MINERAL EXPLORATION AND DEVELOPMENT IN BUREAU OF LAND MANAGEMENT WILDERNESS STUDY AREAS

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Through the contemporary novel about the experience of a soldier in World War II, a new phrase has crept into our language to describe a rule, regulation, or law which presents a totally inconsistent and irreconcible dilemma for those subject to its control.[1] When Congress included section 603, "Bureau of Land Mangement Wilderness Study," in the Federal Land Policy and Management Act of 1976 [FLPMA],[2] those concerned about mineral development on public lands may have concluded that Congress saddled the Secretary of the Interior and the Bureau of Land Management [BLM] with a management mandate that could only be described as a "Catch-22."

When Congress passed the Wilderness Act of 1964,[3] it provided a direction for review of public lands administered by the Forest Service, the National Park Service and the Fish and Wildlife Service. However, the BLM was excluded. Under section 603(a) of FLPMA,[4] Congress gave the BLM the mandate to review all lands under its administration having wilderness characteristics to determine which of them should be recommended to Congress for inclusion in the National Wilderness Preservation System. Section 603(c) provides that during the period of BLM review and until Congress otherwise determines,

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1. J. HELLER, "CATCH-22" (1955).

2. Pub. L. No. 94-579, 60 Stat. 2743 (codified at 43 U.S.C. §§ 1701-1782 (1976)) (commonly referred to as the BLM Organic Act).

3. Pub. L. No. 88-577, 78 Stat. 800 (codified at 16 U.S.C. § 1131 (1976)).

4. 43 U.S.C. § 1782(c) (1976).

"the Secretary shall continue to manage such lands according to his authority under this Act [FLPMA] . . . in a manner so as not to impair the suitability of such area for preservation as wilderness."[5] Under this management mandate, it appears that BLM is faced with the same dilemma that appears in the Wilderness Act.

In a designated wilderness area, each agency administering the area is responsible for managing it in a manner consistent with its originally intended purpose and simultaneously preserving its "wilderness character."[6] Wilderness character is defined in section 2(c) of the Wilderness Act[7] as an area untrammeled by man, where he is but a mere visitor.[8] It is further defined as an undeveloped area of federal land with an unnoticeable imprint of man, having outstanding opportunity for solitude or primitive recreation, of a size of at least five thousand acres, and possibly containing "ecological, geological, or other features of scientific, educational, scenic, or historical value."[9] With this definiton of a wilderness, it is easily assumed that most mineral activity conducted on BLM lands would no longer be permissable in a BLM wilderness study area [WSA]. A careful examination of the entire structure of the Wilderness Act and the BLM mandate in section 603(c)

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5. *Id.* The full section reads:

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 as wilderness, the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated areas, including mineral surveys required by section 4(d)(2) of the Wilderness Act, and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

6. *See* 16 U.S.C. § 1133(b) (1976).

7. *Id.* § 1131(c). Section 2(c) provides in full:

A wilderness, in contrast with those areas where man and his works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled 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.

Id.

8. *Id.*

9. *Id.*

of FLPMA, however, may lead to a different conclusion. The Solicitor of the Department of the Interior has indicated his position on this issue in an unpublished memorandum [hereinafter the Solicitor's opinion].[10] The purpose of this article is first to explore how the opinion interprets the BLM WSA minerals management mandate, emphasizing the Wilderness Act's relation to that mandate, and second, to suggest an interpretation where the opinion leaves gaps, or is unclear. Finally, this article will summarize the BLM WSA interim mangement policy as it concerns mineral exploration and development.

INTERIM MANAGEMENT OF A WSA VS. WILDERNESS AREA

Management

In defining the extent of the mineral management responsibility under section 603(c), the Solicitor's Opinion includes a lengthy explanation of the relationship between the mineral activity permitted in wilderness areas and mineral activity that may be permitted in BLM WSA's.[11] The purpose of the discussion is not entirely clear; it is presumably an attempt to refute the allegation that the mineral provisions of the Wilderness Act control such activity in WSA's.[12] The conclusion that these provisions do not control such activity is inescapable. However, as the opinion indicates, these provisions do provide guidance to BLM for WSA interim management,[13] since "there may not be much difference between interim management of a study area and management of a statutorily designated area."[14]

The leading case providing guidance on the issue of whether Congress in section 603(c) intended to regulate mineral leasing and mining differently during interim management review periods is *Parker v. United States*.[15] In *Parker*, the Secretary of Agriculture, subordinate federal officials, and a lumber company were enjoined from harvesting and selling timber located on public lands.[16] The land adjoined a designated wilderness or primitive area.[17] The court addressed, for the first time, the interpretation of section 3(b) of the Wilderness Act.[18] That section allows the President to recommend "the addition of any contiguous area of national forest lands predominately of wilderness

10. Memorandum from Solicitor to Secretary, BLM Wilderness Review—Section 603, Federal Land Policy and Management Act (September 5, 1978) [hereinafter cited as Solicitor's Opinion].
11. *Id.* at 19-23.
12. *See id.*
13. *Id.* at 5.
14. *Id.* at 23.
15. 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972).
16. *Id.* at 794.
17. *Id.*
18. *Id.* at 794-95.

value,"[19] to be included in the existing primitive area it is contiguous to. In affirming the district court's injunction, the court reasoned from the legislative history of the Act that designated wilderness areas were to be regulated differently than interim management type areas.[20] In addition, the court found that the land in question was subject to the provisions of section 3(b) because the President and Congress should have a "meaningful opportunity to add contiguous areas predominately of wilderness value to existing areas."[21] Thus, the proposed commercial timber harvest had to be enjoined.

The management standard for Forest Service "primitive areas" under section 3(b) of the Wilderness Act is vague. It provides in part: "*Except as otherwise provided* in this chapter, each agency . . . shall be responsible for *preserving the wilderness character* of the area."[22] On the other hand, recent laws requiring review of the eastern United States and Montana WSA's provide a strict standard: "so as to *maintain their* presently *existing wilderness character* and potential for inclusion in the National Wilderness Preservation System."[23] The FLPMA standard in section 603(c) is somewhat in the middle: "so as not to impair the *suitability* of such areas *for preservation as wilderness* . . . ."[24] The meaning of the differences among these three standards provides the initial clue for unraveling the apparent "Catch-22" dilemma posed by section 603(c) of FLPMA.

How the Wilderness Management Mandate Affects WSA's

As indicated in the introduction, most mineral activity and, for that matter, most other multiple-use resources on public lands may impair "wilderness characteristics" of a WSA.[25] This is part of the management policy of the Wilderness Act. The introductory phrase of section 4(b) of the Wilderness Act,[26] however, opens the door for those specific activities which are permitted in wilderness areas in section

19. *Id.* (quoting 16 U.S.C. § 1132(b) (1976)).
20. *Id.* at 796-97; Solicitor's Opinion, *supra* note 10, at 20.
Using similar reasoning, the Solicitor's Opinion indicates that the special statutes recently passed by Congress for WSA's in the eastern United States and Montana are different (more restrictive) than those for BLM WSA's. *See* Act of Jan. 3, 1975, Pub. L. No. 93-622, 88 Stat. 2096 (1975); Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, 91 Stat. 1243 (1977) (to be codified at 16 U.S.C. § 1132); Solicitor's Opinion, *supra* note 10, at 20 and 20 n.43.
21. 448 F.2d 793, 797 (10th Cir. 1971), *cert. denied*, Kaibab Industries v. Parker, 405 U.S. 989 (1972).
22. 16 U.S.C. § 1133(b) (1976) (emphasis added).
23. This language appears in both the Montana Wilderness Study Act of 1977, Pub. L. No. 95-150, § 3(a), 91 Stat. 1243, 1244 (1977) and the Act of Jan. 3, 1975, Pub. L. No. 93-622 § 6(a), 88 Stat. 2096, 2100 (1975) (emphasis added).
24. 43 U.S.C. § 1782(c) (1976) (emphasis added).
25. See text & notes 6-10 *supra.*
26. 16 U.S.C. § 1133(b) (1976).

4(d)[27] of that act and further defines the standard for management of wilderness areas. The suitability of an area for inclusion in the National Wilderness Preservation System [NWPS] is not impaired if the excepted activities in section 4(d) are permitted.[28] On the other hand, if an activity is not included in those in section 4(d), it would not be permitted under section 4(b) if it would impair "the wilderness characteristics of the area." In enacting the Wilderness Act, Congress declared that the wilderness areas should be administered "for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness and so as to provide for . . . the preservation of their *wilderness character*."[29] Nonetheless, in establishing the NWPS as defined in all the provisions of the Wilderness Act (i.e., sections 2(e), 4(b) and 4(d)), Congress may not achieve the objective of preserving wilderness character for some time.

The standard for interim management in section 603 of FLPMA is not as clear as in either the Wilderness Act or the eastern United States and Montana statutes.[30] Because FLPMA defines wilderness as the definition in section 2(c) of the Wilderness Act,[31] it might be argued that the language in section 603 implies that BLM must manage WSA's to preserve their wilderness characteristics. This would be akin to the specific standard in the eastern United States and Montana wilderness statutes.[32] FLPMA is not as precise as those statutes,[33] however, and the total context of the FLPMA language implies that the BLM mandate is more like maintaining the potential for inclusion of the area in the NWPS. If Congress intended the BLM to manage WSA's to preserve their wilderness characteristics, Congress could have been more precise in the language used to describe the intended mandate; it should have directed the Secretary "to manage such lands according to his authority under this Act and other applicable laws in a manner so as not to impair the suitability of such areas for *inclusion in the National Wilderness Preservation System*." Although this standard is not the Wilderness Act standard, it is similar.

The Solicitor argues, however, that section 603 requires the BLM to preserve wilderness characteristics in interim management areas.[34] He supports this conclusion in the opinion by attempting to define the

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27. *Id.* § 1133(d) (1976) (amended 1978).
28. *See id.*
29. *Id.* (emphasis added).
30. *See* text & notes 22-24 *supra.*
31. *See* 43 U.S.C. § 1782(a) (1976).
32. See text & note 22-24 *supra.*
33. *See* 43 U.S.C. § 1782(c) (1976).
34. Solicitor's Opinion, *supra* note 10, at 22-23.

general guidance given to the Secretary for interim management pointing to three yardsticks.[35] The first, and most obvious, is the definition of wilderness.[36] Within this part of the management mandate, some very limited man-made intrusions are permitted,[37] so long as they are unnoticeable. For example, trails, trail signs, bridges, fire towers, fire breaks, hitching posts, fencing are permissible. Second, in section 4(c) of the Wilderness Act, activities which have temporary impacts do not impair wilderness potential.[38] Although the opinion does not deal with the issue, the introductory phrase of sections 4(c) also provides for the excepted activities in section 4(d), including mineral activity as defined in section 4(d)(3).[39] This provides the basis for the third yardstick which is that mineral activities having adverse impacts on wilderness characteristics are nevertheless permitted in wilderness areas, subject to limitations which are designed to avoid permanent impacts on wilderness suitability.[40]

The first yardstick (the wilderness definition) does not permit much mineral activity, except for the most preliminary investigative activity. The second may permit substantially more activity, but these activities are limited to those in which the effect can be eliminated easily upon designation of the area as wilderness. The third provides the greatest amount of flexibility for mineral activity. Although mineral activity could adversely affect wilderness character to some degree, it is still compatible with an area's suitability for preservation as wilderness.[41] In other words, Congress appears to have made mineral activity a favored use. Unlike commercial timber activity, the impacts of which could not be eliminated before Congress could act, or recreational vehicle use, the impacts of which may be substantially eliminated before congressional action, a mineral use may continue in WSA's whether or not its impacts are immediately eliminated when Congress includes the WSA in the NWPS.[42]

The Solicitor's Opinion does not provide much detail about the type or degree of mineral activity which is permissable. Although it uses the word "development", it most likely refers to the generic meaning, rather than the technical. An examination of section 4(d)(3) of the

35. *Id.* at 23-24.
36. *Id.* at 23.
37. *See* 16 U.S.C. § 1131(c) providing in pertinent part: that it is an area which "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." Solicitor's Opinion, *supra* note 10, at 24.
38. *See* 16 U.S.C. § 1133(c) (1976).
39. *See id.* §§ 1131(c), 1133(c).
40. See Solicitor's Opinion, *supra* note 10, at 24-25.
41. *See* 16 U.S.C. §§ 1131(c), 1133(c), 1133(d)(3) (1976).
42. *See* Solicitor's Opinion, *supra* note 10, at 24-25.

Wilderness Act[43] indicates that a substantial amount of mineral activity might be permitted in designated wilderness areas. Under this provision, the mining and mineral leasing laws apply to wilderness areas through 1983, eighteen years after the law went into effect.[44] After 1983, all valid rights are recognized. The extensive enumeration of activities permitted in section 4(d)(3) implies that most mineral operations may continue. The specific and detailed enumeration of permissable activities, including facilities requiring rights-of-way, such as transmission lines, and the recognition that access will be subject to reasonable regulations consistent with these activities, implies that "facilities necessary in exploring, drilling, producing, mining, and processing operations" also include the construction of temporary access routes. Because of the introductory phrases in both section 4(c)[45] and 4(d)(3),[46] the prohibition in section 4(c) of temporary roads (except for administration and emergencies) would not appear to prohibit temporary access for mineral activity if such access is necessary under section 4(d)(3) to use the land for mineral exploration and development.

Although the Solicitor indicated that the last sentence in section 603(c)[47] of FLPMA does not support the suggestion that Congress intended private mineral exploration to continue unrestricted by section 603,[48] it certainly may imply that Congress was indicating that the types of activities which are permissable in designated wilderness areas may be acceptable for WSA's. Because Congress can specify how wilderness areas will be managed in a designating statute, there was no immediate need to indicate in FLPMA that the mineral development and access provisions of the Wilderness Act will apply to future BLM wilderness areas. The 1983 cut-off date for new mineral activity in the Wilderness Act and the requirement in FLPMA for mineral surveys need not indicate the contrary. In the legislative history of the Wilderness Act, the conference committee indicated that the mineral provision was meant to encourage exploration by both industry and the government and it was the intent of the committee that "a similar limitation of time should be placed on those primitive areas . . . that are in the future designated as wilderness areas."[49] In accordance with the intent expressed by Congress in the Wilderness Act and FLPMA, Congress certainly has the option to permit mineral activity to continue for a

43. 16 U.S.C. § 1133(d)(3) (1976).
44. *See id.*
45. *See id.* § 1133(c) ("Except or specifically provided for in this chapter").
46. *See id.* § 1133(d)(3) ("Notwithstanding any other provisions of this chapter").
47. 43 U.S.C. § 1782(c) (1976).
48. *See* Solicitor's Opinion, *supra* note 10, at 22-23.
49. CONF. REP. No. 1829, 88th Cong., 1st Sess. 2, *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 3631, 3632.

period which approximates that in the Wilderness Act when BLM WSA's are included in the NWPS.

All of the mineral activities permitted under section 4(d)(3) are explicitly subject to "reasonable regulations governing ingress and egress . . . and restoration as near as practicable of the surface of the land disturbed."[50] However, these regulations must also be consistent with the mineral activities. Mineral leases and permits issued in wilderness areas must also "contain such reasonable stipulations as may be prescribed . . . for the protection of the wilderness character of the land."[51] Like other mineral activity regulations, these stipulations must also be "consistent with the use of the land for the purposes for which they are leased."[52] Reasonable regulations which must be consistent with the use of the land for mineral activity must permit some mineral activity. Therefore, the obvious impact mineral uses will have on wilderness character will have to be allowed to some extent. However, mineral activity will have to be carefully controlled to avoid total impairment of the wilderness character of the area. The question which remains is how this delicate balance can be achieved in a WSA.

The Solicitor, in his opinion, indicates that mineral development by definition could adversely affect wilderness character;[53] he relied on *Izaak Walton League of America v. St. Clair.*[54] However, *Izaak* is easily distinguished from a possible situation arising under section 603 of FLPMA because the decision involved mining activity in the Boundary Water Canoe Area [BWCA]. The BWCA is a unique wilderness area governed by a special provision in the Wilderness Act.[55] In 1965, on the recommendation of the BWCA Review Committee, the Secretary of Agriculture issued a statement canceling mineral leasing in the BWCA except in a national emergency.[56] The District Court held that since no national emergency existed the Izaak Walton League could enjoin St. Clair's mineral activity within the BWCA.[57]

The Solicitor, however, relied on the broad dictum in Judge Nevilles' decision wherein he stated: "Mineral development . . . by its very definition cannot take place in a wilderness area; else it no longer is a wilderness area."[58] Such a statement appears strained, at best, since

50. 16 U.S.C. § 1133(c) (1976).
51. *Id.*
52. *Id.*
53. Solicitor's Opinion, *supra* note 10, at 25 & n.51.
54. 353 F. Supp. 698 (D. Minn. 1973), *rev'd,* 497 F.2d 849 (8th Cir. 1974), *cert. denied,* 419 U.S. 1009 (1974).
55. 16 U.S.C. § 1133(d)(5) (1976) (amended 16 U.S.C.A. § 1133(d)(5) (West Supp. 1979)).
56. Izaak Walton League of America v. St. Clair, 353 F. Supp. 698, 706 (D. Minn. 1973), *rev'd,* 497 F.2d 849 (8th Cir. 1974), *cert. denied,* 419 U.S. 1009 (1974).
57. *Id.* at 715-16.
58. *Id.* at 715.

Congress expressly provided for mineral activity in the wilderness areas.[59] Yet, criticizing the courts opinion is academic, since the Court of Appeals for the Eighth Circuit overruled the opinion; the Forest Service never acted upon St. Clair's application for a mining permit and thus never made a record for review.[60] The court of appeals did note, however, that in acting upon the permit the Forest Service must determine whether the planned activity was compatible with the wilderness character of the area, implying that if it were, a permit could be granted.[61] Thus, it appears that the Solicitor's reliance on *Izaak* for the broad proposition that mining activity in a section 603 WSA is inimical to that area, is less than compelling.

Withdrawal From Location Under Mining Law

Section 603(c) recognizes that WSA's may not be withdrawn from mining claim location simply because the area is being reviewed for its wilderness suitability.[62] Of course, it may be withdrawn for reasons other than wilderness under provisions of section 204 of FLPMA.[63] This clause is an affirmation that only Congress can withdraw an area for wilderness by designating it part of the NWPS. Identification of a previously withdrawn area as a WSA would also not affect the prohibition on location in the area. Finally, in the same breath in which Congress recognized that a WSA can not be withdrawn from mining claim location merely because of wilderness review, it also instructed that a WSA would continue to be subject to location under the mining laws.[64]

Existing Operations

The management mandate of the Secretary under section 603(c) of FLPMA is subject to a "grandfather" clause which states that preservation of wilderness suitability is "subject . . . 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.[65] After an examination of the sketchy congressional history surrounding this phrase, the Solicitor concluded that "existing mining . . . uses and mineral leasing" means existing mineral uses (both locatable and leasable minerals) and that those uses are judged by the physical and aesthetic impact which they may have on the WSA. Therefore,

59. *See* 16 U.S.C. § 1133(d) (1976); text & notes 27-30 *supra*.
60. Izaak Walton League of America v. St. Clair, 497 F.2d 849, 853 (8th Cir. 1974), *cert. denied*, 419 U.S. 1009 (1974).
61. *Id.*
62. *See* 43 U.S.C. § 1782(c) (1976).
63. *See id.* § 1714.
64. *Id.* § 1782(c).
65. *Id.*

"grandfathered" uses on both mining claims and mineral leases existing on October 21, 1976, must have been actual uses occuring on that date.[66] They are not measured by the legal entitlement under the claim or lease.

Existing claims or leases developed for the first time after October 21, 1976, are subject to regulation governing present impairment of the wilderness suitability of the claim or lease area.[67] Operations being conducted on the lease or claim on October 21, 1976, may continue in the same manner and degree even though the operation impairs wilderness suitability.[68] Operations exceeding the manner and degree of those on October 21, 1976 will be subject to wilderness regulation.[69] The first *proviso* in section 603(c), however, subjects all grandfathered operations to regulation in order to prevent "unnecessary or undue degradation of the lands and their resources or to afford environmental protection."[70] Although this phrase is probably intended to cover the grandfathered activity, it could also apply to the new nongrandfather activity. However, the higher wilderness suitability protection standard would probably achieve the general environmental protection sought by the *proviso*. In some cases, the reverse may also be true.

The section of the Solicitors' Opinion discussing the meaning of "manner and degress"[71] is confusing. It is clear, however, that a rule of reason is to be used in arriving at the definition. Because the opinion's basic conclusion about existing operation is centered around their impact, it concludes that the continuation of those activities is limited geographically by the area of activities development and the "logical adjacent continuation" of the existing activity.[72] Therefore, a surface mine may continue to expand in area and additional exploration or production wells (in the case of oil and gas) may be drilled so long as the cumulative effect of the new and old activity does not raise the level of impact to a degree to which it is judged to represent a new and distinct impairment of the area's wilderness suitability. This is obviously a very fluid and difficult standard to pin down for every case. It will require a careful and even-handed exercise of discretion.

BLM-WSA INTERIM MANAGEMENT GUIDANCE

The Draft Interim Management Policy and Guidelines for Wilder-

66. *See* Solicitor's Opinion, *supra* note 10, at 26-28.
67. *See* 43 U.S.C. § 1782(c); Solicitor's Opinion, *supra* note 10, at 27.
68. *See id.*
69. *See id.*
70. 43 U.S.C. § 1782(c) (1976).
71. *Compare* Solicitor's Opinion, *supra* note 10, at 27 *with id.* at 31.
72. Solicitor's Opinion, *supra* note 10, at 27.

ness Study Areas [DIMP][73] closely follows the analysis of the Solicitor in defining the mandate of BLM under section 603 of FLPMA. As the Solicitor's Opinion states, individual decisions under the wilderness policy will require "a wise exercise of judgment of land management professionals and Departmental decisionmakers."[74] The policy in DIMP provides only general guidance and direction for most activity. It recognizes that most decisions must be influenced by the vast differences in specific proposed activity and the site-specific impacts these activities will have in different climate and land areas. Where possible, certain assumptions are made in the policy about continuing or prohibiting certain activities during the wilderness study period.

The overview of the DIMP poses the most important question concerning interim management: what mineral activities will cause impairment?[75] The goal of interim management of section 603 lands, like that of the Wilderness Act, is to ensure that any area that now satisfies the wilderness definition in section 2(c) of the Wilderness Act will satisfy this definition when Congress acts on the President's recommendations regarding WSA's.[76]

There are, however, two exceptions to this general overall goal of the interim management policy. The first is the decision Congress made to allow the impairment caused by the grandfathered mineral and grazing uses that are subject to the "manner and degree" phrase in section 603.[77] The second is the Solicitor's conclusion that the criterion for "impairment" excludes carefully controlled mineral activity similar to that allowed under section 4(d)(3) of the Wilderness Act.[78] The DIMP concludes that mining and mineral leasing activities could adversely offset wilderness character to some degree. Yet, Congress decided that these activities may be compatible with an area's suitability for preservation or wilderness. Thus, oil, gas, and mining activities that only temporarily impact wilderness areas "are considered not to impair wilderness suitability."[79]

The concept of temporary impacts is the crux of the individual "wise exercise of judgment of land management professionals and Departmental decisionmakers" which the Solicitor stipulated must govern WSA interim management.[80] As the DIMP indicates, "to the extent

73. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, INTERIM MANAGEMENT POLICY AND GUIDELINES FOR WILDERNESS STUDY AREAS (Draft) (Jan. 12, 1979) [hereinafter cited as DIMP].

74. Solicitor's Opinion, *supra* note 10, at 25.

75. DIMP, *supra* note 73, at 5.

76. *See id.* at 6.

77. *Id.*

78. *See id.*

79. *See id.* at 5-6.

80. See text & note 25 *supra*.

that activities and their imprint on wilderness are temporary and can be carried on in a manner that minimizes interference with wilderness potential, these activities pose less of a threat to an area's suitability for wilderness designation than do activities with long-term impact and low rehabilitation potential."[81] "Temporary impacts" are defined by the DIMP as impacts that can be rehabilitated to the point of being substantially unnoticed, "and the damaged environmental systems must be capable of being rehabilitated to essentially the condition which existed on the date the activity was approved by the BLM," by the time Congress designates the area as wilderness or no later than five years after congressional designation.[82]

Any activity, the impacts of which can be rehabilitated before Congress acts, would be permissible in WSA without foreclosing the options of Congress. Rehabilitation must provide a post-activity condition in which residual effects are "substantially unnoticeable."[83] This merely recognizes the definition of wilderness character in section 2(c) of the Wilderness Act.[84] The effects of the activity will be noticeable when compared to the state of the area before the activity took place. The effects after rehabilitation, however, will be unnoticeable to everyone except the trained eye of one familiar with the area before the activity occurred. As the vital part of DIMP definition implies, "substantially unnoticeable" refers to "something that is not immediately recognizable as man made or man caused because of age, weathering, or biological changes, or because the thing is so insignificant as to be only a very minor feature of the overall area."[85]

Obviously, the five year rehabilitation period following Congress' designation of an area for wilderness is going to present a moving target for BLM land managers. Congress has not imposed any deadlines for acting on wilderness recommendations of the President. Therefore, the question present is how will BLM managers know when, or whether Congress will act to designate an area for inclusion in the NWPS? The answer is obvious; they will not. This five-year grace period for mineral activity rehabilitation is, however, a good compromise which may be effective in permitting enough mineral exploration activ-

81. DIMP, *supra* note 73, at 5.

82. *Id.* at 8. The draft further provides:

> Impacts which the BLM has determined to be temporary on grounds that rehabilitation will be practically and economically accomplished by the time of congressional designation of the area or wilderness or, *in the case of new mineral activities*, no later than 5 years after congressional designation. The BLM will determine in advance the plan and schedule for rehabilitation measures.

Id. (Emphasis added).

83. *Id.*

84. *Compare id. with* 16 U.S.C. § 1131(c) (1976).

85. DIMP, *supra* note 73, at 8.

ity to permit a more accurate and balanced decision about including an area in the NWPS. It is a compromise because the mandate of BLM under section 603 appears to provide only two other options.

The first is to approve activity, which like other uses, must be rehabilitated before Congress acts. Although this option may permit some mineral activity in the next few years (i.e., before the wilderness inventory of BLM lands is completed and the initial areas are recommended to Congress), more activity would have to be excluded as the mid-1980's are reached and the schedules for forwarding recommendations to Congress become clearer. The present proposed policy will, in practical terms, probably mean that BLM managers will, in deciding when rehabilitation must be completed, look to the date when they estimate an area will be submitted to Congress for review, rather than the date upon which Congress may eventually act. The congressional submission date is more predictable because BLM will have developed its own schedule for sending recommendations to the President, and he must act within two years on his recommendations to Congress. As those dates draw closer to the time a decision permitting activity is requested, the permissible time for completion of rehabilitation grows shorter. The BLM manager will have to assume that Congress will act almost immediately on recommendations forwarded to it for action (certainly within one year) even though in reality Congress may take several years to act on the President's recommendations. Even the most well planned mineral exploration operations in areas with high rehabilitation potential may take three or more years for the activity to be initiated, completed, and the impacts removed to a substantially unnoticeable state.

The second option would be to require the rehabilitation of impacts to be accomplished in accordance with an agreement between the BLM manager and the operator, within the economic life of the activity. This option was rejected in the DIMP on the assumption that the economic life of an oil and gas production facility may range from five to thirty years. If Congress is to be given a meaningful option to decide whether or not an area should be included in the NWPS or whether controlled mineral activity should proceed, it would be unrealistic to expect it to make a balanced decision when activity of this magnitude is present in the area.

If the effects of mineral activity will have to be eliminated within five years, more options will be available. As indicated previously, the practical effect of this policy will probably mean that rehabilitation may be completed well within five years of the date Congress may propose to act. Therefore, if the congressional decision is to close the area

to all mineral activity, it could do so and provide a procedure to include the affected area within the NWPS within a relatively short time. Similar procedures for dealing with "potential wilderness areas" subject to various encumbrances or impacts have been used by Congress in designating NWPS wilderness areas. If the decision is made to continue to permit mineral activity similar to that in section 4(d)(3) of the Wilderness Act or to permit even greater activity or exclude the area from the NWPS all together, the rehabilitation schedule can be adjusted to accommodate continued activity.

It is important to note that the policy requires rehabilitation only if the area is "designated" by Congress as wilderness. Therefore, a rehabilitation schedule established before the wilderness recommendation was forwarded to Congress, could be readjusted at any time before congressional action if Congress does not act promptly and circumstances necessitate an extension of time. Although the extent of this policy is to reduce the practical impact on the decision of Congress about the wilderness suitability of the area, it will affect the timing of that decision. The sooner the period for completion of rehabilitation draws near, the greater will be the pressure on Congress to decide whether the mineral activity may continue and the rehabilitation must be completed as agreed upon between BLM and the mineral operator.

Even though BLM is required to report to Congress on those areas which it feels should not be "designated" as wilderness, the use of the designation language in the rehabilitation standard should not imply that it does not apply to such areas. Congress or the President always have the option of reversing the recommendation of BLM. The choice of the designation date also permits the BLM manager to avoid violating his own guidelines. If he should use the date he estimates an area will be forwarded to Congress and the recommendation goes to Congress sooner than he expected, there will be, in most cases, plenty of time for completion of rehabilitation, even if Congress acts promptly on the recommendation.

In a sense, the figure of five years is arbitrary. A period of six, ten or even fifteen years could have been chosen. The five year period was probably chosen because it represents the minimum time frame which some reclamation experts believe is necessary to insure successful reclamation. It is also short enough to reduce the possibility of completely foreclosing congressional choice and long enough to permit most exploration operations. Although production activities are not precluded, it is unlikely that the impacts from most mineral production activity could be rehabilitated to the standard required by the DIMP within five years of congressional action. Economic considerations would pre-

clude much of this activity. However, the importance of mineral information to Congress in making a wilderness decision is indicated in its desire, expressed in FLPMA and the Wilderness Act, to promote private mineral exploration activity in addition to the mineral surveys conducted by the United States Geological Survey and Bureau of Mines required in both acts.

Specific Guidelines for Minerals

A. *Existing Uses.* Closely tracking the Solicitor's Opinion, DIMP confines existing mining and leasing operations geographically to the area of active development and its logical continuation.[86] Thus, the area is necessarily limited to the boundary of the mining claim or leased area.[87] If the claim should expand, the expansion could not "cause impairment of wilderness suitability beyond that caused by the existing claim."[88]

In addition to the geographical extent of existing operations, the DIMP also recognizes that activities may be considered existing even though they were not actually being conducted precisely on October 21, 1976. Operations may have been temporarily suspended due to economic or weather conditions before the date of FLPMA. They can be resumed the following year in the same manner and degree as grandfathered activity.[89] It is difficult to determine precisely how long before October 21, 1976 suspended operations may be considered existing. The key will probably depend upon the circumstances surrounding the suspension and the impact the operation has already had and will likely have on the area. The more that impacts from operations have been removed naturally (and thus resumption might create new scars) the less likely it is that those operations would be considered existing. In many cases, this will also be a function of time.

B. *Oil and Gas Leasing and Development.* Oil and Gas leasing will continue in WSA's. Leases, however, are subject to a stipulation which requires a second environmental analysis of the impacts of any exploration or development operations.[90] Those operations may be permitted only if the analysis indicates that they will not impair the wilderness suitability of the area. Most exploration activities (including seismic investigation, wildcat drilling, and construction of temporary access routes) are predicted to have temporary impacts and the policy is

86. *Id.* at 13.
87. *See id.*
88. *Id.*
89. *Id.*
90. *See id.* and app. B-1 at 29.

optimistic that they will be approved.[91] Production activities are not totally precluded. DIMP, however, concludes that only some production activity might be approved because of the five year rehabilitation standard or because it may be substantially unnoticeable, e.g., small delivery pipelines or small well-control equipment.[92]

If drilling operations are delayed beyond the end of the primary lease term because of reviewer WSA inventory, the Secretary may suspend the operation and production requirements of the lease and extend the lease for purposes of conservation.[93] BLM will encourage lessees to file applications for drilling permits within 120 days before the end of the lease term to provide sufficient time to make a decision before the term ends. If an application for suspension is filed, BLM will recommend that suspension, if granted by the Secretary, begin on the date the application is filed with the United States Geological Survey.[94] The regulations give the Secretary the discretion to determine when the suspension becomes effective.[95] BLM will decide, on a case-by-case basis, whether it will recommend that the lease term be suspended.

C. *Geothermal Resources.* Leasing will continue very much like oil and gas leasing.[96] The stipulation included in geothermal leases, however, excludes any development activity involving electric generation facilities.[97] This limitation on electric generation development recognizes that development of a geothermal lease for electrical generation will require construction of a generating plant on the leasehold. The permanent and extensive nature of an electrical generation plant would not be compatible with the wilderness suitability of the area. Other developmental activity is permitted, however, such as exploration activity. As in the oil and gas lease area, delayed operations by the BLM for inventory or WSA purposes will result in the suspension of the lease terms requiring diligent operations.[98] Under geothermal leases, however, the BLM recommends to the United States Geological Survey that the lease terms be suspended, while in the oil and gas area, the BLM will recommend that the lessee file an application to suspend the lease terms. There is no explanation for the difference in treatment between geothermal and oil and gas. In the case of geothermal resources, however, suspension may be granted by the

91. DIMP, *supra* note 73, at 13.
92. *See id.* at 13-14.
93. *Id.* at 14; 30 U.S.C. § 209 (1976); 43 C.F.R. § 3103.3-8(a) (1978).
94. DIMP, *supra* note 73, at 14.
95. 43 C.F.R. § 3103.3-8 (c) (1978).
96. DIMP, *supra* note 73, at 14.
97. *See id.* and app. B-2 at 29.
98. DIMP, *supra* note 73, at 14.

United States Geological Survey.[99]

D. *Coal.* The criteria developed by the Department under the Surface Mining Control and Reclamation Act[100] and the FLPMA for determining what areas are unsuitable for coal mining are used as guidelines to determine whether to lease coal.[101] The criteria indicates that federal lands designated as WSA's shall be considered unsuitable for coal mining while under review for possible wilderness designation unless the coal will be mined by underground mining methods which produce no surface effects on the WSA.[102] Areas which meet the criteria may not be leased unless the lease is conditioned to exclude the surface mining from the WSA while it is under review. Mining operations proposed on existing leases will be subject to the same criteria. Exploration operations are predicted, for the most part, to have temporary impacts.[103] Existing rights to preference right leases will be recognized.

E. *Other Leasable Minerals (Phosphate, Potash, Sodium, Sulphur, and Hardrock (Solid) Minerals on Acquired Lands).* Prospecting permits will continue to be issued for these minerals,[104] subject to a stipulation that no preference right lease will be issued until and unless an environmental analysis is completed and it is demonstrated that the minerals can be removed by mining methods which will not impair the suitability of the area for preservation as wilderness.[105] They will also be subject to a stipulation to insure that the impact caused by the exploration activities will not impair wilderness suitability. The DIMP predicts that exploratory operations may be considered temporary and may be approved.[106] The implication of the DIMP about mining, however, is that surface mining operations and underground mining which has surface effects will have to be carefully controlled before they will be permitted.[107] The guidelines are not optimistic about finding that the impacts of these types of mining operations are temporary. Existing rights to preference right leases will be recognized.

F. *Mineral Materials (Saleables).* The DIMP is optimistic that the disposal of mineral materials from small gravel pits may only in-

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99. 30 C.F.R § 270.17 (1978).
100. 30 U.S.C.A. §§ 1201-1328 (West Supp. 1978).
101. DIMP, *supra* note 73, at 14.
102. *Id.*
103. *Id.* at 14-15.
104. *Id.* at 15.
105. *Id.*
106. *Id.*
107. *Id.*

volve temporary impacts.[108]

G. *Mining Claims.* Mining operations conducted in potential and identified WSA's will be subject to new regulations.[109] The proposed rules provide a procedure for approval of those activities which are identified by the rules as posing the greatest potential for impairment of wilderness suitability.[110] Except for general environmental protection standards, they do not establish the guidelines for approval of operations in WSA's. These are provided in the DIMP.[111] Exploration and mining operations are treated similar to the guidelines for other leasable minerals, i.e., exploration operations are considered likely to have temporary impacts and the prediction about the impacts of surface mining are not optimistic. Of course, location of claims may be continued and discovery and assessment work which are necessary and reasonable to locate or hold a claim will not be totally prohibited.[112] This work will be regulated to prevent impairment of wilderness suitability. Therefore, the activity will be required to be reduced to the minimum necessary under state law to avoid making the claim susceptable to overstaking. Patents will continue to be issued in WSA's.

The proposed regulations require that a plan of operations must be filed prior to commencing new mining operations begun after October 12, 1976, only if the operations involve certain activities. These include 1) construction of access routes or facilities, 2) destruction of trees, 3) use of tracked vehicles or earth moving equipment, 4) use of motorized vehicles in areas closed to their use, 5) construction or placing of any structure on public land for more than thirty days, or 6) the use of explosives.[113] Initial mineral investigative work and exploration which do not require mechanized earth moving equipment or tracked vehicles may be conducted without obtaining an approved plan of operations. Operations which were being conducted on October 21, 1976 are not required to have a plan unless they undergo changes that exceed the manner and degree of operations conducted on October 21, 1976.[114] Operations begun after October 21, 1976, which would normally require an approved plan must file a plan sixty days after the date of the rules.

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108. *See id.*
109. *See id.* The proposed rules appear at 44 Fed. Reg. 2623-29 (1979) (to be codified in 43 C.F.R. § 3802).
110. 44 Fed. Reg. 2624-29 (1979).
111. See DIMP, *supra* note 73, at 15.
112. *See id.*
113. *See* 44 Fed. Reg. 2624, 2625 (1979) (to be codified in 43 C.F.R. § 3802.1-1).
114. *See id.* at 2625 (to be codified in 43 C.F.R. § 3802.1-3).

BLM must approve the plan in thirty days (or a sixty day extension) or the proposed operation may proceed without formal approval.[115] If it is determined that these operations are impairing wilderness suitability, however, the BLM may require a modified plan be filed for approval after these operations have commenced.[116] Proposed modifications of approved plans are subject to appeal to a BLM State Director. To avoid a rubber stamp on the modification proposal, he must find that the BLM authorized officer addressed the initial plan adequately and the proposed modifications are not frivolous. If approval of a plan requires preparation of an environmental statement or compliance with the National Historic Preservation Act, approval may take as much time as is necessary to prepare the statement or comply with the Act.[117] Bonds may be required.[118] The amount is determined by the estimated cost of reclamation and a ceiling is established.[119] Access, even across public land outside of the claim boundaries, will be approved under the plan.

Approved plans must insure compliance with a number of general environmental standards. These include criteria for air quality, water quality, solid wastes, visual resources, fisheries, wildlife and plant habitat, cultural and paleontological resources, access routes, and reclamation.[120] The criteria for air, water, solid wastes, cultural and paleontological resources, and reclamation provide little or no discretion for the BLM authorized officer; no plan can be approved unless air, water, and solid waste standards are met, cultural resources are not adversely affected, and the land is reshaped to "its approximate original contour." For the most part, the reclamation criteria require total rehabilitation and provides little discretion to the authorized officer to permit anything other than the pre-existing condition.

In the case of most of the other resources or activities, the criteria provide a mitigating measure that provides some flexibility in approving a plan. If adverse impacts on the resources can not be prevented, they may be controlled or mitigated to the extent possible. In the case of protection of endangered or threatened fish, wildlife, and plant species, the standard may not be as strict as required by the Supreme Court in *Tennessee Valley Authority v. Hill.*[121]

No new access routes may be constructed unless they cause only

115. *See id.* at 2626 (to be codified in 43 C.F.R. § 3802.1-5).
116. *See id.* (to be codified in 43 C.F.R. § 3802.1-6).
117. *See id.* (to be codified in 43 C.F.R. § 3802.1-5(d)).
118. *See id.* at 2627 (to be codified in 43 C.F.R. § 3802.2).
119. *See id.*
120. *See id.* (to be codified in 43 C.F.R. § 3802.302).
121. 98 S.Ct. 2279 (1978).

temporary impacts.[122] New temporary access routes must be maintained only to control or prevent damage to existing resources and the authorized officer is given discretion to permit new temporary routes to remain open without impacts being rehabilitated.[123] In WSA's, this standard may be too liberal.

The rules provide no direction to the BLM authorized officer to consider the economic impacts or the technological feasibility of imposing conditions on proposed operations under these environmental criteria. In a WSA this would not be appropriate. Because of the limited authority of the BLM to control mining operations outside of WSA's,[124] this direction should be given to the BLM in imposing conditions in the case of the discretionary environmental criteria involving visual resources, fish, wildlife and plant habitat, roads, and reclamation. The information in a plan will be protected in accordance with the provisions of the Freedom of Information Act.[125] If the Act does not require disclosure, confidential information will not be made public. A decision of the BLM authorized officer or the State Director may be appealed to the Interior Board of Land Appeals.[126] Suspension of operations may be required only after they are enjoined by a court. The regulations apply to potential WSA's as well as those already identified as WSA's after a formal inventory, with public participation, is completed. If an area is only a potential WSA, a plan may be approved before the inventory is completed if the operator is willing to accept conditions to protect wilderness suitability. If he is not, the plan may not be approved until the inventory is completed. This may delay approval of a substantial number of plans until all BLM administered lands are inventoried (September 1980). As the inventory progresses however, this number will be reduced. Although the regulations do not specifically state, they will no longer apply to lands which are patented. Bonds will be released or reduced when the land is patented.

CONCLUSION

In his interpretation of the interim management mandate of BLM under section 603(c) of FLPMA, the Solicitor found that carefully controlled mineral operations are favored over other activity in WSA's. Therefore, some new mineral activity may be allowed in a WSA without impairing its suitability. Existing operations may continue in the

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122. *See* 44 Fed. Reg. at 2628 (to be codified in 43 C.F.R. § 3802.3-2(g)).
123. *See id.*
124. *See* 43 U.S.C. § 1732(b) (1976).
125. *See* 44 Fed. Reg. at 2629 (to be codified in 43 C.F.R. § 3802.6).
126. *See id.* (to be codified in 43 C.F.R. § 3802.5).

same manner and degree that they were being conducted on the date of FLPMA even though they impair wilderness suitability.

The Solicitor did not elaborate on the degree of new mineral activity which could be permitted in WSA's. Recognizing that different operations in different areas will have a variety of impacts, some acceptable and some unacceptable, he concluded that the answer will depend on "a wise exercise of judgment of land management professionals and Department decision makers" in individual cases and policy decision. Looking to the Wilderness Act for guidance, he provided three yardsticks for making these decisions. First, activity which is substantially unnoticeable is permitted under the definition of wilderness. Second, activity which is temporary may be allowed because impacts may be successfully removed without permanent impairment of wilderness suitability. Finally, if carefully controlled mineral activity is allowed in wilderness areas, it may be permitted in WSA's.

Using these three yardsticks, BLM prepared the interim management policy for WSA's. The key to new mineral activity is the definition of temporary impacts. Activity which causes only temporary impacts may be permitted in a WSA. Temporary impacts are those which can be practically rehabilitated before Congress designates an area as wilderness or, in the case of mineral operations, within five years after designation. The specific guidelines for each type of mineral resource (oil and gas, geothermal, coal, the hardrock leasables, mineral materials, and locatable minerals) predict that initial prospecting and exploration activities will only cause temporary impacts. For most of these resources, the policy does not preclude development and production activities. It is not optimistic, however, that surface mining activities will be judged to have temporary impacts. Leasing will continue for most minerals, but leases and permits will be conditioned to preserve wilderness suitability. Operations conducted under the mining law will be controlled by new regulations. The rules will require approval of mining plans before commencing operations which involve activities likely to cause impairment of wilderness suitability, such as construction of access routes.