

INTERIOR BOARD OF LAND APPEALS

Ceminex, Ltd.

129 IBLA 64 (March 25, 1994)

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Appeal from a decision by the Acting District Manager, California Desert District Office, Bureau of Land Management, requiring modification of mining plan of operations and reclamation of all disturbed areas within Wilderness Study Area CDCA-222. CA-069-WO9-173428.

Affirmed in part, set aside and remanded in part.

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

FLPMA, 43 U.S.C § 1782(c) (1988), requires the Secretary to regulate mining operations on lands under wilderness review to prevent impairment of the suitability of these areas for potential inclusion in the wilderness system. A claim located after enactment of FLPMA that includes both WSA lands and lands that contain pre-FLPMA mining operations situated outside the WSA does not qualify as a mining operation on WSA lands that may continue if its operations are occurring in the same manner and degree as on Oct. 21, 1976.

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

Although an operator is free under 43 CFR 3802.1-5(e) to re-grade an existing access road if BLM does not notify the operator of any action on a plan of operations, the operator assumes the risk that BLM will later find the action impaired the suitability of the land for wilderness and require necessary changes. BLM is required under 43 CFR 3802.4-1(b) to issue a notice of noncompliance when it determines an operator is failing to comply with the provisions of the regulations in 43 CFR Subpart 3802 and the noncompliance is causing impairment of wilderness suitability.

3. Administrative Procedure: Administrative Record--Federal Land Policy and Management Act of 1976: Plan of Operations--Federal Land Policy and Management Act of 1976: Wilderness--Mining Claims: Plan of Operations--Public Lands: Administration--Rules of Practice: Generally

When the boundary of a WSA excluding mining operations conducted before Oct. 21, 1976, is uncertain, it is appropriate to set aside the portion of a BLM decision requiring reclamation of slopes in the mined area and remand the matter for a delineation of the boundary.

APPEARANCES: David C. Polley, Esq., Las Vegas, Nevada, for appellant.

#### OPINION BY ADMINISTRATIVE JUDGE IRWIN

Ceminex, Ltd. (Ceminex), has appealed the March 22, 1990, decision of the California Desert District Office, Bureau of Land Management (BLM), requiring modification of its mining plan of operations and reclamation of "all disturbed areas, including access routes constructed without authorization," within the Kingston Range wilderness study area (WSA), located within the California Desert District Conservation Area (CDCA).

Ceminex located the DH claim (CAMC 173248) in secs. 25 and 26, T. 19 N., R. 10 E., San Bernardino Meridian, San Bernardino County, California, in November 1985. The claim includes the former Horse Thief Mine and its associated talc mine operations. In January 1986, Ceminex filed a notice with BLM under 43 CFR 3809.1-3 that it would disturb less than 5 acres on the claim. BLM informed Ceminex that because the claim was within the Kingston Range WSA a plan of operations was required under 43 CFR Subpart 3802. Ceminex submitted a plan in February 1986 that called for mining a talc deposit from an open pit with a bulldozer, loading the ore with front-end loaders, and trucking it off-site. The plan also stated: "At 2 locations the present access road courses steeply along the 'fall-line' of a slope where spinning vehicular traffic and subsequent erosion has [sic] caused degr[a]dation. Rerouting to permit a grade suitable for commercial trucks will mitigate these existing conditions." BLM did not act on the plan, so under 43 CFR 3802.1-5(e) Ceminex was free to proceed. 1/

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1/ This regulation reads in part: "If the authorized officer does not notify the operator of any action on the plan of operations within the 30-day period [established in § 3802.1-5(a)] \* \* \* operations under the plan may begin. The option to begin operations under this section does not constitute approval of a plan of operations."

43 CFR 3802.1-1 provides that:

"An approved plan of operations is required for operations within lands under wilderness review prior to commencing \* \* \* (a) Any mining operations which involve construction of means of access, including \* \* \* improving or maintaining such access facilities in a way that alters the alignment, width, gradient size, or character of such facilities; \* \* \* (c) Mining operations using tracked vehicles or mechanized earth moving equipment, such as bulldozers or backhoes; \* \* \*."

During compliance checks in the area in July and August 1987 BLM observed "up-grading and re-routing of the road leading back to [the] \* \* \* claim at the end of the road" and "[s]ome disturbance \* \* \* in T[.] 19 [.] R.] 11 E[.] sec[.] 26" (July 31, 1987 Logbook Entry). BLM wrote Ceminex that it did not have a plan of operations on file for this activity and requested Ceminex to arrange for a meeting at BLM's office to discuss the situation. Ceminex responded by providing copies of its 1986 correspondence with BLM; acknowledged that "[i]n April of [1987], some upgrading of the existing road occur[r]ed, and shortly afterwards, some exploratory work was done at the existing pit site"; and offered to meet with BLM "at the mine site to examine first hand and discuss any concerns that your office may have" (Letter of Oct. 15, 1987, from David C. Polley to BLM).

BLM observed evidence of Ceminex's activities during an April 1989 monitoring flight of the WSA and conducted onsite inspections in May and June. On June 13, 1989, it wrote Ceminex that it had determined that rec-lamation must be complete in the Kingston Range WSA by June 30, 1989, and that "continuation of operations under your plan of operations would not meet the nonimpairment requirement of [43 U.S.C. § 1782 (c) (1988)] and subsequent nonimpairment criteria set forth in the Interim Management Policy and Guidelines for Lands under Wilderness Review, BLM Manual H-8550-1" (IMP). 2/ BLM continued:

This letter constitutes notice to you that in order to prevent impairment of the wilderness characteristics of the Kingston Range WSA, you must reclaim the impacts resulting from your operations in the WSA as a whole by June 30, 1989. Reclamation measures specified in the 3802 Compliance Inspection Sheet (enclosed) have been determined to be the minimum necessary to comply with the nonimpairment requirement. Failure to complete these reclamation measures by the June 1989 deadline will result in a finding of noncompliance with the regulations at 43 CFR 3802, and you will be served with a notice of noncompliance per 43 CFR 3802.4-1 (emphasis in original).

BLM requested Ceminex to sign and return the inspection sheet. The inspection sheet stated that Ceminex had failed to provide a notice of suspension of operations within 30 days after suspension, failed to maintain the site

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2/ Section 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1872(c) (1988), provides in part:

"During the period of review of [lands subject to review and designation as wilderness] and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which they same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection."

in an environmentally acceptable manner, and failed to reclaim the site within a year of cessation of operations. The sheet specified four reclamation measures to be completed by June 30, 1989.

Ceminex replied on June 27 that it did not appear the land on which the claim was located and the corridor leading to it was wilderness, *i.e.*, a roadless area; that the original location and mining activities occurred before the enactment of FLPMA, probably during the 1950's; that its activity on the claim did not constitute undue and unnecessary degradation under 43 CFR 3802.0-5(l); and that it had not suspended its operations, as the inspection sheet stated, and that those operations were consistent with the definition in 43 CFR 3802.0-5(f). "In light of these factors," Ceminex concluded, "it is felt that the execution of the Compliance Inspection Sheet would not be appropriate at this time."

BLM's July 3, 1989, response stated that the area excluded from the Kingston Range WSA included "the road leading west off the Excelsior Mine Road to the Horse Thief Mine and its associated talc mine operations," ending "at the edge of the disturbance, *i.e.*, the berm of the existing access road and the edge of the disturbance created by mining activity as it existed at the time of the intensive wilderness inventory. No buffer zone was created around the cherrystem." <sup>3/</sup> "Since you have created a new access route to the DH Claim and your plan of operations of February 12, 1986 indicates that new areas will be disturbed, it is apparent that these activities lie within the boundaries of the WSA and, consequently, are subject to [43 CFR Subpart 3802]" (Letter of July 3, 1989, from Needles Area Manager, BLM, to Ceminex). Because the claim was located in 1985, it did not qualify for the exception from the requirement that the lands be managed so as not to impair their suitability for preservation as wilderness, BLM stated. Similarly, the valid existing rights protected by section 701(h) of FLPMA applies only to rights existing on the date FLPMA was enacted. BLM repeated its June 13, 1989, message that Ceminex was "required under 43 CFR 3802.3-2(g) and 3802.3-2(h) to reclaim any impacts resulting from construction of new access routes and the mining activity itself in order to comply with the nonimpairment requirement of Section [1782(c)]," that it would be served a notice of noncompliance if it did not accomplish the reclamation measures set forth in the inspection sheet, and that it was to sign and return the inspection sheet. *Id.* at 2.

Ceminex did not reply, and a July 29, 1989, inspection found "no evidence of reclamation going on" (Logbook Entry, July 29, 1989), so BLM issued a Notice of Noncompliance on August 11, 1989, stating that the site had not been adequately reclaimed and detailing the regulations Ceminex was violating. Citing 43 CFR 3802.1-6(b), BLM requested Ceminex to modify its plan of operations "to address spoils piles and grading of slopes, and for

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<sup>3/</sup> BLM's July 3, 1989, letter referenced the Final Environmental Impact Statement and Proposed Plan for the California Desert Conservation Area, APPENDIX, Volume B, Appendix III: Wilderness, page 310, for the statement of the area excluded from the WSA.

developing an adequate reclamation plan" within 30 days. <sup>4/</sup> Reclamation was to be completed by August 31, 1989, the notice stated.

Ceminex's August 25, 1989, reply said that it understood BLM's July 3, 1989, letter to acknowledge that the claim and road leading to it were not within the WSA; that the boundary of the area excluded from the WSA was not defined in the Code of Federal Regulations or the Interim Management Policy and Guidelines for Lands under Wilderness Review (IMP), and that discovery, location, and development work "had begun a substantial period of time prior to October 1, 1976 [sic] upon the property \* \* \* Accordingly, we are not fully convinced that the subject matter under discussion does not fall within the \* \* \* meaning of pre-existing rights." Ceminex repeated that it had not abandoned the claim and concluded that it was "willing to meet with [BLM] representatives in the field and to discuss this matter fu[r]ther."

A meeting took place at BLM's office on November 27, 1989, in which BLM and Ceminex explained their views. BLM provided Ceminex with a map showing segments of newly constructed road diverging from the original road, and a map, prepared on the basis of comparing aerial photographs taken in 1978 with current conditions, of the "portion of the current disturbance from prospecting activity that exceeds the boundary of the original prospects" (Memorandum to Files: WSA CDCA-222 from Gary Sharpe [BLM], concerning 11-27-89 Meeting at 2). BLM said it could not compromise on requiring reclamation of the newly constructed road segments because that would involve changing the official boundary of the WSA or deviating from the law governing management of WSA's. Ceminex said the original access road did not provide usable access because it exceeded Federal mine safety requirements for maximum grade and minimum turning radius. Upgrading the road was essential to determining the commercial value of the talc because talc is evaluated by the truckload. Reclamation would be an expensive solution imposed on a small operator with limited capital, Ceminex stated, and it would appeal if BLM required "reclamation and denied suitable access and development of the claim." Id. at 3.

BLM's March 22, 1990, decision under appeal summarized the events related above and stated:

Because no action has been taken by you to modify your plan of operations and bring activities into compliance with the nonimpairment standard, I am requiring you, in accordance with the regulations at 43 CFR 3802.1-5(e), [<sup>5/</sup>] to modify your plan of

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<sup>4/</sup> Later BLM recognized that 43 CFR 3802.1-6(b) applies to the modification of an approved plan of operations, and that 43 CFR 3802.1-5(e) was the appropriate authority for its action. See Memorandum of Mar. 15, 1990, from Jim Hamilton, CSO, to Rob Waiwood, CDD. See note 5, infra.

<sup>5/</sup> BLM was referring to the part of 43 CFR 3802.1-5(e) that provides:

"If the authorized officer at a later date finds that operations under the plan are impairing wilderness suitability, the authorized officer

operations in order to comply with the requirements of reclamation specified in the 3802 Compliance Inspection Sheet dated June 6, 1989. [6/]

In addition, the decision required Ceminex to "[f]ile with the Area Manager, Needles Resource Area, a bond in the amount of \$2,500.00, to ensure compliance with the reclamation requirements set out in this notice," citing 43 CFR 3802.2. These actions were to be completed within 30 days of receipt of the decision.

Ceminex argues in its statement of reasons (SOR) for appeal that although BLM acknowledged (in its July 3, 1989, letter, at footnote 3, supra) "that the road from the Excelsior Mine Road to the Horse Thief Mine and the associated talc mine operations were excluded from the Kingston Range Wilderness Study Area \* \* \* BLM has nonetheless taken an extremely confining position as to the extent of exclusion by failing to acknowledge the scope of the exclusion, both as to the mine and the access road. The decision fails to either acknowledge or consider the spirit and standards contained in 43 C.F.R. 3802.0-5(j) [and] (l). [7/]

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fn. 5 (continued)

shall notify the operator that the operations are not in compliance with these regulations and what changes are needed, and shall require the operator to submit a modified plan of operations, within a time specified in the notice."

6/ The decision requires appellant to complete the following reclamation requirements:

- "1. Regrade slopes in the mined area to approximate the grade of the surrounding terrain (3 to 1 slope);
- "2. Remove all berms associated with new road construction;
- "3. Recontour slopes, reseed, to rake and block future access to newly-constructed road; and
- "4. Rip the new road to minimum depth of 4 (four) inches and reseed with native plant mix using 6 (six) pounds per acre of pure live seed, \* \* \* [as approved by BLM] \* \* \*."

7/ Ceminex's reference to the definitions in 43 CFR 3802.0-5(j) and (l) indicates a belief that its activities should be regarded as a continuation of a mining use as it was being conducted when FLPMA was enacted on Oct. 21, 1976.

43 CFR 3802.0-6 states the policy contained in section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988), and 43 CFR Subpart 3802:

"Under the 1872 Mining Law (30 U.S.C. 22 et seq.), a person has a statutory right consistent with other laws and Departmental regulations, to go upon the open (unappropriated and unreserved) public lands for the purpose of mineral prospecting, exploration, development, and extraction. The Federal Land Policy and [M]anagement Act requires the Secretary to regulate mining operations in lands under wilderness review to prevent impairment of the suitability of these areas for inclusion in the wilderness system. However, mining operations occurring in the same manner and degree that were being conducted on October 21, 1976, may continue, even if they are

The District Manager's determination is conclusionary without any substantive support other than previous administrative conclusions which, in turn, were without specifically stated factual support" (SOR at 4). Evidence of earlier exploratory efforts is obvious within the boundaries of the DH claim, both at the north and south endline areas, Ceminex states. Additional evidence of earlier exploration exists nearby beyond the north endline and waste removed earlier lies outside the southwest sideline, it adds. 8/ "Thus, the general character of the area encompassing the claim had been defined and established long before the arrival of Ceminex, and the activities of Ceminex neither constituted undue degradation or impaired the suitability of the surrounding area outside the claim for purposes of a wilderness study. 43 C.F.R. 3802.0-5(d) [and] (l)." 9/ Id. at 5.

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fn. 7 (continued)

determined to be impairing. Mining activities not exceeding manner and degree shall be regulated only to prevent undue and unnecessary degradation of public lands."

43 CFR 3802.0-5(j) defines "manner and degree":

"Manner and degree means that existing operations will be defined geographically by the area of active development and the logical adjacent (not necessarily contiguous) continuation of the existing activity, and not necessarily by the boundary of a particular \* \* \* claim or lease, and in some cases a change in the kind of activity if the impacts from the continuation and change of activity are not of a significantly different kind than the existing impacts. However, the significant measure for these activities is still the impact they are having on the wilderness potential of an area. It is the actual use of the area, and not the existence of an entitlement for use, which is the controlling factor. In other words, an existing activity, even if impairing, may continue to be expanded in an area or progress to the next stage of development so long as the additional impacts are not significantly different from those caused by the existing activity. In determining the manner and degree of existing operations, a rule of reason will be employed."

43 CFR 3802.0-5(l) defines "undue and unnecessary degradation": "Undue and unnecessary degradation means impacts greater than those that would normally be expected from an activity being accomplished in compliance with current standards and regulations and based on sound practices, including use of the best reasonably available technology."

8/ Appellant's SOR at page 1 states:

"At the time the discovery and location was made by Ceminex [on November 16, 1985], the property evidenced extensive prior exploratory and developmental work. The ore body, previously known as the Horse Thief Mine[,] is inventoried in U.S. Geological Survey Bulletin 1709-D, dated 1987[,] as having reserves of approximately 200,000 tons. The report further indicated the prior activity upon the property." 9/ Ceminex's reference to 43 CFR 3802.0-5(d) is to the definition of "impairment of suitability for inclusion in the Wilderness System":

"Impairment of suitability for inclusion in the Wilderness System means taking actions that cause impacts \* \* \* that cannot be reclaimed to

In addition, Ceminex argues, only about 1,000 feet of the 4 miles of the pre-existing access road from the Excelsior Mine Road to the DH claim were relocated in order to be able to accommodate the ore trucks required to transport sufficient amounts of talc for testing, and the deviation occurs within 100-200 feet of the old road. Its February 1986 plan of operations clearly stated that the existing road would be re-routed in two locations to enable truck access and reduce erosion, Ceminex observes, and in October 1987 it informed BLM that some upgrading had occurred in April of that year, but BLM did not respond until its letter of June 13, 1989.

The posture taken by the BLM is contrary to 43 C.F.R. 3802.4-2 which allows an operator access to the property. If the mandate of the District Manager was to be followed, access to the DH claim is effectively denied \* \* \* contrary to the Mining Law of 1872 which has always recognized the rights of ingress and egress to a validly located mineral property.

Id. at 7.

As indicated above, BLM is required under section 603(c) of FLPMA, supra at note 2, to manage lands under wilderness study so as to not impair their suitability for preservation as wilderness (the nonimpairment standard). Murray Perkins, 116 IBLA 288, 292-93 (1990); 43 CFR 3802.0-6; Ralph E. Pray, 105 IBLA 44 (1988). The regulations in 43 CFR Subpart 3802 and the IMP, 44 FR 72014-34 (Dec. 12, 1979), as amended, 48 FR 31854-56 (July 12, 1983) (published as Dept. of the Interior Doc. H-8550-1), call for surface management controls over mineral activities on lands under wilderness review to ensure that the nonimpairment standard is met. The Board has consistently held that in managing WSA's pending review of the suitability or unsuitability for inclusion in the permanent wilderness system, BLM must follow the guidelines established by the IMP. Robert L. Baldwin, Sr., 116 IBLA 84, 87 (1990); Oregon Natural Resources Council, 114 IBLA 163, 167 (1990).

Section 603(c) provides an exception to the nonimpairment standard. Existing mining and grazing uses may continue in "the manner and degree in which the same was being conducted on October 21, 1976" even if the use would cause impairment of wilderness characteristics, provided that it shall be regulated to prevent unnecessary or undue degradation of the lands. Robert L. Baldwin, supra; Oregon Natural Resources Council, supra at 167 n.6; State of Utah v. Andrus, 486 F. Supp. 995, 1005 (D. Utah 1979); IMP, I. B. 6., H-8550-1 at 15. See Richard C. Behnke, 122 IBLA 131 (1992).

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fn. 9 (continued)

the point of being substantially unnoticeable in the area as a whole by the time the Secretary is scheduled to make a recommendation to the President on the suitability of a wilderness study area for inclusion in the National Wilderness Preservation System or have degraded wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability for preservation as wilderness."

[1] Ceminex's April 1987 activities affecting lands that were excluded from the WSA, were, of course, not subject to the nonimpairment standard. Ceminex's activities also affected lands beyond those excluded, *i.e.*, lands within the WSA. Ceminex located the DH claim in the WSA in 1985, however, and therefore its activities within the WSA cannot be regarded as a continuation of the mining at the Horse Thief Mine that took place on a portion of the DH claim before the enactment of FLPMA in 1976. Eugene Mueller, 103 IBLA 308, 310 (1988); *see* Ralph E. Pray, *supra* at 47.

[2] Although a mining claimant has a right of access to his mining claim under 30 U.S.C. § 22 (1988), FLPMA amended the 1872 mining law to authorize BLM to regulate the method and route of access over Federal lands so as to prevent permanent impairment of wilderness characteristics in WSA's. Eugene Mueller, *supra* at 311; State of Utah v. Andrus, *supra* at 1006. Access to mining claims located within WSA's is governed by 43 CFR 3802.3-2(g). <sup>10/</sup> Although Ceminex was free under 43 CFR 3802.1-5(e) to re-grade the existing access road before BLM approved its plan of operations, it assumed the risk that BLM would later find the action impaired the suitability of the land for wilderness and require necessary changes. International Silica Corp., 124 IBLA 155, 159-60 (1992); Murray Perkins, *supra* at 297. BLM is required under 43 CFR 3802.4-1(b) to issue a notice of noncompliance when it determines an operator is failing to comply with the provisions of the regulations in 43 CFR Subpart 3802 and the noncompliance is causing impairment of wilderness suitability. Paul M. Shock, 126 IBLA 232, 235 (1993).

The record in this case demonstrates that Ceminex's April 1987 activities impaired the lands within the meaning of 43 CFR 3802.0-5(d), *supra* at note 9.

In regard to the access road to the DH claim, the intended boundary between the road and the WSA was the physical edges of the road, including outer edges of cuts and fills. [Ceminex's] road work clearly exceeded those boundaries and impacted the WSA. As shown by the attached photographs, the impacts are of a nature

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<sup>10/</sup> This regulation provides:

"No new access routes that would cause more than temporary impact and therefore would impair wilderness suitability shall be constructed in a wilderness study area. Temporary access routes that are constructed by the operator shall be constructed and maintained to assure adequate drainage and to control or prevent damage to soil, water, and other resource values. Unless otherwise approved by the authorized officer, roads no longer needed for operations shall be closed to normal vehicular traffic; bridges and culverts shall be removed; cross drains, dips, or water bars shall be constructed, and the road surface shall be shaped to as near a natural contour as practicable, be stabilized and revegetated as required in the plan of operations."

that suitability of that part of the WSA appears to have been impaired.

(Memorandum from Gary Sharpe, Wilderness Lead, to Richard Fagan, Needles Resource Area Manager, entitled "DH Claim in Kingston Range Wilderness Study Area, Status as of 11-24-89," at 5). The photographs and maps that accompany this memorandum show the original access road to the Horse Thief Mine and the deviations constructed by Ceminex. The photographs demonstrate that Ceminex's 1987 regrading is so prominent that it impairs the suitability of the lands for inclusion in the wilderness system.

The original cherrystemmed road is, of course, outside the WSA. The subsequent blading by [Ceminex] deviates considerably from that route for a total of approximately a mile and also extends beyond the surface disturbance along portions of the remainder of the route and at the end of the cherrystem \* \* \*. As such, those portions are within the WSA. The color contrast and vegetative removal of this line form associated with the road blading and other surface disturbance are a sign of man that is substantially noticeable from virtually anywhere within the drainage. As such, it degrades the wilderness characteristic of naturalness. This disturbance was not reclaimed by June 30, 1989, is not now reclaimed, nor is it expected to reclaim by natural processes within a decade (at least) to a substantially unnoticeable condition.

(Memorandum from Chris Roholt, Wilderness Coordinator for California Desert District Office, to CA-069-WO3-173428, entitled "District Office Supplementation of Analysis Under the Nonimpairment Standard," dated March 22, 1990). Thus, the record supports BLM's issuance of the notice of noncompliance and the decision requiring Ceminex to reclaim the April 1987 regrading.

Ceminex's argument that BLM is taking a confining position concerning how much land was excluded from the WSA and that its decision is contrary to established facts is in part an expression of Ceminex's view that too little land was excluded and in part an objection to the fact that the WSA boundary was established where it was. The issue of whether the lands within the WSA have the required wilderness characteristics was settled at the time the WSA was designated and is no longer open to challenge. Robert L. Baldwin, supra at 87. Even if it were open to challenge, we have held that "BLM's practice of designating certain lands within an inventory unit as nonwilderness corridors (cherrystems) was not an unlawful practice or contrary to any Department policy," Jacqueline L. McGarva, 60 IBLA 278, 282 (1981); National Outdoor Coalition, 59 IBLA 291 (1981), and that BLM's judgment whether an area qualifies for inclusion in a WSA is entitled to considerable deference. "[A]n appellant seeking to substitute its subjective judgments for those of BLM has a particularly heavy burden to overcome the deference we accord to BLM in such matters." Conoco, Inc., 61 IBLA 23, 27 (1981). BLM's establishment of the boundary in this case was consistent

with the policy set forth in Organic Act Directive (OAD) No. 78-61, Change 2, dated June 28, 1979, which gave guidance on several issues that arose in conducting wilderness inventories, including how the characteristic of naturalness was to be applied in an initial inventory. <sup>11/</sup> We have approved BLM's use of OAD's as guides to the exercise of its discretion in general, The Wilderness Society, 66 IBLA 287, 291 (1982), and this portion of OAD 78-61, Change 2, in particular, Owyhee Cattlemen's Association, 71 IBLA 4, 7 (1983); Mitchell Energy Corp., 68 IBLA 219, 223 (1982).

[3] In one respect, however, BLM acknowledges that the boundary of the WSA is uncertain, *i.e.*, the extent of the "associated talc mine operations." BLM's memorandum describing the status of the DH claim as of November 24, 1989, states:

Delineation of the boundary of the "associated talc mine operations" is more difficult [than for the "road leading west off the Excelsior Mine Road to the Horse Thief mine"]. At the time of the Wilderness Inventory of March 31, 1979, the disturbances related to the Horse Thief Mine were prospects. No commercial mineral extraction had appar[e]ntly occurred and there was no delineation of the "associated talc mine operations" on maps or on the ground.

\* \* \* \* \*

An examination of the evidence available on USGS topographic maps, aerial stereo photography, and on the actual site was made by wilderness specialists in the Needles [Resource Area]. The con[s]ensus is that the phrase "associated talc mine operations" best describes the area of concentrated prospects and shallow aids and shafts near the end and adjacent to the cherrystemmed road. This area is shown on the attached map and includes all but two known isolated prospects.

Using that delineation, the recent activity by [Ceminex] appears to have exceeded the limits of the "associated talc mine

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<sup>11/</sup> OAD 78-61, Change 2, states at 5-6:

"When major imprints of man, which are substantially noticeable, are located within a roadless area, consideration must be given to adjusting the unit boundary to exclude that imprint of man. Major imprints of man which are substantially noticeable should not be carried forward as part of an inventory unit receiving further wilderness review. \* \* \* When a boundary adjustment is made due to imprints of man, the boundary should be relocated on the physical edge of the imprint of man. \* \* \* The adjusted boundary must not be drawn on a 'zone of influence' around the imprint. \* \* \* When a powerline or other developed right-of-way [ROW] is located within a unit and the decision has been made to eliminate that substantial impact on naturalness from the remainder of the unit, the boundary should be drawn on the edge of the developed ROW."

operations." \* \* \* However, it would be extremely difficult, if even possible, to establish the precise boundary of the original disturbances.

\* \* \* \* \*

\* \* \* The current disturbance area is believed to be only slightly larger than the original disturbance area. The best solution appears to be to establish a survey cap and define the current limits of the disturbance by a metes and bounds survey expressed in distance and bearing. This established boundary would then define the "associated talc mine operations" portion of the described cherrystem.

(Memorandum from Gary Sharpe, Wilderness Lead, to Richard Fagan, Needles Resource Area Manager, entitled "DH Claim in Kingston Range Wilderness Study Area, Status as of 11-24-89," at 5, 9).

Under these circumstances, it is apparent the requirement of BLM's March 22, 1990, decision that Ceminex "[r]egrade slopes in the mined area to approximately the grade of the surrounding terrain (3 to 1 slope)" and that it modify its plan of operations to comply with this requirement are not appropriate. We therefore set that portion of BLM's decision aside and remand it so that it may establish the boundary of the associated talc mine operations as suggested above. See Richard W. Taylor, 119 IBLA 310, 316 (1991). The remainder of the decision, requiring reclamation of the new road construction, modification of the plan of operations to reflect this reclamation, and posting of a bond, is appropriate.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and set aside and remanded in part.

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Will A. Irwin  
Administrative Judge

I concur:

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James L. Byrnes  
Chief Administrative Judge