min) 86; 74 IBLA 106, GFS (Min) 165 (1983); Southwest Resource Council, et al., 73 IBLA 39, GFS (Min) 121 (1983); Golden Triangle Exploration Co., 76 IBLA 245, GFS (Min) 268 (1983). These cases all concern plans of operations on mining claims located after FLPMA became law. The most interesting is Southwest Resource Council, the only one in which BLM approved a plan of operations as containing sufficient mitigation measures to meet the no-impairment standard.
C. The no-impairment policy is subject to two general exceptions: (a) the "grandfather clause" of § 603(c) for "existing mining and grazing uses and mineral leasing in the same manner and degree which the same was being conducted" when FLPMA became law (October 21, 1976); and (b) the general protection in FLPMA's § 701(h) for "valid existing rights."

1. Grazing has not proved particularly controversial except in a few isolated cases. Grazing is afforded some protection in designated wilderness areas anyway. See 16 U.S.C. § 1133(d)(4); McCloskey, supra, 45 Ore. L. Rev. at 311-12. But may BLM open up a previously pristine WSA to new grazing during the study phase? (It is proposing to do so in Idaho.)

2. Mining uses under the Mining Law have proved contentious. Construing the grandfather clause is complicated by the mining "exception" to the Wilderness Act, 16 U.S.C. § 1133(d)(3). One needs also to consider § 302(b) of FLPMA here, generally preventing "unnecessary or undue degradation" on all BLM lands. For a regulatory definition of this slippery term, see 43 CFR § 3809.0-5(k):

(k) "Unnecessary or undue degradation" means surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas or creation of a

sance may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation. Where specific statutory authority requires the attainment of a stated level of protection or reclamation, such as in the California Desert Conservation Area, Wild and Scenic Rivers, and other such areas, that level of protection shall be met.
For the Department's application, see IMP, pp. 11-13, and the special regulations it has promulgated governing Mining Law activities in wilderness, 43 C.F.R. Part 3802. The leading judicial decision is Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979), and a recent Departmental application is Doyle Cape, 79 IBLA 204 (1984). For an overview, see 1981 Ariz. St. L. Rev. at 407-08, 430-32, 439-45.

3. The "mineral leasing" grandfather clause has also been hotly disputed. See 21 Ariz. L. Rev. at 385-87; 1981 Ariz. St. L. Rev. at 408-24. The matter has been authoritatively resolved, at least in the Tenth Circuit, in the Department's favor. Rocky Mt. Oil and Gas Ass'n v. Watt (now, that doesn't sound right) 694 F.2d 734 (10th Cir. 1982). Congress has stepped in with appropriation act riders to prohibit (except for some narrowly drawn exceptions) mineral leasing in BLM WSA's, see, e.g., Pub. L. No. 98-146, § 308 (1983), and the Department's current policy is not to lease in WSA's.

4. The "valid existing rights" protection is closely bound up with much of the foregoing. It is very generally treated in an opinion of the Solicitor, reported at 88 I.D. 909 (1981). For particular issues, consider the following:

a. Do states have rights of access to isolated school section inholdings in WSA's? If so, what kind of access; i.e., how heavily can it be regulated to preserve wilderness characteristics? May access be regulated pursuant to FLPMA's rights-of-way sections, 43 U.S.C. §§ 1761-71? Cf. Utah Wilderness Association, 83 IBLA 356 (March 30, 1984) (access road across WSA to state school section may be approved even though wilderness suitability impaired).
b. Are there different rights of access to privately owned inholdings; e.g., patented mining claims, homesteads, railroad land grants, privately owned mineral interests under BLM-owned land?


5. Finally, it is worth recalling that the National Environmental Policy Act applies to BLM decisions allowing wilderness-impairing activities in WSA's under various grandfather
clauses and valid existing rights protections. Even if the agency has no discretion to prohibit such activities, it will always have authority to regulate them against the "unnecessary or undue degradation" standard of § 302(b). Thus, exercise of agency regulatory discretion sufficient to trigger NEPA's procedural requirements will usually be present. See generally NRDC v. Berklund, 458 F. Supp. 925 (D.D.C. 1979); aff'd 609 F.2d 553 (D.C.Cir. 1979). See also Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983); cf. Cabinet Mountains Wilderness v. Peterson, 685 F.2d 678 (D.C. Cir. 1982). But see 47 Fed. Reg. 50368-73 (1982) (broadening "categorical exclusions" from NEPA process, with ambiguity concerning excluded actions with effect on wilderness).

V. The Study Process and Results
   A. See § 603(b) and "BLM's Wilderness Study Policy," 47 Fed. Reg. 5098 (1982). Consider also in this context the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. Cf. California v. Block, 690 F.2d 753 (9th Cir. 1982). The BLM seems to have learned a lesson from the Forest Service's experience; viz., recommendations both for and against designation will be accompanied by a (presumably adequate) EIS.

VI. The Outlook in Congress
   A. Relationship between § 603 and the RARE process of the Forest Service.
B. The "release" issue.
C. Negotiating over legislation; the Arizona Strip phenomenon.
D. The consequences of delay.
E. Long-term prospects; some predictions.

VII. Summing Up:

What BLM-managed public lands mean to the National Wilderness Preservation System and what the wilderness review process means to the BLM.