
NATURAL RESOURCES JOURNAL

Volume 16
Issue 3 *Symposium on the Gulf of California*

Summer 1976

Bureau of Land Management Primitive Areas - Are They Counterfeit Wilderness

John D. Foster

BUREAU OF LAND MANAGEMENT PRIMITIVE AREAS—ARE THEY COUNTERFEIT WILDERNESS?

JOHN D. FOSTER*

Over sixty percent of the federally owned land in the United States is managed by the Bureau of Land Management (BLM).[1] In addition to extensive federal landholdings in Alaska, the BLM has management responsibility for over 175 million acres of land in ten western states.[2] BLM lands, now officially labeled "natural resource lands," have been more commonly known as the "public domain"—diverse in terrain, climate and vegetation, rough or broken, arid or semi-arid. The topography ranges from flat prairies to mesas and canyons, from desert valleys to mountain peaks. Dominant vegetation varies from sagebrush, prairie grasses, desert shrubs and pinyon-juniper, to forests of pine and fir.[3]

The public domain includes vast expanses of wild and semi-developed lands, and yet no part of it has been set aside as part of the National Wilderness Preservation System. The 1964 Wilderness Act, which applies to national forests, national parks, and national wildlife refuges, does not apply to BLM lands.[4] However, since passage of the Wilderness Act, the Interior Department and the BLM have provided for an analogue to wilderness areas, administratively created BLM "primitive areas."[5]

---

*Third-year student, School of Law, University of Oregon. The work upon which this article is based was supported by funds provided through the Oregon Student Public Interest Research Group. The author wishes to express his gratitude for the advice in the writing of this article to Professor Charles Wilkinson, School of Law, University of Oregon.

1. Public Land Law Review Commission, *One Third of the Nation's Land*, 21 (1970) [hereinafter cited as *PLLRC Rep.*]. The director of the Bureau of Land Management [hereinafter cited to as the BLM] is headquartered in Washington, D.C., and oversees 11 state offices and 63 districts. Districts are the basic organizational unit and state offices are the intermediate, regional unit; the respective chief officers are district manager and state director. Clawson, *The Bureau of Land Management* 53-61 (1971) [hereinafter cited as Clawson].

2. The BLM has management responsibility for 275 million acres of land in Alaska; however, this article will focus exclusively on BLM lands in the contiguous United States. Excluding Alaska, the BLM has approximately 10 million acres less than the total amount of land managed by the United States Forest Service. The total BLM acreage in each of the 10 western states is: Nevada, 48.3 million acres; Utah, 22.8; Wyoming, 17.5; California, 15.6; Oregon, 15.5; New Mexico, 13.2; Arizona, 13.0; Idaho, 12.2; Colorado, 8.4; Montana, 8.2. Clawson at 46.

3. *Id.* at 70-73. *See PLLRC Rep. supra* note 1, at 22-27.

4. 16 U.S.C. §1132(b), (c) (1970).

5. 43 C.F.R. §2071.1 (1975); *Bureau of Land Management, Dep't of Interior, Manual* §6221 (1975) [hereinafter cited as *BLM Manual*]. "The *BLM Manual* is the basic source of permanent written policy and guidance for the Bureau." *BLM Manual* 6221.11 (1975). Copies of the manual are located at BLM national, state, and district offices. *BLM Manual* §1221.11 (1975).

Since 1969 the BLM has designated eight primitive areas totaling 170,000 acres. These primitive areas include a variety of different land forms. There are four large canyon areas in the Southwest, two high mountain alpine areas in Colorado and Wyoming, and two small areas in Montana. Existing primitive areas range in size from 2,700 acres to 57,000 acres;[6] their average size is considerably smaller than that of wilderness areas. Five additional areas are being considered for designation as primitive.[7]

The BLM intends for primitive areas to substitute for the National Wilderness Preservation System on BLM lands. The *BLM Manual* states, "BLM primitive areas will be managed to maintain the same quality as lands in the National Wilderness Preservation System."[8] A primary purpose of designating BLM primitive areas is officially stated to be "the preservation of natural ecosystems," in keeping with the preservationist policy of the Wilderness Act.[9] Primitive area criteria listed in the *BLM Manual* are taken directly from the definition of a wilderness section of the Wilderness Act.[10]

6. The eight existing primitive areas are: (1) *Powderhorn*, Colorado, 40,400 acres, an alpine area of lakes and streams which ranges in elevation from 8,600 to 12,600 feet. (2) *Paria Canyon*, Utah and Arizona, 27,515 acres, a 500-foot-deep canyon that is extremely narrow for six miles of its fifteen-mile length. (3) *Aravaipa Canyon*, Arizona, 5,080 acres, a relatively inaccessible canyon with walls of up to 1,000 feet which contains a stream and extensive riparian vegetation. (4) *Dark Canyon*, Utah, 57,248 acres, high mesas and canyons east of the Colorado River. (5) *Grand Gulch*, Utah, 24,080 acres, a relatively inaccessible area of canyons and high mesas. (6) *Humbug Spires*, Montana, 7,041 acres, numerous rock spires of up to 600 feet in height which rise from a forested ridge. (7) *Beartrap Canyon*, Montana, 2,761 acres, coniferous forests in rough terrained area enclosing the fast flowing Madison River. (8) *Scab Creek*, Wyoming, 6,680 acres, rocky, steep, rough terrain; elevation ranges from 7,400 feet to 9,600 feet; includes several small lakes and creeks.

7. Requests for authorization to designate the following areas as primitive areas are currently pending before the BLM Director: (1) *Paiute*, Arizona, 35,095 acres, 8,000-foot mountains bordering on a desert. (2) *Chemise Mountain*, California, 3,621 acres, steep, rugged mountains along the California Coast. (3) *Brown's Canyon*, Colorado, 9,194 acres, Arkansas River Valley and adjacent mountainside; elevations range from 7,100 feet to 9,000 feet. (4) *North Fork Powder River*, Wyoming, 22,400 acres, open hillsides with ponderosa pine and a broad river canyon. (5) *Centennial Mountains*, Montana, 21,985 acres, forested mountains reaching up to alpine summits; it lies immediately to the south of Red Rock Lakes Wilderness Area. (Authorization to designate this area was given to the BLM State Director for Montana on June 25, 1975.) Letter from George Lea, Acting Ass't Director, BLM, Washington, D.C., to the author, July 25, 1975, on file with the *Nat. Res. J.*

For a partially complete list of roadless areas on BLM lands *see Hearings on H.R. 5224 and H.R. 5622 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess., at 400-02 (1975) [hereinafter cited as *1975 Hearings*].

8. *BLM Manual* §6221.06(B) (1975).

9. *BLM Manual* §6221.02(A)(2-4) (1975); 16 U.S.C. §1131(a) (1970).

10. 16 U.S.C. §1131(c)(2-4) (1970). Virtually the only difference between these two sections is that wilderness *"has at least five thousand acres of land* or is of sufficient size to make practicable its preservation and use in an unimpaired condition," 16 U.S.C. §1131(d)(3) (1970) (emphasis added), whereas, a primitive area, "[i]s of sufficient size to make practicable its preservation and use in an unimpaired condition." *BLM Manual* §6221.11 (1975).

The purpose of this paper is to analyze whether the BLM's primitive area program is in fact a functional alternative to the National Wilderness Preservation System. A comparison of the official management guidelines of wilderness areas and primitive areas will be made to determine whether the BLM has provided administrative safeguards comparable to the statutory safeguards for wilderness areas. However, the primary focus will be on the process of inventory, study, and selection of potential primitive areas, which the BLM has coordinated with its land use planning system.

The format will be to review briefly the background of the public domain and the BLM; then to examine the legal underpinnings of primitive designation and its interrelationship with land management practices; and finally to compare the BLM primitive area system and the National Wilderness Preservation System in the following areas: management guidelines; procedures for inventory, processing identified areas, and interim protection; as well as procedural formats for final decision making.

BLM AND THE PUBLIC DOMAIN

Special Problems Involved in Creating Primitive Areas

A review of the origins of the BLM helps to explain some of the special problems that it faces in creating primitive areas. The BLM originated in 1946 as a merger of the General Land Office and the Grazing Service. The General Land Office, dating from the early nineteenth century, administered the many statutes which facilitated disposal of the public domain.[11] This land disposal system allowed federal agencies, states, and individuals to select, under applicable laws, land most suited to their purpose. The results have been twofold: the most desirable forest and farming lands passed out of the public domain; and public lands are frequently interspersed with private or state lands.[12]

The Grazing Service was created in the 1930s, pursuant to the Taylor Grazing Act,[13] to regulate previously uncontrolled use of the public domain for livestock grazing. This agency issued permits to individual stockmen for grazing livestock on specified BLM lands, called allotments, proximate to their privately owned ranches.[14]

11. Clawson, *supra* note 1, at 8-17, 26-34. For a detailed discussion of the General Land Office and the history of federal land law affecting the public domain *see* Gates and Swenson, *History of Public Land Law Development* (1968).

12. Clawson, *supra* note 1, at 43, 69.

13. 43 U.S.C. §315 *et seq.* (1958, Supp. 1976).

14. Foss, *Politics and Grass, the Administration of Grazing on the Public Domain*, 39-72 (1960) [hereinafter cited as *Politics and Grass*]; Clawson, *supra* note 1, at 34-38, 84, 85.

Permits are limited to a ten-year term, but permittees have preferential renewal rights.[15] BLM allotments are so closely identified with private ranch lands that they normally transfer with the ranch.[16]

Over 80 percent of BLM land in the western states is included within grazing districts and subject to grazing by permit; much of the remaining land is leased for grazing.[17] Thus, ranchers have a long standing interest in most BLM lands having potential as primitive areas. The stockmen rely on the continued availability of grazing rights on land they have used for many years.[18] Further, it is contended that most permittee stockmen could not continue to operate their ranches without seasonal use of their BLM allotments.[19]

Grazing interests pose a special problem for the BLM in the establishment and management of primitive areas. BLM regulations authorize grazing on primitive areas subject to restrictions necessary to preserve primitive values.[20] However, intensive land management for livestock grazing entails range improvement projects such as: extensive fencing; construction and maintenance of water impoundments; and weed control and sagebrush eradication[21]—all of which

15. *PLLRC Rep. supra* note 1, at 109.

16. Allotments are considered as "adjunctive pasture rights" to private lands, so that preference for grazing privileges passes with the land. *Politics and Grass* 63, n. 84. "Grazing permits are ordinarily capitalized into the value of the ranch so that if permits are stabilized a ranch buyer actually pays for both the private and public lands contained in the ranch unit." *Politics and Grass, supra* note 14, at 197. *See* W. O. Douglas, *A Wilderness Bill of Rights* 74, 75 (1965); *PLLRC Rep., supra* note 1, at 118.

17. Clawson, *supra* note 1, at 43, 70.

18. Grazing permits are now "practically in perpetuity," according to BLM Director Curt Berklund, *1975 Hearings, supra* note 7, at 14. The Public Land Law Review Commission recommended that permittees be given even greater stability of tenure, that permittees should have preference rights to purchase their allotments upon the disposal of such lands and should be compensated when their permits are terminated by diversion of the allotted grazing lands to other federal uses. *PLLRC Rep., supra* note 1, at 115, 118. These recommendations have been proposed in recent legislation. *See, e.g.,* Proposed Public Land Policy and Management Act, Subcomm. Print No. 2, §221(a), (c), and (e), prepared for Subcomm. on Public Lands, House Int. Comm. (August 13, 1975). *But see, 1975 Hearings, supra* note 7, at 14-21, 223 (BLM criticisms of these legislative proposals). For a discussion of the present legal status of grazing permits, *see* Kingery, *The Public Grazing Lands,* 43 Den. L. J. 329, 337-39 (1960).

19. "To many of the stockmen of [the West], the federal range is an integral part of their ranching operation. Their private holdings may be of little value without continued access to the range. The range is not usually an extra or bonus piece of pasture; it is more likely to be a necessary part of the ranching unit." *Politics and Grass, supra* note 14, at 197. Under the Taylor Grazing Act preference in allocation of grazing privileges was given to those stockmen who *required* the federal lands in conjunction with their own private lands in order to form an economic ranching unit. *Politics and Grass, supra* note 14, at 63. *See PLLRC Rep., supra* note 1, at 105; Clawson, *supra* note 1, at 144.

20. *BLM Manual* §6221.06(K) (1975).

21. Intensive grazing management refers to BLM's "allotment management plans." Under this system individual allotments are fenced into smaller pastures so that individual pastures may be selectively grazed or rested according to season and available forage resources. This necessitates developing additional water sources within each pasture, since more livestock are

conflict with the spirit of wilderness, if not with explicit BLM primitive area regulations. Range improvement projects are usually controlled at the BLM district level, where local ranchers exercise considerable influence through their majority control of the district advisory boards.[22] In addition, many potential primitive areas contain small parcels of private land, usually former homesteads, owned by local ranchers who hold grazing permits to the surrounding federal lands. The necessity of negotiating for land exchanges or access rights to private inholdings gives these ranchers additional leverage to influence the relative priorities of primitive values and range improvements. It may well be, as a result of the influence of local ranchers, that the presence of some range improvements will be a feature that distinguishes BLM primitive areas from wilderness areas.

The scattered nature of BLM land holdings combines with a reluctance to create primitive areas from semi-arid lands to limit the number of areas designated. A sizable block of federal land is a prerequisite for a primitive area. If more than a few small islands of private land are present within a tract of federal land, the area is likely to be inappropriate as a primitive area in view of the problem of access rights to the private inholdings. A considerable amount of BLM land that has remained in sizable blocks is cohesive only because the land is too dry, the soil too poor, or slopes too steep for farming. Some BLM personnel have misgivings about designating such semi-arid range lands as primitive areas.[23] As one BLM district

---

periodically concentrated into smaller areas and are no longer free to roam to existing developed or natural water sources. The extent of fencing within an allotment depends on the number of cattle owned by the permittee, as well as the carrying capacity of the land.

Presently, much BLM land is only fenced according to seasonal use; in community allotments the land enclosed in one fenced area might include *up to* several hundred thousand acres. Interview with Mr. Don Gipe (Chief of Range, Watershed, and Wildlife, BLM, Oregon State Office) by telephone, February 26, 1976. *See BLM Manual* §4112 (1975). "It is . . . the goal of the BLM to bring 133 of the 171 million acres of public lands under the third cateogry of management—intensive management—by the year 2000. Currently, however, only 25 million acres (18 per cent) are under intensive management." National Resources Defense Council v. Morton, 388 F. Supp. 829, 830 (D.D.C. 1974).

A range improvement program might also entail: wells, ditches, spring developments, storage tanks, watering troughs, check dams, contour furrowing, plowing and range reseeding, rodent and insect control, eradication of brush stands by chemical spraying, bridges, stock trails, truck trails, etc. *Politics and Grass, supra* note 14, at 102.

22. "A district board may contain from six to thirteen members, one of whom represents wildlife interests and the rest of whom are livestockmen." Clawson, *supra* note 1, at 149. However, the BLM is now moving away from stockmen-dominated boards to broader based multiple-use advisory boards. *See 1975 Hearings, supra* note 7, at 8-13. For a discussion of the development of grazing district advisory boards *see Politics and Grass, supra* note 14, at 117-139.

23. Referring to BLM's flat, sagebrush-covered lands in eastern Oregon, a BLM Area Manager stated, "most people would probably find this land distasteful . . . maybe I can appreciate it more than a person interested in primitive values." Interview with E. K. Majors, Area Manager, BLM, Warner Lakes Resource Area, Lakeview District, Oregon, in Lakeview,

manager in Oregon said, "[t]he BLM got what was left over, the least productive and the driest. If a primitive area is created and people come, they'll say, 'what is the BLM trying to do, giving a rotten area like this to the public?' "[24] BLM land holdings also include many steep river-cut canyons too narrow for grazing, and high, rugged desert mountains that have never been roaded—land forms that are in keeping with the more traditional notions of wilderness.[25] In many such areas the land remains predominantly federally owned, and it may be possible to acquire any remaining small private inholdings by land exchanges.

The Last Ten Years

Why was the BLM excluded from the Wilderness Act? A review of the legislative history of the Act reveals a striking absence of discussion about including the BLM.[26] This omission contrasts sharply with the 1974 hearings on the "BLM Organic Act," during which numerous conservation organizations argued for inclusion of a wilderness review provision in the bill to make the BLM subject to the Wilderness Act.[27] This change in attitude among wilderness groups reflects a change in public attitude toward BLM lands in the last ten years.

During the 1960s, BLM lands were referred to as the residue of "unappropriated and unreserved" federal lands, in contrast to

---

Oregon, June 9, 1975. "The criteria for primitive areas must be uniqueness. And not just in terms of BLM land, but compared to the national park and national forest standard. We don't want to bastardize the wilderness system with subpar areas." Interview with Richard Geier, Chief of Recreation, BLM, Idaho State Office, in Boise, Idaho, June 5, 1975. "BLM lands are not normally in the same class in considering primitive/wilderness representatives in the high mountain alpine ecosystem. However, the BLM has the opportunity to place areas in the 'system' which represent totally different ecosystems than are now included. But areas of this type should not be mediocre but limited to outstanding examples which fit into the existing high quality system." Letter from W. L. Mathews, State Director, BLM, Idaho State Office, to the author, June 27, 1975, on file with the *Nat. Res. J.*

24. Interview with Marvin Lenoue, District Manager, BLM, Lakeview District, Oregon, in Lakeview, Oregon, June 9, 1975. However, wilderness proponents have said that desert lands are appropriate for wilderness designation. *See, e.g.*, Fosberg, *Desert Wilderness*, 34 The Living Wilderness 17 (1970). *See also* Whitaker, *Primitive Areas—a New Designation Under BLM*, 101 The Living Wilderness 12 (1969).

25. *See* notes 6 & 7, *supra.*

26. *See, e.g., Hearings on Bills to Establish a National Wilderness Preservation System Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 88th Cong., 2d Sess., pts. 1, 2, 3 (1964). Even the first proposed draft of the wilderness act in 1955, which the Sierra Club and the Wilderness Society participated in writing, did not include BLM lands. McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 Ore. L. Rev. 288, 298 (1966).

27. *E.g., Hearings on H.R. 5441 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., pt. 2, at 999 (1974) [hereinafter cited as *1974 Hearings*].

national parks and forests which had been reserved from the public domain for specific purposes.[28] In 1964 it was still an open question whether BLM public domain lands should remain in federal ownership or be sold or transferred into private ownership.[29] In view of such uncertainty it is not surprising that most people would have overlooked the public domain as a potential source of wilderness areas.

Two significant acts affecting the BLM were passed in 1964: the legislation creating the Public Land Law Review Commission,[30] and the Classification and Multiple Use Act (C. & M. U. Act).[31] The C. & M. U. Act mandated that the BLM classify all its lands either for disposal to private ownership or for interim retention in public ownership, explicitly recognizing wilderness protection as a valid reason for federal retention. The Public Land Law Review Commission was given a mandate to review and recommend changes to the myriad public land laws. The BLM has classified most of its land for interim retention in federal ownership[32] and the Public Land Law Review Commission has recommended that most public lands should be permanently retained and managed by the federal government.[33] The change in public attitude toward considering BLM lands as natural resources may be largely traced to the impact of these two pieces of legislation.[34]

The BLM still lacks organic legislation, which means the BLM does not have a "basic mission for the lands, [n]or adequate authority for effective management of the lands."[35] Organic legislation could put the BLM on an equal administrative footing with the Forest Service and National Park Service. Two bills designed to achieve this purpose died in the 93rd Congress, but similar legislation is being proposed in this Congressional session.[36]

---

28. Clawson, *supra* note 1, at 43; S. Rep. No. 873, 93d Cong., 2d Sess. 24 (1974).

29. "For many years the Bureau seemed to be a self-liquidating agency, its future summed up crudely in the hopeful Western saying that 'the Bureau of Land Management's main business is to get out of business.' " *Preservation and the Public Lands*, 39 *National Parks Magazine* 20 (1965). *See PLLRC Rep.* 1, 42, 43.

30. 43 U.S.C. §1391-1400 (1970).

31. Act of September 19, 1964, Pub. L. No. 88-607, 1(a)(9), 78 Stat. 986 (expired December, 1970).

32. Letter from George Lea, *supra* note 7. *See* Clawson, *supra* note 1, at 50, 51; *PLLRC Rep.*, *supra* note 1, at 53, 54.

33. *PLLRC Rep.*, *supra* note 1, at 1.

34. M. Frome, *Battle for the Wilderness* 144 (1974) [hereinafter cited as Frome]; *Preservation and the Public Lands*, *supra* note 29, at 21.

35. *1975 Hearings*, *supra* note 27, at 1070.

36. S. 424, 93d Cong., 2d Sess. (1974); H.R. 16800, 93d Cong., 2d Sess. (1974). *See* part VI *infra*.

THE SIGNIFICANCE OF DESIGNATION

"Primitive area" is a designation; an official title given to an area of land by the Secretary of the Interior to notify the public that the land is "wild and undeveloped . . . the natural environment has not been disturbed by commercial utilization."[37] The process of designation does not confer new authority upon the BLM to manage designated lands,[38] since the BLM has the discretionary authority to exclude roads and commercial developments (except mining) on any of its lands.[39] Because the land could be protected as well without the formalities of designation, some BLM personnel assert that designation is a "futile exercise in paperwork."[40]

Designation at least commits the BLM to certain management practices that otherwise would be discretionary.[41] Federal regulations promulgated by the Secretary of the Interior mandate that once an area is designated as primitive "[c]onstruction . . . roads, mechanized equipment, commercial timber harvesting, non-transient occupancy . . . are [generally] prohibited."[42]

The apparent conflict between the information purpose of BLM designation and the protective purpose of wilderness preservation is explainable in terms of BLM's vague and now expired statutory authority to enter the wilderness management field. The seminal statute is the C. & M. U. Act which listed wilderness preservation as a basis for retaining land in federal ownership and as a legitimate goal of BLM land management.[43] However, since multiple use principles were followed in the C. & M. U. Act land classification, no single specific use, including wilderness protection, was assigned to any parcel of land.[44] Subsequent to the C. & M. U. Act, the Secretary of

37. 43 C.F.R. §§2070.0-5(a), 2071.1(b)(1)(v) (1975).

38. "The formal designation does not actually give the area any special protection." Letter from W. L. Mathews, *supra* note 23. "[D]esignation does not afford legal protection of resources but [only] identifies internal management policy." Letter from E. F. Spang (Assistant State Director, BLM, Arizona State Office) to the author, August 18, 1975, on file with the Nat. Res. J.

39. "BLM has the administrative authority to protect any area, except through activities under the General Mining Law of 1872. . . ." Letter from W. L. Mathews, *supra* note 23. "A separate administrative action is required to effect legal protection [from mining], i.e., a protective withdrawal." Letter from E. F. Spang, *supra* note 38.

40. Interview with William Schneider, District Recreation Specialist, BLM, Vale District, Oregon, in Vale, Oregon, June 4, 1975.

41. "[D]esignation in itself places no legal constraints on the land. This is merely a process of naming and *morally obligating* the Bureau to a specific course of action." Letter from George Lea, *supra* note 7 (emphasis added).

42. 43 C.F.R. §6221.1(c), (d) (1975).

43. Act of September 19, 1964, Pub. L. No. 88-607, §1(a)(9), 78 Stat. 986 (expired December, 1970). Although, on its face, this statute has expired, the Department of Interior contends that it has continuing legal force. *See* note 97 *infra*.

44. "No overall priority is assigned by the Classification and Multiple Use Act or by the Secretary to any specific use." 43 C.F.R. §1725.3-1 (1975). *See* Clawson, *supra* note 1, at 50, 51.

the Interior drafted regulations listing wilderness preservation as one of ten objectives of public land management, i.e., as a component of BLM multiple use management.[45] As in the case of the C. & M. U. Act classification, these multiple use regulations did not mandate special protective measures for any particular piece of BLM land.[46]

Although the C. & M. U. Act is cited as the statutory authority for the section of the Code of Federal Regulations (C.F.R.) which outlines procedures for designation of sites, this section does not mention "wilderness" or "wilderness preservation."[47] Primitive areas, although described in this section as "wild and undeveloped areas," are listed as a subcategory of recreation lands, along with: "high density recreation areas," "general outdoor recreation areas," and "outstanding natural areas."[48] The emphasis in designating primitive areas is not wilderness preservation but public identification for recreation purposes.

The section of the C.F.R. which lists special management practices for designated primitive areas comes under the general heading, "Recreation Management," subheading, "Protection and Preservation of Natural Values."[49] Thus, the statutory mandate to manage BLM land for wilderness preservation now finds practical application only in regulations requiring protection of natural values on lands which have previously been designated as primitive recreation sites. The C.F.R. does not require that any areas be designated as primitive, regardless of the need for protection of natural values.[50] The purpose of designation, the process which invokes some mandatory protection of natural values, is not to safeguard areas in need of, or worthy of, protection—but to inform the public about recreation areas. Some BLM personnel argue that designation is an impediment to protecting fragile and unique ecosystems: since the purpose of designation is to inform the public about the existence of recreation areas, and the net effect of designation is to invite increased and more intensive public usage, designation can destroy the value that it is supposed to protect.[51]

---

45. 43 C.F.R. §1725.3-3(i) (1975). For a discussion of the present validity of this regulation *see* note 97 *infra*.

46. 43 C.F.R. §1725.3-1 (1975).

47. 43 C.F.R. §2070 (1975).

48. 43 C.F.R. §2071.1(b)(1) (1975).

49. 43 C.F.R. §§6200, 6220 (1975).

50. 43 C.F.R. §§2070.0-1, 6221.0-2 (1975).

51. "Designation will only attract more people, which will destroy the value trying to be protected." Interview with Ken Boyer, Chief of Resources, BLM, Lakeview District, Oregon, in Lakeview, Oregon, June 9, 1975.

MANAGEMENT GUIDELINES FOR BLM PRIMITIVE AREAS

The Code of Federal Regulations and the BLM Manual

The most authoritative statement on management guidelines for BLM primitive areas is found in Section 6221.2 of the C.F.R. This section lists certain actions which are prohibited within primitive areas, including mechanized equipment, roads, and construction, "except in connection with activities necessary in the use of the lands for authorized non-recreational purposes";[52] and then lists three (non-recreational) uses of primitive area lands, i.e., livestock grazing, water storage projects, and utility rights-of-way, which may be "permitted by the authorized officer under such conditions and restrictions as he deems necessary to preserve primitive values."[53] Thus, actions which are otherwise prohibited within primitive areas may be permitted if they are deemed to be necessary in utilization of the land for a non-recreational purpose authorized by the BLM, such as grazing. The phrase "authorized non-recreation purpose" is not further explained in the C.F.R.; it is unclear whether it refers solely to the three enumerated permissible non-recreational uses of primitive areas.[54]

More detailed management guidelines for primitive areas are contained in the *BLM Manual,* which is based upon, and supplemental to, the C.F.R.[55] The *BLM Manual* lists several actions as absolutely prohibited in primitive areas: *commercial timber harvesting;*[56] *mining,* subject to valid existing rights; and *public use roads,* except for access to private inholdings in primitive areas or for emergencies such as fire.[57] Also prohibited are motorized equipment, motorized transportation, and construction, but with the proviso, "except [as] otherwise provided herein."[58] This passage could be narrowly construed to refer only to activities which expressly provide for construction or the use of vehicles: firefighting and emergency operations.[59] Alternatively it could be read to include land uses which "may be permitted" in primitive areas: grazing, water storage

52. 43 C.F.R. §6221.2(c) and (d) (1975) (emphasis added).
53. 43 C.F.R. §6221.2(e) (1975) (emphasis added).
54. The phrase "authorized non-recreation purpose" must refer to the three named uses, since these uses are both non-recreational and "authorized," *i.e.,* permissible according to the regulation. Further, it is not likely that the regulation would permit construction of power lines but prohibit the use of heavy equipment, since such construction is virtually impossible without the use of heavy equipment.
55. *See* note 5 *supra.*
56. *BLM Manual* §6221.06(I) (1975).
57. *BLM Manual* §6221.06(J), (G) (1975).
58. *BLM Manual* §6221.06(F), (D), (H) (1975).
59. *BLM Manual* §6221.06(O), (Q) (1975).

projects, and utility rights-of-way.[60] The latter interpretation would be consistent with the C.F.R. in allowing prohibited actions as adjuncts to land uses that may be permitted in primitive areas under restriction.

The *BLM Manual* does not use the wording "authorized non-recreational purposes" and thereby closes one potential loophole in the C.F.R., since this open-ended phrase could have served to justify any non-recreational use of primitive area lands which the BLM might approve. The issues of mining and timber harvesting in primitive areas are clearly resolved by the *BLM Manual;* however, the *Manual's* overall treatment of management guidelines is quite brief and leaves many other ambiguities unresolved.[61] For example, the *Manual* offers no assistance in determining when and to what extent construction and motorized equipment and vehicles may be permitted as elements of livestock grazing in primitive areas. When faced with the decision of whether to allow stock pond construction by heavy equipment or to require construction by manual labor, the authorized officer may refer to the C.F.R. and the *BLM Manual* for authority permitting him to impose such "restrictions *as he deems necessary* to preserve primitive values."[62] However, the regulations provide no further guidelines; the decision is left entirely to the unguided discretion of the officer.[63]

The Authorized Officer

Neither the C.F.R. nor the *BLM Manual* define the term "authorized officer." Is the *authorized officer* to be a BLM official at the national, state, or local, i.e., district, level? Since a purpose of BLM primitive areas is to "preserve public values that would be lost if the lands were developed,"[64] it would seem appropriate for the authorized officer to be a high level agency official, one able to assess the public values involved from a regional or national perspective. Local officials are subject to pressure from local interest groups that may not represent the regional or general public.[65] Yet the official interpreta-

60. *BLM Manual* §6221.06(K), (M), (N) (1975).

61. The *BLM Manual* contains six pages of regulations that relate to the establishing and management of primitive areas. *BLM Manual* §6221 (1975). In contrast, the *U.S. Forest Service Manual* contains over 100 pages of management guidelines for Forest Service wilderness areas. *U.S. Forest Service, Dep't of Agriculture, Manual* §2320 (1975) [hereinafter cited as the *Forest Service Manual*].

62. 43 C.F.R. §6221.2(e) (1975); *BLM Manual* §6221(K), (M), (N) (1975).

63. In contrast, the *Forest Service Manual* specifically requires that structural range improvements for livestock on wilderness areas must be constructed by primitive, non-mechanized means. *Forest Service Manual* §2323.24 (1972 Supplement).

64. *BLM Manual* §6221.02(A)(2) (1975).

65. Note, *Managing Federal Lands: Replacing the Multiple Use System,* 82 Yale L.J. 787,

tion by the BLM Washington office is that the *authorized officer* will be the local district manager.[66] Since the decision to authorize such activities as utility rights-of-way on non-designated BLM lands normally rests with the local district manager, primitive areas receive no additional procedural protection.

Mining in Primitive Areas

A second critical issue concerns the *BLM Manual* prohibition against prospecting and mining in primitive areas.[67] The BLM lacks discretionary authority to prohibit prospecting and mining for "locatable," hard-rock type minerals.[68] The General Mining Law of 1872 grants to the public the right to enter vacant public lands to prospect and, upon discovery, to locate, purchase, and mine for locatable minerals, without first seeking BLM permission.[69] Since the act of designating an area as primitive does not confer the authority to prohibit prospecting and mining on the designated area,[70] the BLM can prevent prospecting and mining on specific areas of land *only* by withdrawing those lands from mineral entry, i.e., from the operation of the 1872 Mining Law.[71] Withdrawal is a complex and time-consuming procedure.[72] The *BLM Manual* states that all lands

793-94 (1973); *Politics and Grass, supra* note 23, at 198-204. *See* note 22 *supra* and accompanying text.

66. Interview with Wayne Boden, Recreation Planner, BLM, Washington, D.C., by telephone, July 16, 1975. *See* letter from George Lea, *supra* note 7. The Colorado state office of the BLM funded a study by Colorado State University which concluded that authority to approve utility rights-of-way and water storage projects *should* rest with the appropriate BLM state director. This study does imply, however, that the local district manager ought to have authority to control grazing practices on primitive areas. Schomaker and Brown, Recommended Primitive Area Management Guidelines to Supplement BLM Manual Section 6221.06, at 2, 3 (Colorado State University, July 1, 1975) copy on file with the Nat. Res. J.

67. *BLM Manual* §6221.06(J) (1975).

68. Locatable minerals include silver, gold, uranium, etc. Common varieties of minerals such as sand, stone, gravel, pumice, cinders, and clay may not be removed without prior BLM approval, and generally are sold under competitive bidding procedures. 30 U.S.C. §601, 02, 11 (1970). Oil, oil shale, gas, coal, phosphate, sodium and certain other hydrocarbons and non-metallics may not be removed without first securing a lease from the BLM. 30 U.S.C. §181 *et seq.* (1970).

69. 30 U.S.C. §22 *et seq.* (1970). "The Mining Law of 1872 is essentially a self-executing statute. . . . As such, it does not permit the Secretary of the Interior to exercise his discretion to determine that other public values require . . . retention of such lands or minerals in federal ownership. . . ." J. Muys, *The Federal Lands, Federal Environmental Law*, 525 (1974).

70. *See* notes 38 and 41 *supra.*

71. "Under the General Mining Law locators are able to initiate rights to public mineral deposits merely by discovery and without prior administrative approval if the lands have not been closed to mineral location by withdrawal. . . ." *PLLRC Rep., supra* note 1, at 124. *See* note 39 *supra.* The authority to make withdrawals was delegated to the Secretary of the Interior by Executive Order No. 10355. 3 C.F.R. §873 (1949-53 Compilation). For a discussion of the development and legality of executive withdrawals *see PLLRC Rep.* 43, 44, 52-57.

72. Formal approval by the Secretary of the Interior of applications for withdrawals may take several years. However, once an application is received in the Washington Office a

designated as primitive areas *must be* withdrawn or segregated from mineral entry.[73] BLM Director Curt Berklund, however, issued an instruction memorandum in 1973 advising that withdrawal requests should be limited to significant features within the total proposed primitive area,[74] and, in fact, only portions of three of the existing eight BLM primitive areas have been withdrawn from mineral entry.[75]

The rationale for not requiring withdrawal, as recently stated by a BLM Washington office official, is that:

> A withdrawal need only be imposed on a potential primitive area where or when there is threat of a non-compatible use.

temporary segregative effect begins and the lands are deleted from the tract books at the BLM state land office so that no new mining claims may be filed. 43 C.F.R. §2091.2-5(a) (1975). It is significant that a formal application for withdrawal may not be filed until prior approval to file is received from the BLM Washington office. Interview with Sheldon Saxton, District Lands Specialist, BLM, Vale District, Oregon, in Vale, Oregon, June 4, 1975.

Applications must be accompanied by a justification for the withdrawal. 43 C.F.R. §2351.2 (b)(5) (1975). Regulations require that negotiations be conducted to reduce the withdrawn area to the "minimum essential to meet the applicant's needs." 43 C.F.R. §2351.4(c) (1975). Notice of the proposed withdrawal must be published in the *Federal Register;* any public opposition to the application could necessitate a formal public hearing on the proposed withdrawal. 43 C.F.R. §2351.4(a) and (b) (1975). Applications for withdrawal of more than 5,000 acres require special procedures and in practice are substantially more difficult to get approved. 43 C.F.R. §2351.2-1 (1975).

There is also an "unwritten gentlemen's agreement" that all requests for withdrawals for more than 5,000 acres be approved by the chairmen of the House and Senate Interior Committees. *1974 Hearings, supra* note 27, at 1075; *1975 Hearings, supra* note 7, at 227. For a discussion of proposed legislation to require closer Congressional control of executive withdrawals *see 1975 Hearings* 227-29, 460-63, 478.

73. "To protect primitive values, the lands within areas to be designated and managed as primitive areas must have been classified or must be withdrawn. Since the Classification and Multiple Use Act of 1964 has expired, lands to be included within future primitive areas *must be withdrawn* under E. O. 10355 *from all forms of appropriation including . . . the Mining Laws,* but not the Mineral Leasing laws. However, areas may be designated and managed as primitive areas if the lands previously have been classified for retention under the Classification and Multiple Use Act of 1964, as amended, and *segregated from all forms of appropriation including . . . the Mining Laws,* but not the Mineral Leasing laws." *BLM Manual* §6221.14 (1975) (emphasis added).

Although most BLM lands were classified for retention under the Classification and Multiple Use Act, this only rarely entailed segregating (withdrawing) the lands from the mining laws. Usually, classification under the Act only involved segregating lands from the agricultural entry and public-sale land laws, to insure continued retention of the lands in federal ownership. Interview with Virgil Seiser, Chief of Adjudication Section, BLM, Oregon State Office, by telephone, February 26, 1976. For a description of segregation by classification *see* 43 C.F.R. §2440 (1975).

74. BLM Washington, D.C., Office Instruction Memorandum No. 73-399, September 20, 1973, copy on file with the Nat. Res. J. Instruction Memoranda are "temporary directives" which "either provide new instructions or interpret existing regulations, policies, or instructions." *BLM Manual* §1221.3 (1975).

75. The three areas are: Aravaipi Canyon Primitive Area, Arizona, 5,080 acres, partially withdrawn; Beartrap Canyon Primitive Area, Montana, 2,761 acres, and Powderhorn Primitive Area, Colorado, 40,400 acres—both withdrawn in their entirety from mineral entry. Letter from George Lea, *supra* note 7.

> Mining is not a threat unless there are resources to mine. A withdrawal from mining is not necessary unless there is a mineral which could be mined. Consequently, some primitive areas are not withdrawn from mineral entry.[76]

This argument has a certain syllogistic appeal. However, the BLM renders itself powerless to enforce its own regulatory prohibition of prospecting and mining in primitive areas when it fails to withdraw the designated lands from mineral entry.

First, BLM geological information that mineralization is not present could be inaccurate, new areas of mineralization could be discovered, or technological advances in mining could make feasible the extraction of trace or low grade ores. Once mining claims are filed, formal withdrawal is ineffective to preclude mining. The optimum opportunity to secure withdrawal is while information indicates that no mineralization is present in the area, since there would then be no basis for opposing withdrawal from the mining laws.

Second, prospecting is a protected activity under the 1872 Mining Law, and prospecting might legitimately entail the use of mechanized vehicles or equipment. It is unclear whether BLM regulations prohibiting the use of mechanized vehicles and equipment in primitive areas could be enforced against anyone who could plausibly assert that he was engaged in prospecting. BLM closures to off-road vehicle use have been regularly thwarted by the ruse of asserting that one is engaged in prospecting, the practice being to carry a pick and shovel in the offending vehicle in order to prove intent to prospect.[77]

PRIMITIVE AREAS DISTINGUISHED FROM SIMILAR BLM LAND DESIGNATIONS

Natural Areas

"Natural area" is an existing BLM land designation.[78] There are two types of BLM natural areas: research natural areas and outstanding natural areas.[79] Research natural areas are established primarily for scientific research and may be closed to the general public.[80] This is a well established designation utilized by other federal land management agencies;[81] usually, the areas are representative of

76. Letter from Darrel Lewis, Acting Deputy Ass't Director, BLM, Washington, D.C., to the author, August 6, 1975, on file with the Nat. Res. J.

77. Interview with William Schneider, *supra* note 40. BLM regulations governing use of off-road vehicles on public lands were recently struck down. Nat'l Wildlife Fed'n v. Morton, 393 F. Supp. 1286 (D.D.C. 1975).

78. 43 C.F.R. §2071.1(b)(1)(iv) (1975).

79. 43 C.F.R. §6225 (1975).

80. 43 C.F.R. §6225.0-5(a) (1975).

81. *See, e.g.*, U.S. Forest Service, Dep't of Agriculture, Pacific N. W. Forest and Range Experiment Station, Federal Research Natural Areas in Oregon and Washington 1-6 (1972).

particular plant communities and are quite small in size.[82] Outstanding natural areas, however, are established to "preserve scenic values and areas of natural wonder." Management guidelines provide that "[a]ccess roads, parking areas and public use facilities are *normally* located on the periphery of the area. The public is encouraged to walk into the area for recreation purposes wherever feasible."[83]

Although the C.F.R. guidelines are sketchy, it appears outstanding natural areas are to be managed somewhat like primitive areas. A principal drawback to this designation is that the *BLM Manual* contains no supplementary, specific guidelines for management of natural areas.[84] Even though outstanding natural areas have the potential to serve as functional alternatives to primitive areas for the BLM,[85] the recent emphasis by the BLM Washington Office on increased designation of primitive areas indicates that the primitive designation will be their chosen administrative tool for preserving natural land values.[86]

Back Country Areas

"Back country area" is a proposed land designation drafted by the BLM Idaho state office; it has not been formally approved by the Secretary of Interior and does not yet appear in the C.F.R. In back country areas, grazing and some timber harvesting would be allowed. The designated area would be open to mining, although mineral withdrawals could be made for special land features within the area. Oil and gas leasing would be allowed; but such surface construction as pipelines, canals, transmission lines or removal of non-locatable minerals would be allowed only if "there is no feasible alternative in the face of demonstrated need."[87]

Tables, toilets, fireplaces, shelters, picnic sites, and campgrounds would be allowed. Hostels or chalets might be allowed. Motorized recreation vehicles would be allowed on designated roads and trails.

82. For example, the average size of the 30 Forest Service natural areas in Oregon is 200 acres. In contrast, the BLM has designated a quite large natural area in Oregon: Lost Forest, 8,700 acres. *Id.* at 7, 8 (Table I).

83. 43 C.F.R. §6225.0-5(b) (1975) (emphasis added). The Burns BLM District in Oregon is planning to have a paved road built into the proposed Jordan Craters Natural Area. Interview with Don Brake, District Recreation Specialist, BLM, Burns District, Oregon, in Fields, Oregon, July 5, 1975.

84. However, the BLM is planning to draft *BLM Manual* regulations for management of natural areas in the near future. Interview with Wayne Boden, *supra* note 66.

85. The BLM has been criticized for designating sites as outstanding natural areas when the primitive designation would also have been appropriate. *E.g., 1975 Hearings, supra* note 7, at 476.

86. Office Instruction Memorandum, *supra* note 74.

87. BLM Idaho State Office Instruction Memoranda No. 74-69, March 22, 1974, and No. 74-36, February 14, 1974, copies on file with the Nat. Res. J.

Motorized vehicle use would be given preference over hikers or horse-back riders.[88]

The stated goal of back country management is to offer a "near primitive *recreation opportunity* in a natural setting reached primarily by trail or low standard road,"[89] without any mention of preservation or protection of natural values, which is supposed to be a major function of BLM primitive areas. If approved as a BLM land designation, the back country designation may usurp land that would be appropriate for designation as primitive areas.[90]

BLM PRIMITIVE AREAS COMPARED TO WILDERNESS

Legal Framework

The single most important difference between the two systems is that a wilderness area is created by act of Congress, whereas a BLM primitive area is an administrative designation made by the Secretary of the Interior.[91] Once enacted, wilderness status cannot be retracted without subsequent Congressional legislation. The management guidelines in the Wilderness Act are explicit as to what conflicting activities must be prohibited within wilderness areas.[92] Federal agencies which manage wilderness areas have narrowly circumscribed discretion in promulgating specific management regulations to implement the Act.

In contrast, the Secretary of the Interior has the unilateral discretion to retract the designation of any BLM primitive area. Management guidelines for BLM primitive areas, contained in the C.F.R., may be amended by the Secretary of the Interior without the minimal procedure of notice and comment rule making.[93] The C.F.R.

88. BLM Idaho State Office Instruction Memorandum No. 73-278, November 15, 1973, copy on file with the Nat. Res. J. The BLM Idaho Chief of Recreation justified this aspect of back country areas as follows: "off-road vehicle users want the opportunity to experience those areas [wilderness], but they just use vehicles instead of feet. Why not give the motorcyclists the same experience? They claim to have the same sensitivity for the land while riding on their bikes. It's merely a different mode of transportation." Interview with Richard Geier, *supra* note 23.

89. Instruction Memorandum, *supra* note 88.

90. The concept of back country area is also gaining in popularity with the U.S. Forest Service. Although back country area is not a designation recognized by regulation or statute, the Forest Service is now identifying such areas through its planning system. A Forest Service back country area seems basically to be a roadless area in which off-road vehicles and some recreation development may be permitted. *See* statement of Thomas Nelson, Deputy Chief, National Forest System, U.S. Forest Service, *Hearings on the Wilderness Act of 1964 Before the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., at 14, 15 (1974) [hereinafter cited as *Oversight Hearings*].

91. 16 U.S.C. §1132(c) (1970). 43 C.F.R. §2070 (1975).

92. 16 U.S.C. §1133(c), (d) (1970).

93. The Administrative Procedure Act §4(2), 5 U.S.C. §553(a)(2) (1970). Public lands are excluded from A.P.A. rulemaking procedures. *See PLLRC Rep. supra* note 1, at 252.

management guidelines are brief and ambiguous;[94] the BLM has wide discretion in drafting primitive area management guidelines in its administrative manual.[95] Further, the *BLM Manual* is subject to immediate change at any time by the Director of the BLM.[96] It is not clear whether the BLM even has statutory authority to manage its lands for recreation and the preservation of wilderness and primitive land values.[97] In sum, there is much less assurance that primitive areas will continue to exist and be managed to preserve and protect wilderness and primitive values.[98]

From the perspective of a wilderness advocate, administratively

94. 43 C.F.R. §6621.2(c), (d), (e) (1975). *See* notes 52-54 *supra*, and accompanying text.

95. 43 C.F.R. §6221.2 (1975), for example, the phrase "authorized non recreation purposes" is not defined in the C.F.R., it could be held by the BLM to apply to mining so as to permit mining in primitive areas. *See also*, note 60 *supra*.

96. The following situation reveals how quickly the *BLM Manual* may be changed. At a public meeting in 1974, a member of the public quoted to BLM Director Curt Berklund from §6221.06(K) of the *BLM Manual*, which at that time prohibited livestock grazing on designated BLM primitive areas. Mr. Berklund responded that he did not realize that such a provision existed. "Nine days after this meeting, the BLM national office issued a directive to all BLM districts in the country, saying that primitive area designation should permit grazing to continue." *1974 Hearings, supra* note 27, pt. 1, at 790, 793. The regulation prohibiting grazing had been in the *BLM Manual* over two years.

97. The section of the C.F.R. dealing with the designation of sites and the section of the *BLM Manual* dealing with primitive areas both cite as their statutory authority the Classification and Multiple Use Act of 1964 (C. & M. U. Act). 43 C.F.R. §2070 (1975); *BLM Manual* §6221.03 (1975). However, the C. & M. U. Act, as amended, duly expired six months after submission of the final report of the Public Land Law Review Commission, *i.e.*, December 1970, Act of Sept. 19, 1964, Pub. L. No. 88-607, 78 Stat. 986, as amended by the Act of Dec. 18, 1967, Pub. L. No. 90-213, §2, 81 Stat. 660. *See PLLRC Rep., supra* note 1, at 51. Nonetheless, the BLM maintains that the authority conferred by the C. & M. U. Act to manage public lands is currently valid and must last at least until the recommendations of the Public Land Law Review Commission are implemented by future legislation. Memorandum from the Assoc. Solicitor, Div. of Pub. Lands, Dep't of Interior to the Ass't Secretary, Pub. Land Management, Dep't of Interior, June 19, 1967, copy on file with the Nat. Res. J.

This is an important issue because the C. & M. U. Act was the source of BLM authority for multiple use land management; prior to the Act the BLM lacked the authority to manage public lands for recreation and wilderness preservation. *See PLLRC Rep., supra* note 1, at 43. And yet the current BLM multiple use regulations, although they expressly refer to the C. & M. U. Act and include wilderness preservation as a component of multiple use, do not cite the C. & M. U. Act as their statutory authority. 43 C.F.R. §1725 (1975). The authority cited for these regulations is the general delegated authority of the Secretary of Interior to execute the public lands laws. 43 U.S.C. §1201 (1970). The uncertainty of the law in this area points up the need for comprehensive organic legislation for the BLM.

98. The relative impermanence of BLM primitive areas, the ease with which the designation may be revoked or altered, is subject to interpretation as an advantage or disadvantage depending on one's perspective. Contrast the opinions of the following two BLM personnel, both of whom work within the same BLM district. "The advantage of primitive designation is that in a time of energy crunch, we can move with practicality to lift the designation. To lift the designation is in the national interest. This is hard to do with wilderness, probably impossible." Interview with Marvin Lenoue, *supra* note 24. "I suggest that existing BLM primitive areas be included into the National Wilderness Preservation System [because] . . . BLM primitive areas are not protected by law, such as the Wilderness Act, and are vulnerable to revocation because of some other 'needed' resource use." *1974 Hearings, supra* note 27, pt. 1, at 308.

created sanctuaries arguably have the advantage of fewer and simpler procedural steps, so that more areas may be created more quickly administratively than is possible through the process of Congressional legislation. However, primitive designation offers no protection from mining unless the land is also withdrawn from mineral entry, and that withdrawal is a separate and laborious process which in most cases now requires informal Congressional committee approval.[99] Furthermore, experience reveals that relying on administrative discretion for action can result in agency heel-dragging: since 1969 the BLM has designated only eight primitive areas, totaling 170,000 acres.[100] In contrast, the Forest Service, between 1931 and 1939, established 73 primitive areas totaling over 13 million acres.[101]

Management Guidelines

The Wilderness Act and BLM regulations are alike in prohibiting permanent roads and commercial timber harvesting, but allowing grazing to occur under restriction.[102] Transmission lines, water-conservation works, and reservoirs may be permitted in wilderness areas on national forest lands subject to Presidential approval.[103] These same developments are allowed in BLM primitive areas subject to the approval of the "authorized officer,"[104] the local district manager.[105] It seems likely that the higher the level of authority required to approve such conflicting uses, the greater the protection afforded an area, which indicates that BLM's reliance on local

99. *See* note 72 *supra.*

100. *See* note 7 *supra,* and accompanying text.

101. McCloskey, *The Wilderness Act of 1964, supra* note 26, at 296. These areas were established under authority of Forest Service administrative regulations which required conditions to be kept primitive, but allowed low standard roads, simple shelters, and some wood cutting. These regulations, however, were amended in 1939 to exclude roads, motorized vehicles and commercial timber harvesting. Frome, *supra* note 34, at 125, 126. *See generally* D. Baldwin, The Quiet Revolution, The Grass Roots of Today's Wilderness Preservation Movement (1972). Thus, Forest Service primitive areas during this period were similar to the present BLM primitive area designation.

102. "Except as *specifically* provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area. . . ." 16 U.S.C. §1133(c) (1970) (emphasis added). The Wilderness Act specifically provides for the continuation of livestock grazing on *national forest* wilderness areas if the lands had been grazed prior to 1964. 16 U.S.C. §1133(d)(4) (1970). *See* 36 C.F.R. §293.7(b) (1975). For a description of BLM regulations governing these activities *see* notes 55-60 *supra,* and accompanying text.

103. 16 U.S.C. §1133(d)(4) (1970). This is a special provision in the Wilderness Act which applies only to wilderness areas on national forest lands. The enumerated activities are not allowed on wilderness areas on Dep't of Interior lands by virtue of the Act's general prohibition against commercial enterprises 16 U.S.C. §1133(c) (1970). *See* notes 205-207 *infra,* and accompanying text.

104. *BLM Manual* 6221.06(M), (N) (1975).

105. *See notes 64-66 supra,* and accompanying text.

administrative discretion offers insubstantial protection for its primitive areas.

The Wilderness Act stipulates that as of January 1, 1984, all existing and subsequent wilderness areas on national forest lands will be withdrawn from the mining laws and mineral leasing laws.[106] In the interim period, between passage of the Act and 1983, prospecting and mining within wilderness areas on national forest lands is allowable under restrictions imposed by the Wilderness Act and by Forest Service regulations.[107] In contrast, withdrawal from the mining laws may now be secured in conjunction with a primitive area designation.[108] Thus, at the present time, greater protection against mining intrusions is possible through primitive designation and withdrawal than through wilderness legislation.[109]

However, only three of the existing eight BLM primitive areas have in fact been withdrawn from the mining laws.[110] And the BLM Director has urged that future requests for withdrawals be limited to significant features within the total proposed primitive area.[111]

Further, the *BLM Manual*[112] suggests that primitive area lands

106. 16 U.S.C. §1133(d)(3) (1970). The above provision is an express exception to the Wilderness Act's general prohibition of commercial enterprises in wilderness areas and therefore is inapplicable to wilderness areas on Dep't of Interior lands. *See* notes 205-207 *infra*, and accompanying text.

107. The Wilderness Act provides that in wilderness areas on Forest Service lands: prospecting must be "carried on in a manner compatible with the preservation of the wilderness environment"; patents issued to mining claimants shall not convey title to the land's surface; and mineral leases shall include stipulations for the protection of the wilderness character of leased lands. 16 U.S.C. §1133(d)(2), (3) (1970). *See* 36 C.F.R. §252.15 (1975).

The Chief of the Forest Service has said that relatively little mineral development has occurred on Forest Service wilderness areas, in large part because of the dampening effect on mineral development of Forest Service regulations designed to protect wilderness values. Nonetheless, mining has been alleged to be the greatest single threat to wilderness areas. *Hearings on S. 1010 Before the Subcomm. on Minerals, Materials, and Fuels and the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., 57, 68-72, 97, 98 (1973). *See* Sumner, *Wilderness and the Mining Law*, 125 *The Living Wilderness* (1974).

108. *See* notes 67-77 *supra*, and accompanying text.

109. Primitive areas may be withdrawn from the mining laws by the Secretary of the Interior. The BLM Director lacks the authority to revoke or modify such an administrative withdrawal. Dep't of Interior, Departmental Manual §235.1.2(A)(3) (1975). The Secretary of Interior, however, may revoke an administrative withdrawal, and there is no requirement that such revocation be preceded by a public hearing. Interview with Virgil Seiser, *supra* note 73. *See* 43 C.F.R. §2370 (1975). In contrast, wilderness areas on Forest Service lands will be withdrawn from the mining laws on January 1, 1984, by authority of the Wilderness Act. Legislative withdrawals may not be revoked except by a subsequent Congressional Act offering a greater guarantee of protection. Thus, Forest Service wilderness areas, although open to new mining intrusions for an interim period, will eventually receive a more permanent form of protection from these intrusions.

110. *See* note 75 *supra*.

111. Office Instruction Memorandum, *supra* note 74.

112. *BLM Manual* §6221.12 (1975), as set out in note 73 *supra*.

should not be withdrawn from the mineral leasing laws.[113] The agency rationale seems to be that since the BLM already has discretionary authority to prevent leasing under the mineral lease laws, they can protect an area as well without having to go through the procedure of formal withdrawal. This rationale overlooks the possibility that the public may prefer to have BLM primitive areas protected from BLM discretion; removing leasing authority from the agency would offer a more certain guarantee that primitive area lands will not be leased for oil or geothermal drilling.[114] The BLM officially maintains that the decision to lease primitive area lands under the mineral leasing laws rests with the local administrator, the district manager.[115] This is another manifestation of the BLM local control policy that must offer scant comfort to wilderness advocates.

Inventory to Identify Potential Wilderness/Primitive Areas

The Wilderness Act mandated that the Secretary of the Interior review every roadless area of 5,000 or more contiguous acres in the national parks and national wildlife refuges within ten years of passage of the Act and give recommendations to the President for each area, as to its suitability for wilderness status.[116] This review requirement is an essential element of the Wilderness Act, for it establishes a timetable and deadlines for completion of the inventory and review process. It also requires that agencies actively inventory all their lands to find areas meeting the minimum criteria and then report on every area found, even though the agency does not deem the area suitable for wilderness. Without such a review provision agencies would have no obligation to propose any area for wilderness status.

A principal shortcoming of the BLM primitive area system, as established in the C.F.R., is the lack of a clear mandate that all areas

113. 30 U.S.C. §181 *et seq.* (1970). *See* note 68 *supra.*

114. According to the BLM Washington Office interpretation, the local district manager is the officer authorized with discretion to permit leasing under the Mineral Leasing Act of lands within designated BLM primitive areas. Letter from George Lea, *supra* note 7. ". . . the Secretary of the Interior may issue leases for the development and utilization of geothermal steam . . . [in] public, *withdrawn*, and acquired lands, . . ." The Geothermal Steam Act of 1970, 30 U.S.C. §1002 (1970) (emphasis added). BLM regulations for geothermal resource leasing are contained in 43 C.F.R. §3200-240 (1975). Although exploration for geothermal resources is subject to BLM control, it does not require a formal lease. T. Stoel, *Energy*, Federal Environmental Law 1110-11 (1974). *See* note 145 *infra.*

115. Letter from George Lea, *supra* note 7.

116. 16 U.S.C. §1132(c) (1970). The Wilderness Act also mandated that the Secretary of Agriculture review and report on the wilderness suitability of all Forest Service lands administratively classified as primitive areas. 16 U.S.C. §1132(b) (1970). The Forest Service, however, has gone beyond the requirements of the Wilderness Act. *See* text accompanying notes 147-151 *infra.*

meeting basic primitive area criteria must be reviewed and considered as potential primitive areas. The C.F.R. outlines procedures for designating areas as primitive and contains guidelines for managing areas once designated, but does not require the BLM to actively review its lands to identify potential areas, or to propose any areas for designation. However, the BLM has provided in its administrative manual for a lands inventory to identify potential primitive areas, to be conducted as part of the BLM land use planning system.

The *BLM Manual* advises that the inventory of potential primitive areas should be completed in accordance with the unit resource analysis phase of the BLM planning system.[117] The unit resource analysis, however, requires only a review of known data and not an original inventory; BLM district personnel are not required to study maps or make field trips to discover new areas that meet the basic primitive area criteria.[118] As a result, very few of the many areas which meet the basic primitive area criteria are actively being considered by the BLM for primitive status.[119]

According to former Secretary of the Interior Rogers Morton, the BLM has identified 5.5 million acres of land in the nation to be considered for primitive areas.[120] This figure would seem to indicate the BLM made a base inventory of potential primitive areas, and yet it clearly represents only a tiny fraction of all BLM lands meeting the minimum primitive area criteria of being roadless and of sufficient size to make preservation practical.[121] The Forest Service has estimated that the BLM has 322 million acres of "roadless and undeveloped lands."[122]

Processing Identified Potential Wilderness/Primitive Areas[123]

The decision to designate a primitive area must be made within the

117. *BLM Manual* §6221.12 (1975).

118. *BLM Manual* §1605.11(B) (1975).

119. Consider, for example, the 4.6-million-acre Vale District in Oregon: four potential primitive areas have so far been identified but, according to one of the district's resource area managers, "[i]f the 5,000 acre roadless standard were really applied, two-thirds of Vale District would fit the [primitive] description." Interview with J. Lorin Slegilmilch, Area Manager, BLM, Central Resource Area, Vale District, Oregon, in Vale, Oregon, June 4, 1975.

120. *1974 Hearings, supra* note 27, at 1072. *See* note 154 *infra.*

121. *See* 43 C.F.R. §6221.1 (1975); *BLM Manual* §6221.11 (1975).

122. This figure includes BLM lands in Alaska; still, it indicates that over 70 percent of BLM's total land holdings are "roadless and undeveloped." U.S. Forest Service, Dep't of Agriculture, Roadless and Undeveloped Areas, Final Environmental Statement 13 (October, 1973) [hereinafter cited as *Roadless Study*]. It is notable that the Forest Service conducted an inventory of its 187 million acres of lands to identify areas meeting the basic criteria of wilderness, *i.e.*, roadless and of more than 5,000 acres, and located 1,449 individual areas totaling 55 million acres. *See* notes 147-151 *infra,* and accompanying text.

123. The procedure for processing identified potential wilderness areas, as established by the Wilderness Act, consists of three phases: field review, executive review, and congressional

context of the BLM planning system,[124] as a recommendation by the district recreation specialist which is then reviewed and approved by the local area manager and district manager.[125] The planning system structures not only initial identification of potential areas but also the study and decisional process which precedes, and culminates in, designation.

The BLM planning system is designed to evaluate and resolve potential conflicts between different resource uses.[126] In theory, any area identified as meeting the basic criteria of primitive areas should remain plugged into the planning system until the public meeting stage, even if district opinion is in opposition to designation,[127] to

---

review. *See* 16 U.S.C. §1132(b-d) (1970). (1) *Field review phase.* Agency field studies terminating in local administrative hearings on preliminary wilderness proposals. (2) *Executive review phase.* Records of the public hearings reviewed by the agencies culminating in recommendations as to wilderness suitability for all reviewed areas by the Secretaries of Agriculture and Interior to the President. Then recommendations as to wilderness suitability by the President to Congress. (3) *Congressional review phase.* Designation of a wilderness area becomes effective if so provided by an Act of Congress. *See, The Wilderness System* 128, The Living Wilderness 38 (1974).

"Given the complex procedures of the Wilderness Act—agency field analyses, study reports, local administrative hearings, Presidential recommendation, congressional hearings, often in the field as well as in Washington—it is surprising that we are this far along in fulfilling the provisions of the act." Editorial, Sierra Club Bulletin 28, September 1974. However, Congress has on occasion taken a "short cut" and considered proposals regardless of whether the areas under consideration were mandated by the Act for review, and regardless of whether department reviews of particular areas had been completed. *See* Haight, *The Wilderness Act Ten Years Later*, 3 Env. Affairs 275, 76 (1976).

124. *BLM Manual* §6221.07 (1975).

125. Letter from Wm. Mathews, *supra* note 23. Proposed designations must also be channeled through the BLM state office and approved by the BLM Director's office in Washington, D.C.

126. The BLM planning system, which is conducted at the district level, is designed to produce land use plans ("management framework plans," or MFPs) that will "establish constraints and parameters for future actions and programs." *BLM Manual* §1608.12(A) (1975). The management framework plans are built on an information base keyed to designated planning units within the BLM district ("unit resource analysis" or URA) which contains resource conditions, uses, and management potentials. District planning is guided by general policy statements and "planning assumptions," periodically issued by the BLM Washington Office.

127. To reach this result the planning regulations must be followed at three key stages: (1) In the final phase of the URA, the district activity specialists are required to list management opportunities for the available resources; for example, whether primitive status might be appropriate for a specific area. *BLM Manual* §1605.12(D)(1) (1975). In listing opportunities, the activity specialists are required to consider the "fullest possible potential of each resource" without regard to economic constraints. *BLM Manual* §1605.11(E) (1975). Thus, any area that meets the minimum primitive criteria of *BLM Manual* §6221.11 ought to have primitive designation listed as a potential land use.

(2) In Step 1 MFP, the activity specialists are required to make recommendations based on the management opportunities listed in the final phase of the URA; for example, recommend that any area having primitive potential be designated as a primitive area. *BLM Manual* §1608.15(A) (1975). "[N]o attempt should be made in Step 1 MFP to resolve conflicts or to make trade offs. All conflict resolutions, within or between activities, are to be accomplished in Step 2 MFP." *BLM Manual* §1608.38(A)(1) (1975). Thus, the suitability of an area for recreational

provide public review of agency decision making. Unfortunately, local BLM planners have all too often ignored the procedural requirements of the planning system with regard to primitive areas. One BLM district recreation specialist in Oregon explained the problem as follows:

> In the nine years that I have worked on BLM districts, at no time have primitive or wilderness values been given adequate consideration in the management of national resource lands. It's not that primitive or wilderness values are not included in the BLM planning system, but, rather that, most BLM managers feel that wilderness is unimportant or are personally biased against wilderness values. . . . Some BLM managers are biased against wilderness values because they bow to political pressure from special interest groups, such as the livestock industry. . . .
>
> . . . Every district that I worked on had areas that met the criteria for wilderness, however, the areas were never identified as such or included within the BLM planning system. The excuses were: there was not enough public interest, establishing wilderness areas caused too many conflicts with other resources, the local people were opposed to any wilderness areas, wilderness values "locked-up" the land to multiple use. . . .[128]

In Oregon most currently identified potential primitive areas were not processed through the BLM planning system; these areas were added to "final" planning documents in the form of a recommendation for study for primitive designation potential.[129] A dominant pattern among districts that did process identified potential primitive

---

off-road vehicle use or for geothermal development should not preclude the area from being recommended for primitive area designation.

(3) In Step 2 MFP, the area manager is required to resolve conflicts between recommendations made by the various activity specialists in Step 1; for example, the area manager may decide that the district geologist's recommendation that an area be leased for oil drilling is more appropriate than the district recreation specialist's recommendation that the same area be designated as a primitive area. *BLM Manual* §1608.15(B) (1975). However, regulations require the area manager to record the rejected recommendation on the planning documents when a new or alternative recommendation has been adopted. *BLM Manual* §1608.43(D) (1975).

Step 1 MFP is perhaps the weakest link in this process, since the recreation specialist formulating activity recommendations must consider policy statements periodically issued by the BLM Washington Office, which could emphasize other resource uses over primitive values. *See BLM Manual* §1608.15(A) (1975).

128. *1974 Hearings, supra* note 27, at 308 (letter from Dennis Hill).

129. The seven currently identified potential primitive areas in the Burns District were not identified in the District's unit resource analyses and were added to the area management framework plan after the public meeting. Interview with Jim Anderson, Acting Resource Area Manager, BLM Andrews Resource Area, Burns District, Oregon, in Burns, Oregon, June 3, 1975. The six currently identified potential primitive areas in the Lakeview District were written into the typed management framework plans after the Step 2 MFP public meetings. Letter from Dennis Hill, District Recreation Specialist, BLM, Lakeview District, Oregon, to the author, August 6, 1975, on file with the Nat. Res. J.

areas through the planning system was a failure to reach any decision, other than recommending further study or maintenance of the status quo.[130] In one Oregon district two potential primitive areas were identified early in the planning process, and the ensuing planning period spanned six years, during which time no studies were made of the two areas. Yet, the final planning document recommended further study.[131] The BLM planning system has largely failed to produce land use decision for primitive areas in Oregon.[132]

Another shortcoming of the BLM planning ystem is that there is no requirement for public meetings until the conflicts between potential resource uses have been tentatively resolved.[133] Planning regulations require all recommendations, even those subsequently rejected in favor of recommendations for other resource uses, to be presented for review at the public planning meeting[134]—but this has not always been done.[135] In practice, at least in Oregon, the public has been presented with a completed planning document at the planning meeting.[136] Perhaps there has been little need for revision of the planning documents after planning meetings because these meetings

---

130. The two potential primitive areas identified in Prineville District were recommended for "study for designation as primitive areas." Prineville District, BLM, Upper Crooked River MFP Step 3 (1974) copy on file with the Nat. Res. J. The one potential primitive area identified in Baker District was recommended for maintenance "in an undeveloped condition." Baker District, BLM, Baker Resource Area MFP Step 2, at 38 (1975) copy on file with the Nat. Res. J.

BLM planning documents usually are not paginated. Steps 1 and 2 of the management framework plan and subsequent revisions and penciled-in amendments usually are not dated. *Cf. BLM Manual* §§1605.14(B), 1608.14(B) (1975). These planning documents are usually kept only at the appropriate district office. Letter from E. F. Spang, *supra* note 36; letter from Wm. Mathews, *supra* note 23.

131. Gerry Mountain and Sulfur Butte were identified in the district planning documents in 1968 as having potential as primitive areas. Interview with Marvin Bagley, Area Manager, BLM, Central Oregon Resource Area, Prineville District, Oregon, in Prineville, Oregon, June 2, 1975.

132. The purpose of the management framework plan is to "develop and record *decisions* indicating development and use . . . of specific areas of land within a Planning Area." *BLM Manual* §1608.12(A) (1975) (emphasis added).

133. The *BLM Manual* does require "public participation" in the MFP preparation, including the activity recommendation stage. *BLM Manual* §1608.13 (1975). However, *formal solicitation* of public commentary has been limited to the planning meeting following Step 2 MFP, which focuses on conflicts between resource recommendations.

134. *BLM Manual* §1608.43(D) (1975).

135. For example, in Vale District, Red Buttes was recommended for primitive status by the district recreation specialist in Step 1 of the management framework plan. Letter from George Gurr, District Manager, BLM, Vale District, Oregon, to the author, August 15, 1975, on file with the Nat. Res. J. But Red Buttes was not mentioned as a rejected recommendation for primitive status in the Northern Resource Area MFP Step 2 planning document, nor at the Step 2 planning meeting held in Ontario, Oregon, on June 4, 1974. This omission is in violation of *BLM Manual* §1608.43(D) (1975).

136. *See, e.g.*, Vale District, BLM, Northern Resource Area MFP Step 2 (June 4, 1975) on file with the Nat. Res. J. This document was signed by the District Manager on June 30, 1975, and thus became MFP Step 3.

are structured to attract local groups, with whose interests the BLM districts had already become familiar prior to the drafting stage.[137]

Although the BLM planning system provides the context for decision making, it provides no yardstick for measuring whether or not an area would be a high quality primitive area. To fill this gap the BLM has borrowed a form from its recreation section, the "quality evaluation chart [for] primitive values."[138] This chart is one of a series of scoresheets designed to assist recreation specialists in the field to identify potential recreation areas and to evaluate the recreation potential for different types of recreation activities. There are scoresheets for fishing, skiing, float-boating, scenery, etc. Most of the scoresheets appraise a single physical recreation activity, such as fishing, in contrast to "primitive values, which is not an *activity* as such, and which would seem to be measurable only as the total experience of being in a primitive area."[139]

The *BLM Manual* allows these scoresheets to be used to identify recreation opportunities in the initial inventory stage of the planning process.[140] However, it is clear the forms were not designed to compare already identified potential primitive areas to determine which area should be selected for designation. The scoresheet is of little value as a means of comparing potential primitive areas: because direct comparisons between areas are not made—evaluation is made against whatever ideal standard the various evaluators have in mind at the time; because the areas rated are given alphabetical scores, without accompanying written explanation to reveal the rater's state of mind or possible bias; and, most importantly, because the form does not accurately reflect the official BLM criteria for primitive areas.[141] Nonetheless, the official BLM position is that use

137. In Oregon the practice has been to hold planning meetings in the town in which the district headquarters are located; and for all the larger BLM districts, these are towns of less than 5,000 population located in the sparsely populated eastern half of the state. The practice of advertising the meetings in locally distributed papers, rather than in papers of statewide circulation, has further deterred attendance by a broader cross section of the regional public.

138. *BLM Manual* §6111.21H.1 (1975). *See* appendix A.

139. *See BLM Manual* §6111.15 (1975).

140. *BLM Manual* §6100.08(A) (1975).

141. Shortcomings of this form, which is reproduced in appendix A, include:

(a) "Uniqueness" (factor #7) is unduly emphasized. "Unique" suggests that an area must be one of a kind or unusual in the region, which is erroneous and misleading. The C.F.R. authoritatively states that a "primitive area may be *representative* of natural environments." 43 C.F.R. §6221.1 (1975) (emphasis added).

(b) "Wildlife" (factor #3) unduly emphasizes large game, predatory, and fur-bearing mammals to the exclusion of birds, reptiles, small mammals and other animal life forms. Counting appropriative type animals that might attract hunters and trappers, but ignoring other life forms which attract non-consumptive "users" of wildlife, such as bird watchers, constitutes a prejudiced census.

(c) "Fishing" (factor #4) and "water usability" for boating (factor #5) are not mentioned in

of this scoresheet will be the standard procedure for evaluating potential primitive areas in all BLM states.[142] The BLM Chief of Recreation for Oregon has stated that potential primitive areas will not be proposed for designation unless they receive a high score on this evaluation scoresheet.[143]

Interim Protection of Potential Wilderness/Primitive Areas

BLM regulations do not require that identified potential primitive areas be given any special protection during the time these areas are processed through the planning system, even though this interim period may last several years.[144] Conflicting activities permitted in potential primitive areas during this period could irreversibly compromise their primitive qualities, effectively foreclosing decision making through the planning system. The BLM has allowed this to happen, even though no studies had been conducted to measure the primitive potential of the areas and no decision adverse to designation had been reached in the planning process.[145]

BLM Manual §6221.11 (1975) primitive area criteria, except inferentially as "opportunities for . . . primitive type recreation." This phrase also entails many other activities not appearing on the 6111.21H.1 form: mountain climbing, ski touring, hunting, hiking, camping, collecting, horse-back riding, etc. Rating areas only according to water-related primitive recreation activities is biased, particularly since most BLM land is arid.

(d) "Scenic quality" (re: "Quality Evaluation Chart, Scenery," *BLM Manual* §6111.21F.1 (1975), which is to be used in conjunction with the primitive evaluation chart) emphasize vertical land forms over rolling and flat land forms and vivid color contrasts over subtle shadings, which is prejudicial to some natural environments that might appropriately be designated as primitive areas. Further, the *BLM Manual* lists preservation of natural ecosystems as an objective of primitive designation, and does not stipulate that ecosystems must be "scenic" in order to justify their preservation. *BLM Manual* §6221.02(A)(4) (1975).

(e) "Size" (factor #6) is not explicit in explaining what constitutes "opportunities for isolation." The rater has to rely solely on gross acreage to measure this factor. Evaluation of the vegetative cover and terrain features which screen camping spots and travel routes, and evaluation of the opportunity for dispersing recreationists throughout the area based on a wide availability of springs or other sources of potable water would provide a better index of opportunities for isolation.

(f) This form doesn't measure "water usability" (factor #3) as the presence of potable water, although this probably would be the critical factor in determining the extent of recreation use of most arid BLM lands.

142. Letter from George Lea, *supra* note 7.

143. Interview with Ken White, Chief of Recreation, BLM, Oregon State Office, in Portland, Oregon, June 27, 1975.

144. Letter from George Lea, *supra* note 7.

145. Gerry Mountain was identified as a potential primitive area in Prineville District, Oregon, in 1968. In 1971, an extended lease was granted to allow oil drilling on all 10,000 acres of the area. The lease was not revealed at the MFP planning meeting in December, 1973. The Upper Crooked River MFP Step 3 planning document of 1974 recommends that Gerry Mountain be studied for possible designation as a primitive area. Although no drilling has yet begun, the lease has not expired. Interview with Marvin Bagley, *supra* note 131.

The Alvord Desert was identified as a potential primitive area and recommended for primitive evaluation studies in the district planning documents. Burns District, BLM, Andrews

If the decision in the final planning document is to propose further primitive evaluation studies, the unprotected period is extended. Temporary protective measures for primitive study areas have been proposed in the planning documents in Oregon, but district level recommendations are of questionable effectiveness.[146]

The Forest Service is pursuing a course quite similar to that of the BLM in regard to wilderness-primitive studies. Although the Wilderness Act did not require the Forest Service to review and report on all areas meeting the criteria for wilderness,[147] the Forest Service has undertaken an inventory of all its lands to identify roadless tracts of at least 5,000 acres. But rather than make a wilderness report on every area found, the Forest Service has adopted a procedure of selecting only areas which have the highest wilderness potential for further study and report to Congress. Such areas are temporarily classified as "new wilderness study areas," pending completion of wilderness studies.[148] It is notable that from the 1449 inventoried roadless areas totaling 55 million acres, the Forest Service selected 274 new wilderness study areas totaling 12 million acres.[149]

The *Forest Service Manual* requires wilderness study areas to be managed "to protect their wilderness character"; in effect, they must be managed as if they were already wilderness until studies are

Resource Area MFP Step 3 (June 26, 1974) copy on file with the Nat. Res. J. Subsequently, the BLM granted permits for extensive geothermal exploratory drilling in the Alvord Desert, although no further primitive evaluation studies had been conducted. The environmental analysis which preceded granting of the permits did not even mention the fact that the area had been proposed for primitive evaluation in the district MFP. *See* BLM, Alvord Desert Geothermal Leasing Program, Environmental Analysis Record, No. 36020-5-20.

146. For example, the Fish Fin potential primitive area was added to the district planning document as a recommendation that the area be evaluated for primitive qualities, with the further recommendation, "[to] restrict all development in these areas until primitive values are determined." Lakeview District, BLM, Beatty's Butte MFP Step 2 (1975), copy on file with the Nat. Res. J. (This recommendation now appears in the district records under Warner Lakes MFP Step 1.)

Although Fish Fin is a 34,000 acre roadless area, a visit by one individual from the BLM state office for a part of a day was deemed a sufficient basis for determining primitive values. It was decided that since the area "lacked the features to make it a high evaluation area," *i.e.*, no water and little wildlife, it would not be necessary to send a team of district specialists into the area to assess primitive vaues. This evaluation was made in the context of an Environmental Impact Statement study on a proposed 500k.v. power line which is to pass through the Fish Fin area. Interview with Ken White, *supra* note 143.

147. 16 U.S.C. §1132(a), (b) (1970).

148. *See Roadless Study, supra* note 122.

149. U.S. Forest Service, Dep't of Agriculture, New Wilderness Study Areas, Current Information Report No. 11, at 4 (October, 1973). Although the Forest Service roadless area review went beyond the requirements of the Wilderness Act, the Forest Service has been sharply criticized for excluding many potentially qualifying areas from new study status. For an in-depth analysis of the review process which concludes that it was "grossly inadequate," *see* Pacific N.W. Chapter, Sierra Club, Critique and Analysis of the U.S.D.A. Draft Environmental Statement on Selection of Proposed New Study Areas from Roadless and Undeveloped Areas 1-62 (1973) copy on file with the U. of Oregon Library.

completed and final decisions reached.[150] Those Forest Service inventoried roadless areas not selected as new wilderness study areas are also given a measure of protection. A Forest Service national directive requires that an Environmental Impact Statement be completed in accordance with the procedures of the National Environmental Policy Act before activities that would irreversibly compromise the wilderness potential will be allowed on inventoried roadless areas.[151]

The BLM has no counterpart to inventoried roadless areas since it has not conducted a comprehensive inventory of its lands for this purpose. The BLM counterpart to wilderness study areas are those areas recommended for further primitive evaluation in the BLM planning documents; there is no BLM regulation requiring that such areas be protected during the study period.[152] The total BLM acreage being considered for primitive status, 5.5 million acres,[153] includes areas being processed through the BLM planning system prior to the public meeting stage, as well as areas proposed for designation or for further primitive evaluation.[154] No BLM regulation requires the protection of areas being processed through the planning system pending final decisions.[155] There is no assurance that BLM's potential primitive areas will even receive the protection guaranteed to Forest Service inventoried roadless areas, for it is not BLM policy to require

150. "No actions will be undertaken in new study areas that will change their wilderness character, including harvesting timber, building roads, vegetative type changes, or construction of other permanent improvements that would not be allowed in an established wilderness. . . . Actions that are not permitted in an established wilderness but are transitory in nature, such as use of off-road vehicles . . . will be restricted. . . ." U.S. Dep't of Agriculture, *Forest Service Manual* §8261.1 (April 1970).

New wilderness study areas will be managed and evaluated in the same manner as Forest Service primitive areas under the Wilderness Act. *See* Note, *Parker v. United States: The Forest Service Role in Wilderness Preservation*, 3 Ecol. L.Q. 145, 169 n. 114 (1973) [hereinafter cited as *Parker*].

151. Forest Service Memorandum from E. W. Schutz, Acting Chief, U.S. Forest Service to all Regional Foresters, November 28, 1972, copy on file with the Nat. Res. J. This directive was promoted by, and is in settlement of, Sierra Club v. Butz, 349 F. Supp. 934 (N.D. Calif. 1972). *See Parker, supra* note 150, at 170 n. 115.

152. *See* notes 144-146 *supra*, and accompanying text.

153. *1974 Hearings, supra* note 27, at 1072.

154. "To date, through our management framework planning system, we have identified some 38 areas in the west totalling 1,800,000 acres which we feel have wilderness value and we formally recognize them as such. In addition to that, we are studying another 4 million acres found in 128 areas where we think there may be wilderness potential." *Oversight Hearings, supra* note 90, at 66 (Statement by BLM Associate Director, George Turcott). The 38 areas include the 8 existing primitive areas and 30 additional areas which have been *recommended* for primitive designation in district management framework plans. The 128 areas represent areas which have been identified as having primitive potential in district unit resource analyses. Letter from George Alderson, Legislative Director, Friends of the Earth, to FOE Field Representatives, January 3, 1974, copy on file with the Nat. Res. J.

155. Letter from George Lea, *supra* note 7.

an Environmental Impact Statement before the commencement of all major developments.[156] Several of the BLM's potential primitive areas in Oregon, recommended in the district planning documents for primitive evaluation studies, have never had their boundaries delineated on a map so it is not possible to accurately determine whether primitive values are threatened or compromised.[157]

THE DECISION TO DESIGNATE[158]

Allocation of Authority to Designate

In 1973 the Director of the BLM issued a memorandum to all BLM state directors stating that all potential primitive areas which had been processed through the BLM planning system and were not rejected "should be designated as rapidly as possible."[159] Although there is a large backlog of appropriate areas, only one BLM primitive area has been designated in the two years since this memo was issued.[160] The bottleneck in the process of creating primitive areas is budgetary. Budget planning determines which projects will have

156. It is the official policy of the BLM to draft an abbreviated analysis, an Environmental Analysis Record (E.A.R.), to determine whether a full Environmental Impact Statement (E.I.S.) is necessary to comply with the National Environmental Policy Act. *See BLM Manual* §1791 *et seq.* (1975). All too often the conclusion reached in the E.A.R. is that a full E.I.S. is not required, so that the BLM is absolved of the statutory obligation to solicit extensive public commentary prior to undertaking the proposed project. *Cf. 1975 Hearings, supra* note 7, at 475; *Hearings on S. 507 and S. 1292 Before the Subcomm. on Environment and Land Resources of the Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess., at 300 (1975). For an example of the cursory treatment afforded primitive values in one E.A.R., *see* note 145 *supra.*

157. Seven areas were recommended for primitive evaluation studies in the Burns District, BLM, Andrews Resource Area MFP Step 3 (June 26, 1974). Because these areas did not evolve through the BLM planning system the narrative and map sections of the respective unit resource analyses do not describe the area; there is no way to accurately estimate their boundaries. *See* note 129 *supra.* After having been recommended for study in the MFP these areas *should have been* added onto the unit resource analysis maps. *See BLM Manual* §§1605.16, 1605.14(B) (1975).

158. Final decision on designation of wilderness areas is reserved to Congress. 16 U.S.C. §1132(b), (c) (1970). The Wilderness Act established a ten-year deadline ending in September 1974, for completion of agency reviews and recommendations to the President. *See* note 123 *supra.* Wilderness suitability recommendations were transmitted to the President by that date on all remaining areas reviewed by the agencies. A backlog of areas awaits Congressional action. Unlike the agency review process, there is no statutory deadline for completion of congressional action on recommended wilderness areas. *See* Haight, *The Wilderness Act Ten Years Later, supra* note 123, at 278-281. For a status report on the present components of the National Wilderness Preservation System and the recommended areas now awaiting congressional action, *see The Wilderness System, supra* note 123, at 38-47.

159. Instruction Memorandum No. 73-399, *supra* note 74. "BLM Instruction Memorandum 73-399 is not currently in force. However, even though this instruction memorandum has expired, it is still BLM policy to process, as rapdily as possible, designations for potential primitive areas which have passed through MFP Step 3. . . ." Letter from Darrel Lewis, *supra* note 76.

160. Scab Creek Primitive Area, Wyoming, was designated in June, 1975. 40 Fed. Reg. 26721 (1975). By 1974 there were 30 other areas *recommended* for designation. *See* note 154 *supra.*

priority for completion within the constraints of available funding for a given year; these priorities are passed from the national office to state offices and then to districts in the form of commitments to complete certain projects in the following fiscal year. Unless the national office lists primitive designation as a mandatory project, the district manpower necessary to conduct primitive management studies and process designation proposals is not likely to be available due to the manpower demands of priority projects.[161]

In fiscal year 1975, notwithstanding the BLM Director's admonition to designate primitive areas as quickly as possible, the BLM Washington Office committed only five states to designate a primitive area.[162] A BLM staff officer in the Washington office stated that this was a minimum figure not intended to discourage other states from proposing additional areas for designation.[163] However, a BLM staff officer in the Oregon State Office interpreted "no commitment" as a mandate not to propose areas for designation. The Oregon office did not commit any districts to designate a primitive area in that year.[164] The BLM Wyoming State Office has stated that no area can be designated in Wyoming this year because the state did not receive a commitment to designate from the BLM Washington Office.[165]

In fiscal year 1976, the BLM Washington Office committed all ten BLM western states to propose at least one area for primitive designation.[166] The BLM Oregon State Office interpreted "at least one" expansively and committed two districts in the state to each propose one area for designation.[167] Nonetheless, the BLM State Offices in Idaho and New Mexico do not intend to propose any areas for designation in 1976, although there are appropriate areas available.[168]

The procedure of allocating commitments to propose areas for designation on a state by state basis, one area per state, is not rational:

---

161. Interview wtih Jerry Wright, Chief, Branch of Administration, BLM, Oregon State Office, by telephone, February 26, 1976. *See BLM Manual* 1631 (1975).

162. BLM, Washington, D.C., Instructional Memorandum No. 74-203 at G-9.

163. Letter from George Lea, *supra* note 7.

164. Interview with Stan Lester, Chief of Lands, Minerals, and Recreation, BLM, Oregon State Office, in Portland, Oregon, May 29, 1975.

165. Letter from Jesse Lowe, for Daniel Baker, State Director, BLM, Wyoming State Office, to the author, August 29, 1975, on file with the Nat. Res. J.

166. Letter from John D. Evans, Chief, Planning Coordination Staff, BLM, Oregon State Office, to the author, July, 1975, on file with the Nat. Res. J.

167. *Id.*

168. Letter from Wm. Mathews, *supra* note 23. Letter from C. R. Durnell, Acting State Director, BLM, New Mexico State Office, to the author, July 30, 1975, on file with the Nat. Res. J.

Nevada currently has 60 potential primitive areas, Idaho has two.[169] It would seem more logical to give additional commitments for designation to states with the greater number of potential areas. However, the disparity in identified potential area between these two states also reflects the autonomy that the BLM state offices have in establishing unwritten policy for in-state districts. The Idaho State Office manifests an aversion to wilderness, and one state officer admits squelching proposals for primitive designation emerging from the district level.[170] This aspect of BLM "state control" is an impediment to the creation of a primitive area system which, like the National Wilderness Preservation System, is intended to meet long-range national needs and not just current local demands.

A related problem involving the impact of the budgetary process on primitive areas is that fiscal planning proposals are considered tentative and therefore not subject to public review until Congress has approved appropriations for the proposals.[171] In Oregon, as a result, one month into the fiscal year the State Office revealed it had received a commitment to designate a primitive area and announced which potential primitive areas the chosen districts had selected to designate. There was no public involvement in the decision of which areas should be selected for designation.[172]

In view of the number of appropriate potential areas in some states and the lack of adequate interim protection,[173] the decision of which area to designate first is critical.[174] Without active public involvement

169. Letter from E. I. Rowland, State Director, BLM, Nevada State Office, to the author, August 29, 1975, on file with the Nat. Res. J. Letter from Wm. Mathews, *supra* note 23.

170. "Idaho people feel they have given enough of their state to wilderness. . . . [besides] [w]e don't need large wilderness areas to get whatever experience people seek in wilderness areas." Interview with Richard Geier, *supra* note 23. The Idaho BLM Chief of Recreation stated that the state office did not wish to dictate to the districts, and that if a district felt strongly about a potential area then it could be proposed to the public at the MFP planning meeting. However, he said, usually he would "try to persuade otherwise." *Id.* This attitude also precipitated the BLM Idaho State Office proposal for back country areas as an alternative to primitive areas. *See* note 87-90 *supra*, and accompanying text.

171. Interview with Jerry Wright, *supra* note 161.

172. For example, Lakeview District received a commitment to propose one area for primitive designation in fiscal year 1976. There were then six potential primitive areas in the district, none of which had been processed through the BLM planning system. The district selected Fort Rock Lava Beds potential primitive area to designate. There was no public involvement in this decision; in fact, because the area had not been recommended for designation within the planning system, there never had been an opportunity for the public to comment on the suitability of the area for primitive status. *See* letter from Dennis Hill, *supra* note 129.

173. *See* note 154 *supra*, and text accompanying notes 144-146, 156, 157 *supra*.

174. The BLM Oregon State Office has recognized the need to evaluate all identified potential primitive areas on a statewide basis in order to establish relative priorities and selection criteria. A regional study with representation from all districts was proposed, but has yet to be carried out. *See* BLM Oregon State Office Instruction Memorandum No. 74-437, Sept. 26, 1974, copy on file with the Nat. Res. J.

in the selection process, there is less assurance that the better areas will be proposed for designation first. BLM staff personnel in Oregon give high priority in the selection process to areas which were non-controversial, which is almost a guarantee of mediocrity.[175] Since it seems likely that a saturation level will be reached before all potential primitive areas are designated, failure to designate the better areas first could result in a BLM primitive area system that is of mediocre quality.[176]

Budget Limitations

Historically the BLM has been underfunded for recreation management,[177] and it seems that the BLM now lacks adequate funding for its primitive area program. Several BLM state offices have asserted that intensive primitive area studies, as well as management plans for prospective primitive areas, have been curtailed by lack of adequate funding.[178] The BLM State Director for Nevada has said, "Unless we receive increased public support and increased manpower we will be lucky to achieve one primitive area per year Statewide. It is easy to designate an area, but we will not substitute quantity for quality by ignoring management needs."[179] The Utah State Office, which has the longest experience in managing BLM primitive areas, recently advised its districts to consider the impact of primitive area management programs on existing manpower and funding in the evaluation of a new area for designation[180]—a tactfully worded discouragement to proposing of new areas for designation.

175. The Vale District Recreation Specialist stated that the Honeycombs was selected for designation from among three potential primitive areas in the district, because, among other reasons, "it's more acceptable to the public, why not go for the easiest?" Interview with William Schneider, District Recreation Specialist, BLM, Vale District, Oregon, by telephone, June 29, 1975. The Lakeview District Recreation Specialist stated as one of the reasons for selecting the Lava Beds for primitive designation from among six potential primitive areas in the district, "it's the least controversial." Interview with Dennis Hill, District Recreation Specialist, BLM, Lakeview District, Oregon, by telephone, June 29, 1975.

176. "[I]s there a social saturation level where we exceed an acceptable number of areas and lose public interest? If the latter should happen, then will there be better areas of primitive value above those previously designated?" Letter from E. I. Rowland, *supra* note 169.

177. No funds were appropriated for recreation management of BLM lands until the late 1950s. Clawson, *supra* note 1, at 23, 116.

178. "Before any area is formally designated as a primitive . . . area, detailed studies will be required to determine if the designation is justified. . . . Present funding will keep us from completing many special studies." BLM Idaho State Office Instruction Memorandum No. 73-39, Feb. 20, 1973, copy on file with the Nat. Res. J. *See also,* letter from E. F. Spang, *supra* note 38 and letter from William Leawell, Associate State Director, BLM, Utah State Office, to the author, August 13, 1975, on file with the Nat. Res. J. "The lack of 1280 (recreation) funds . . . has slowed management plans and thereby held up designations." Letter from E. I. Rowland, *supra* note 169. *See also,* letter from Wm. Mathews, *supra* note 23.

179. Letter from E. I. Rowland, *supra* note 169.

180. BLM Utah State Office Instruction Memorandum No. 73-178, Sept. 28, 1973, copy on

PROPOSED LEGISLATION TO MAKE BLM LANDS SUBJECT TO PROVISIONS OF THE WILDERNESS ACT

Legislation was proposed in the 93rd Congress to provide for a systematic review of BLM lands to identify areas for inclusion in the National Wilderness Preservation System. These proposals appeared as provisions of House and Senate bills designed to give the BLM comprehensive organic legislation and are popularly referred to as wilderness review provisions of the proposed "BLM Organic Act."[181] Both bills provided that all BLM lands be reviewed within 15 years in accordance with the provisions of the Wilderness Act: a BLM report and recommendation to the President on each area identified as meeting wilderness criteria; Presidential recommendations to Congress; and final Congressional decision making and the legislative creation of BLM wilderness areas. An important difference between the two bills was that the Senate bill emphatically precluded any interim protection of wilderness values during the review process, whereas the House bill required that the wilderness character of identified areas be preserved, subject to mining and grazing uses. Also, the Senate Bill did not provide a time frame for completion of the review process, other than requiring that areas be identified within five years; the House bill required that one-half of all identified areas be reported on by the President within five years, which would have considerably expedited the agency review process.[182]

---

file with the Nat. Res. J. "A primitive area is not country without management. Management needs to be very intensive to maintain the natural character." Instruction Memorandum, *supra* note 178.

181. S. 424, §102(a), §103(e), 93d Cong., 2d Sess. (1974); H.R. 16800, §312, 93d Cong., 2d Sess. (1974) (this bill was formerly H.R. 5441). Both of these bills were formally titled, "The National Resources Land Management Act." This legislation was in large measure designed to implement the recommendations of the Public Land Law Review Commission. *Cf.* S. Rep. No. 873, 93d Cong., 2d Sess., 29 (1974). *See* text accompanying notes 30-36 *supra.*

182. The text of the wilderness review provision of the H.R. 16800 is reproduced in appendix B. The wilderness review provision of the S. 424 is as follows:

> The Secretary shall prepare and maintain on a continuing basis an inventory of all national resource lands. . . . Areas containing wilderness characteristics as described in section 2 (c) of the (Wilderness Act) shall be identified within five years of enactment of this Act. The inventory shall be kept current. . . . The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change in management or use of national resource lands.
>
> . . .
>
> Areas identified . . . as having wilderness characteristics shall be reviewed within fifteen years of enactment of this Act pursuant to the procedures set forth in subsections 3 (c) and (d) of the (Wilderness Act): *Provided, however,* that such review shall not, of itself, either change or prevent change in the management or use of the national resource lands. S. 424, §102 (a), §103 (e), 93d Cong., 2d Sess. (1974).

The BLM has indicated that should a wilderness review provision be passed, they intend to use their existing planning system to "inventory and assess the values" of potential wilderness areas.[183] In an "in house" document the BLM interpreted the review requirements of these two bills to have quite different effects on the functioning of their planning system.[184] Under the House bill the BLM would report on every area which was identified as meeting the 5,000 acre and roadless criteria.[185] Under the Senate bill, however, only those areas which survive step 2 of the management framework planning process would be reported to the President.[186] This is significant since areas meeting the criteria *might not* be recommended for wilderness designation at step 1 of the management framework plan, or, if recommended, might still be rejected at step 2 of the process in favor of a conflicting resource use.[187] Thus, the Senate bill allowed local BLM staff personnel to make conclusive decisions as to wilderness suitability within the context of the BLM planning system.

The distinction made by the BLM between the two bills seems to be based on the criteria in each for areas to be reviewed. The House bill required that "roadless areas of 5,000 contiguous acres" be reviewed and *each such area* be reported to the President.[188] The Senate bill, in contrast, required that "areas containing wilderness characteristics" as described in the Wilderness Act be identified and reviewed.[189] This expands the discretion of the BLM to include conclusive determinations of wilderness quality in addition to roadlessness and size, since the Wilderness Act includes subjective wilderness characteristics.[190]

Since the Wilderness Act requires every roadless area of five thousand acres to be reviewed,[191] it would seem that the Act's list of wilderness characteristics is intended to be a standard for agency evaluation and recommendation to the President and not a basis for

183. *Oversight Hearings, supra* note 90, at 66.

184. BLM Washington, D.C., Memorandum to State Directors from the Chief, Division of Recreation, Dec. 19, 1974 (Enclosure #4), copy on file with the Nat. Res. J.

185. "We must *report* to Congress on every area which appears in our base URA. . . . The final *recommendations* to Congress would be based on information in MFP step 2. . . ." *Id.* (emphasis added).

186. "Only those areas which appear in MFP step 2 would be *reported* to the Congress." Memorandum, note 184, *supra* (emphasis added).

187. *See* note 126, 127 *supra.*

188. *See* appendix B.

189. *See* note 182 *supra.*

190. Characteristics of wilderness include, "the imprint of man's work substantially unnoticeable," and "outstanding opportunities for solitude." 16 U.S.C. §1131(c) (1970).

191. This was the criteria for reviewability in the national parks and wildlife refuges; wilderness review of the national forests was limited to existing "primitive" areas. 16 U.S.C. §1132(b), (c) (1970).

rejecting areas at the agency level. Rather than having lower echelon BLM personnel make conclusive determinations based on vague standards, it would be more consistent with the policy of the Wilderness Act to have *all* roadless areas reported to the President, accompanied by recommendations for or against designation.

Both of these bills died in the 93rd Congress. However, similar legislation has been introduced in the 94th Congress. In February of 1976 the Senate passed a bill, S. 507, which includes a wilderness review provision *identical* to that of the Senate bill in the 93rd Congress, complete with the shortcomings described above.[192] The House Subcommittee on Public Lands is presently considering several similar bills. The Administration bill, H.R. 5224, includes a wilderness review provision based on that of the Senate bill in the 93rd Congress.[193] However, two important changes have been made: the minimum acreage for wilderness review has been increased to 50,000 acres; the deadlines for completion of the identification and review processes have been deleted.[194]

Failure to require a deadline for completion of the review process is tantamount to eliminating any legal obligation for the BLM to inventory and review its potential wilderness areas.[195] Even if a termination date for completion of the review process were included, limiting the inventory to areas of 50,000 acres would "considerably reduce" the amount of land to be reviewed;[196] a Wilderness Society spokesman asserted the provision would exclude three-fourths of the roadless areas currently identified by the BLM.[197] The average size of the eight existing BLM primitive areas is 21,000 acres; only one of these areas would have been identified by the Administration's proposed inventory.[198] An Interior Department official testified that the BLM would also consider smaller areas for wilderness protection.[199] However, sole reliance on agency discretion to review the vast majority of roadless areas with wilderness potential, those of less

192. S. 507 §§102(a), 103(e), 94th Cong., 1st Sess. (1975). 122 Cong. Rec. 2, 368 (daily ed. Feb. 25, 1976). That part of the 93d Congress bill from which this provision was *copied* is reproduced in note 182 *supra*.

193. H.R. 5224 §§102(a), 103(e), 94th Cong., 1st Sess. (1975). *Cf.* 93d Congress bill, note 182 *supra*.

194. The section reads: "Areas containing wilderness characteristics as described in section 2(c)(1), (2), and (4) of the (Wilderness Act) shall be identified: *Provided*, that such areas be comprised of fifty thousand contiguous, roadless acres or more." *Id.* Section 2(c)(3) of the Wilderness Act, which the bill has omitted, refers to the minimum size of 5,000 acres. 16 U.S.C. §1131(c) (1970).

195. *Cf., 175 Hearings, supra* note 7, at 397.

196. *Hearings on S. 507 and S. 1292, supra* note 156, at 58.

197. *1975 Hearings, supra* note 7, at 397.

198. *See* note 7 *supra*, and accompanying text.

199. *1975 Hearings, supra* note 7, at 222.

than 50,000 contiguous acres, offers scant improvement of the existing primitive area system. Further, if the BLM continues to interpret the bill to require only a review of areas surviving step 2 of the management framework planning process, there is no guarantee that even 50,000-acre roadless areas would be reported to the President.[200]

The other bill under consideration by the House Subcommittee on Public Lands, H.R. 5622, includes a wilderness review provision based on that of the House bill in the 93rd Congress, with three important changes.[201] First, the time period for completion of the review process has been shortened to ten years. Second, interim protection for potential wilderness areas during the study and review process has been further strengthened by allowing use of these areas for other purposes only "so long as such uses do not substantially impair the suitability of such area for preservation of wilderness."[202] Third, "[o]nce an area has been designated for preservation as wilderness, the provisions of the Wilderness Act shall apply with respect to the administration and use of such designated area."[203]

This last change marks a significant departure from the wording of the 93rd Congress House bill, which provided that BLM wilderness areas would be managed according to the provisions of the Wilderness Act *for Forest Service wilderness areas.*[204] The Wilderness Act prohibits structures and commercial enterprises in wilderness areas,[205] with the specific exceptions that in Forest Service wilderness areas transmission lines and water projects may be allowed if authorized by the President, and new mining claims may be allowed until 1983.[206] The Wilderness Act does not explicitly state that mining, transmission lines, and water projects are prohibited in all wilderness areas except those located on Forest Service lands; however, it is clearly implied. The Department of Interior has construed the Act to exclude these activities from national parks and national wildlife refuges.[207] Thus, H.R. 5622 would require a stricter

200. *See* text accompanying notes 182-190 *supra.*

201. H.R. 5622 §103, 94th Cong., 1st Sess. (1975). *Cf.* the 93d Congress bill, appendix B.

202. *Id.*

203. *Id.*

204. H.R. 16800 §312, 93rd Cong., 2d Session (1974). *See* appendix B.

205. The Wilderness Act §4(c), 16 U.S.C. §1133(c) (1970).

206. The Wilderness Act §4(d), 16 U.S.C. §1133(d) (1970).

207. "Subsection 4(c) of the Wilderness Act, read in conjunction with subsection 4(d), is inconsistent with permitting extraction activities within wilderness areas of the National Park and Wildlife Refuge System and, for this reason, we have proposed no area for wilderness designation which is open to mineral entry." *Hearings on S. 1010, supra* note 107, at 16 (Letter from the Assistant Secretary of Interior). *But see, The Wilderness System, supra* note 123, at 46. Most national parks and national wildlife refuges were withdrawn from mineral entry some time ago. *Oversight Hearings, supra* note 90, at 67. In the case of BLM lands, the great majority of which are open to mineral entry, it would be necessary to withdraw proposed wilderness areas

standard for management of BLM wilderness areas than is now required for Forest Service wilderness areas.[208]

The House Subcommittee on Public Land is drafting its version of the "BLM Organic Act," which now contains a wilderness review provision that is identical to that of the House bill of the 93rd Congress, except that the deadline for completion of wilderness review has been shortened to ten years.[209] Thus, in its present form this bill would allow new mining claims to be located in BLM wilderness areas until 1984 and would allow transmission lines and water projects to be located in these areas if approved by the President.[210]

If the policies enunciated by the Wilderness Act are taken as a standard, the most important elements of a wilderness review provision are a set time frame for completion of the review process, i.e., within at least 15 years; and an easily ascertainable criteria for reviewability, i.e., 5,000 acres and roadless. Of lesser significance, but also important, is a requirement for interim protection of areas during the review process. Of the bills so far discussed, H.R. 5622 is preferable since it conforms closely to these standards.[211] S. 507 and the House Public Lands Subcommittee print No. 2 have workable wilderness review provisions, but both have shortcomings. The Subcommittee Print would allow intrusions in BLM wilderness areas such as are allowed in Forest Service wilderness areas,[212] and it has an interim protection provision that is worded less strongly than that of H.R. 5622.[213] S. 507 contains vague criteria for reviewability and prohibits any interim protection measures.[214] The Administration bill, H.R. 5224, has the least desirable wilderness review provision; its worst features are that it lacks a time frame for completion of the

from the mining laws by administrative action prior to designation or by legislative action accompanying the designation. *See* note 109 *supra.*

208. S. 507 would seem to require the same stricter management since this bill does not provide that BLM wilderness areas must be managed according to the provisions of the Wilderness Act for Forest Service wilderness areas.

209. Proposed Public Land Policy and Management Act, Subcomm. Print No. 2, §312, Prepared for the Subcomm. on Public Lands of the House Interior Committee (August 13, 1975). *Cf.* the 93d Congress bill, appendix B.

210. *See* text accompanying notes 204-206 *supra.* Since this proposed provision provides a 10-year time frame for completion of the review process, most BLM wilderness areas would probably not be designated until after the 1984 deadline for filing of new mining claims. Since the areas would be subject to mining claims during the review process in any event, allowing new mining claims with a 1984 cut-off date would not pose a serious threat to BLM wilderness areas. *See* note 107 *supra.*

211. *See* notes 201-208 *supra,* and accompanying text.

212. *See* notes 209 and 30 *supra,* and accompanying text.

213. *See* note 202 *supra;* and appendix B.

214. *See* text accompanying note 192 *supra;* and note 182 *supra;* and text accompanying notes 186-190 *supra.*

review process, and it limits reviewability to areas of greater than 50,000 acres.[215]

Conservation groups have repeatedly urged that a provision be included to immediately designate some BLM lands as wilderness, in a fashion similar to the Wilderness Act's treatment of the Forest Service's administratively created "wild," "wilderness," and "canoe" areas.[216] BLM primitive areas are directly analogous to these Forest Service administrative areas which received wilderness status under the Wilderness Act.[217] Further, the existing system of BLM primitive areas is quite small compared to the Forest Service system of wild, wilderness, and canoe areas that existed immediately prior to passage of the Wilderness Act: 180,000 acres compared to 9.1 million acres.[218] It does not seem inappropriate that BLM primitive areas should be granted immediate wilderness status by the "BLM Organic Act," should it be passed.

A number of areas have been proposed for primitive designation in the management framework plans at the BLM district level.[219] Some of these areas are now awaiting approval from the BLM Washington Office, others have applications pending for withdrawal from the mining laws.[220] These recognized areas ought to receive expedited treatment under any wilderness review provision, particularly if the provision contains incomplete interim protection measures. A provision requiring that such areas be reported to the President within two years of passage of the Act would accomplish this end.

CONCLUSION

The BLM primitive area system is not a functional alternative to the National Wilderness Preservation System. Major limitations are built into the BLM's administrative machinery for handling primitive areas. The ideal solution would be to make BLM lands subject to provisions of the Wilderness Act, giving statutory force to the promise

215. *See* notes 193-200 *supra*, and accompanying text.

216. 16 U.S.C. §1132(a) (1970). *See 1974 Hearings*, *supra* note 27, at 1000, pt. 1 at 14, 18, 206, 587; *1975 Hearings*, *supra* note 7, at 396, 397. These proposals were sharply criticized in the hearings. *See, e.g., 1974 Hearings*, *supra* note 27, at 1049, 50.

217. There were also 5.4 million acres of Forest Service administratively created "primitive areas" which were not immediately designated as wilderness by the Wilderness Act. The Wilderness Society, *A Handbook on the Wilderness Act* 11 (Jan. 1970). However, BLM primitive areas are more analogous to Forest Service wild and wilderness areas than to Forest Service primitive areas. Originally Forest Service primitive areas were allowed to contain low standard roads. *See* note 101 *supra*. Forest Service wild and wilderness areas were drawn from within the boundaries of areas previously designated as primitive areas, so as to exclude roads. *See* McClosky, *The Wilderness Act of 1964*, *supra* note 26, at 296, 297.

218. Wilderness Handbook, *supra* note 217; letter from George Lea, *supra* note 7.

219. *See* note 154 *supra*.

220. *See* note 7 *supra*.

that the wilderness character of designated areas will continue to be protected. Of more importance, this solution could establish time frames for completion of the review process. However, this legislation alone would not solve BLM's problem of insufficient funding for its wilderness/primitive program.

Should the proposed wilderness legislation fail to pass, the BLM possesses the power and authority to improve its established system. Individual primitive areas could be protected by prohibiting water development projects and utility rights of way within their boundaries unless approved by the director of the BLM. This could be achieved simply by changing the *BLM Manual*, or, preferably, by petitioning the Secretary of the Interior to amend the appropriate C.F.R. section. Decisions regarding essential primitive values would then be removed from the influence of local pressure. The local district manager could remain the "authorized officer" with discretion to control grazing within primitive areas to meet local needs. Secondly, primitive areas could be given genuine protection by amending the regulations to unequivocally require that every primitive area be withdrawn from the mining laws and mineral leasing laws. This step is necessary to fulfill the promise in the *BLM Manual* that mining is to be prohibited in primitive areas.

The agency could also draft regulations which would guarantee the interim protection of potential primitive areas. Protection could take the form of a "study status" category for potential primitive areas analogous to Forest Service "wilderness study areas." The BLM would have initial discretion to winnow out those areas it determines to be of lower quality, thus temporary protection afforded by study area status would be reserved for the better areas. Protective regulations could be drafted to prohibit major new actions, such as roads and utility lines, while permitting actions which do not involve irreversible change, such as grazing and off-road vehicle use. This would eliminate any necessity for active management to protect the primitive study areas, reducing cost and manpower requirements.

Changing the initial inventory and selection process, now structured by the BLM planning system, presents a more complex problem. First, selection is a discretionary action guided by few standards as to what constitutes a high quality primitive area. It is still unresolved whether the primary purpose of primitive areas is to protect *representative* ecological areas, to protect *unique* ecological areas, or to provide recreation. Amendments to the planning regulations circumscribing individual discretion will not be possible until these policy issues are decided. Second, planning regulations mandating thorough inventory of all BLM lands to identify areas meeting the

minimum criteria of primitive areas present financial problems. Conducting the inventory may not be a major expense, but to study and process each area found is a task which will require additional funds. The BLM alleges that it cannot conduct intensive studies of all presently identified potential primitive areas due to lack of funding, and an inventory to locate BLM lands meeting the minimum primitive area criteria would result in a flood of new areas to be evaluated.

The BLM primitive area system is still in its infancy. The BLM Washington Office's current emphasis on increasing the volume of primitive designations indicates that the system will be expanding rapidly. While there is certainly no shortage of available and appropriate areas for designation, it appears inadequate funding may prove to be a major limiting factor in the creation of an extensive BLM primitive area system. It may not be within the agency's power to secure additional funding from Congress without strong public support or a Congressional mandate for the BLM to manage wilderness areas.

APPENDIX A
An excerpt from *BLM Manual* §6111.21H1 (1975).

Quality Evaluation Chart
PRIMITIVE VALUES

KEY FACTORS	RATING CRITERIA AND SCORE		
(1) INTRUSIONS	Pristine or nearly so. Evidence of man's activities are minimal. 6	Some roads or other intrusions. But good potential for restoration. 4	Limited capacity for restoration but still some potential. 2
(2) SCENIC QUALITY	Most of the area falls in the Class A. 5	Most of the area is Class B or higher 3	Most of the area is Class C. 2
(3) WILDLIFE	Large mammals present. Opportunities for viewing excellent. Generally 10 or more species. 3	Large mammals present. Opportunities for viewing restricted. Generally less than 10 species present. 2	Large mammals lacking or nearly so. 1
(4) FISHERIES	Potential for high fisherman success. Generally 3 or more desirable species. A major attraction. 3	Potential for moderate fisherman success. Mostly "B" class fishing opportunities. 2	Little or no potential for fisherman success. Mostly Class C opportunities. 1
(5) WATER USABILITY	Water bodies large enough to accommodate non-mechanized boating use and are a dominant attraction. 3	Same—except not dominant attraction. 2	Water bodies not large enough to accommodate boating. 1
(6) SIZE	Greater than 50,000 acres or excellent opportunities for isolation. 6	Between 5,000-50,000 acres or good opportunities for isolation. 4	Area less than 5,000 acres. 1
(7) *UNIQUENESS	Unique 6+	Rare 4	Common 1

*Compared to other similar type areas in the region.

A = 20 or more B = 15-20 C = 8-15

Explanation of Rating Criteria

(1) *Intrusions.* This criteria measures the degree of impact man has had on the land and the potential for restoration to a natural condition.

(2) *Scenic Quality.* Use the rating identified in the Scenery Quality evaluation, *BLM Manual* §6111.21F1 (1975).

(3) *Wildlife.* The variety of large mammals present in the area is used as an indicator of quality of experience. Following is a partial list of large mammals that should be considered in this evaluation: Antelope, Bear, Beaver, Bobcat, Big Horn Sheep, Bison, Burro, Caribou, Cougar, Coyote, Dall Sheep, Deer, Elk, Fisher, Fox, Javelina, Lynx, Martin, Moose, Mountain Goat, Musk Ox, Wild Horses, Wolf, Wolverine.

(4) *Fisheries.* The criteria is designed to measure the probable success a fisherman may expect in the area. Use the fishing quality evaluation as a basis for these ratings.

(5) *Water Usability.* This criteria has reference to the usability of water as a form of transportation and as a source of interest and excitement, i.e., white water boating. Examples of dominate water attractions are:
—A rather extensive white water river system.
—A series of inter-connecting lakes that could be used for canoeing, etc.

(6) *Size.* This criteria is designed to measure the degree of isolation a visitor could experience. The size and general character of the area are the two variables which are used to measure this.

(7) *Uniqueness.* Use this factor to compensate for values not recognized in other criteria. Is there something (not considered elsewhere) different or unusual about this area which would significantly add to the wilderness experience? The rater has the option to add whatever points he feels is necessary to give a feature a valid rating. . . .

APPENDIX B

§312, the wilderness review provision, of H.R. 16,800, 93d Cong. 2d Sess. (1975):

> The Secretary shall review those roadless areas of 5,000 contiguous acres or more and roadless islands of the public lands administered by him through the Bureau, and shall report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness. The review conducted by the Secretary shall be made according to the procedure specified in sections 3(c) and 3(d) and section 4(d)(2) (with respect to mineral surveys) of the Wilderness Act. The recommendations of the Secretary based on the review conducted by him under this section shall be submitted to the President from time to time. The President shall advise the President of the Senate and Speaker of the House of Representatives of his recommendations with respect to the designation as wilderness of each such area on which review has been complete, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given with respect to not less than one-half of all the areas within five years after the date of enactment of this Act, and the remaining areas within ten years after the date of

enactment of this Act. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress. During the period of review of such areas, the Secretary shall continue to administer such lands according to his existing authority in a manner so as to preserve the wilderness character of each such area, subject only to the continuation of existing mining and grazing uses in the manner and degree in which the same was being conducted. Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act shall apply with respect to the administration and use of such designated area, including mineral development, in the same manner as they apply to national forest wilderness areas.