

**Editor's note: Reconsideration denied by Order dated Nov. 2, 1992**

STAN RACHESKY

IBLA 92-284

Decided September 2, 1992

Appeal from a final record of decision of the Glenwood Springs, Colorado, Resource Area Office, Bureau of Land Management, establishing off-road vehicle travel management standards for the Mitchell/Oasis Creek area. EA CO-078-2-1.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Generally

Where, under the general authority of the Secretary of the Interior to regulate the use of public lands pursuant to FLPMA, and other acts and Executive Orders, BLM makes a determination to limit off-road vehicle use in a certain area of public lands, one challenging that determination must provide compelling reasons for modification or reversal. Failure to do so will result in the determination being affirmed on appeal when it is supported by the record.

APPEARANCES: Stan Rachesky, pro se; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

In the Bureau of Land Management (BLM) Glenwood Springs, Colorado, Record of Decision and Resource Management Plan (RMP), dated January 1984 (Revised 1988), motor vehicle use in the Mitchell/Oasis Creek area was limited to designated roads and trails year round, except for snowmobiles (RMP at Map 15). However, no roads or trails were designated. Therefore, motor vehicle use, other than snowmobiles, was prohibited. That prohibition was intended to protect the area, classified as Debris Flow Hazard Zone because of its steep slopes, from damage which might increase soil erosion in periods of extreme water run-off.

Thereafter, in 1990, Charles R. Collard, a landowner in the Mitchell/ Oasis Creek area, proposed to BLM that he would allow access across his private lands for horseback riders, hikers, mountain bikers, and handicap-ped operators of all terrain vehicles (ATV's), if BLM would authorize motor vehicle use on approximately 3.5 miles of mostly existing trail across public lands in the Mitchell/Oasis Creek area. BLM evaluated the Collard

proposal in an environmental assessment (EA) (CO-078-0-37), dated August 7, 1990, and in a record of decision dated September 13, 1990, the Area Manager, Glenwood Springs Resource Area, Bureau of Land Management, approved it. Thus, the Collard Trail was made available for handicapped operators of ATV's to use to gain access to the designated trail. Others were allowed to use the designated trail if they could find alternate access to the area. Several adjacent landowners had such access.

Thereafter, due to increased use of the public lands in the Mitchell Creek, Oasis Creek, and Transfer Trail areas by a variety of users, including operators of ATV's, BLM and the Forest Service conducted public meetings regarding future travel management of those areas and prepared an environmental assessment tiered to EA CO-078-0-37. In connection with the environmental assessment, on October 2, 1991, the Area Manager issued a record of decision relating, inter alia, to travel management in the Mitchell/Oasis Creek area in which he closed that area to snowmobiles all year and opened the area to motor vehicle use to handicapped people holding a BLM special recreation permit. He announced that the only access to the trail on public land would be the "Collard Trail," and that the "Collard Trail will also be open to the public year round for foot, horse, and mountain bike traffic under a memorandum of understanding with Mr. Collard." 1/

On November 21, 1991, Stan Rachesky, another landowner in the area, filed a timely appeal with BLM objecting to the limitation of ATV access to handicapped persons. Rachesky asserted that such a limitation was discriminatory. In a letter dated November 22, 1991, the Area Manager informed Rachesky that he had received Rachesky's appeal, as well as numerous requests that he reconsider his decision relating to off-road vehicle (ORV) use, especially snowmobile use of the area. He stated that he had agreed to reevaluate his decision to insure that all interested users had an opportunity to comment. He further stated that his October 2, 1991, decision would be considered a proposed decision and Rachesky's appeal would be treated as a protest rather than an appeal. 2/

On January 14, 1992, the Area Manager issued his final record of decision (EA CO-078-2-1) in which he stated at page 1:

Decision: Change the proposed decision of October 2, 1991. Do not designate any roads or trails in the subject area for use

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1/ Memorandum of Understanding (MOU) CO-077-MOUO-006, as amended, was executed by the Area Manager on Oct. 10, 1991.

2/ Clearly, the filing of Rachesky's appeal, prior to the Area Manager's action to reevaluate his decision, removed BLM's subject matter jurisdiction and placed it with this Board. Petrol Resources Corp., 65 IBLA 104, 108 (1982). Therefore, the action by the Area Manager, sua sponte, to reevaluate his decision was improper. He should have informed the Board of his intentions and sought remand of the case to permit issuance of a new decision. Nevertheless, at this juncture, it would serve no useful purpose to remand this case for another decision.

by motor vehicles, except snowmobiles may be operated. (This effectively closes the area to motorized vehicles, except snowmobiles.) Reevaluates snowmobile restrictions in the area at a later date when a formal land use plan amendment is prepared. This decision maintains current land use plan (Glenwood Springs Resource Area, Resource Management Plan, dated January 1984) designations for the area.

The Area Manager further stated at pages 2-3:

Additional information: During the comment period, the BLM learned that Mr. Collard was offering his property for sale. Since the agreement for public access between Mr. Collard and the BLM was not a recorded easement, public access will not be available after the property is sold unless a separate agreement can be reached with the new landowner.

Rationale: My decision not to designate any trails for motorize use is based primarily on the issue of fairness. Without the public access granted by Mr. Collard (the access will be lost upon sale of Mr. Collard's property), there is no reason to designate a trail for motorized use. Permitting motorized use on any trail in the area, without public access to that trail, would amount to an exclusive authorization for adjacent property owners only. This is simply not fair.

The following day the Area Manager sent a letter to Collard stating that "[g]iven the imminent transfer of ownership of your property I believe the subject MOU needs to be formally canceled. Termination will be effective as of January 15, 1992. The trails on public land will be closed to motorized use after that date." 3/

Rachesky filed an appeal requesting that the action be stayed or suspended pending a decision by the Board. On appeal, Rachesky contends, essentially, that BLM's action is in error and not substantiated by written evidence in the record. He states: "Because I have access to the area as do my neighbors, I feel I should also be permitted to occasionally take my ORV into the area on the designated trail and road." He disagrees with BLM's designation of the area as a Debris Flow Hazard Zone, asserting a need for such concern "would have to be virtually non-existent." He points out that the area is unique because it is surrounded by private land ownership, preventing much public access no matter what the mode of transportation.

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3/ We note that the MOU had an expiration date of Dec. 31, 1995, and a cancellation provision that stated that "[a]ny of the parties to this MOU may unilaterally terminate it before its expiration date by providing sixty (60) days written notice to the other party." Under the terms of the MOU, it would appear that the Area Manager's Jan. 15, 1992, cancellation letter should not have been effective until 60 days later. The record contains no objection from Collard, however.

He also points out that the damage to the trails and roads caused by horses is far greater than by ORV use (Statement of Reasons at 2-3).

BLM has responded, opposing appellant's request to stay or suspension of its travel management decision. BLM asserts the decision should remain in full force and effect because it best serves the public interest by protecting resources in the Debris Flow Hazard Zone and minimizes conflicts with non-motorized recreational users.

[1] BLM has the authority, pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1988), and other acts and Executive Orders, to regulate the use and operation of ORV's on the public lands. See 43 CFR Part 8340 (Off-road Vehicles). 4/ In cases in which we have reviewed BLM decisions relating to its authority to authorize ORV use through the permitting process, this Board has noted that absent compelling reasons for modification or reversal, a BLM determination will be affirmed if the decision is supported by the record. American Motorcycle Association, District 37, 119 IBLA 196, 199 (1991), and cases cited therein. We see no reason to deviate from this standard when reviewing the decision appealed from in this case.

Appellant has provided no grounds for modifying or overturning BLM's decision. The case record indicates that following BLM's determination in 1990 to designate a portion of the Mitchell/Oasis Creek trail open to motor vehicles, use of the area by ATV's increased dramatically. Therefore, BLM and the Forest Service engaged in a reevaluation of travel management guidelines for that area. To limit motorized use in the area, the Area Manager decided to curtail snowmobile use and to limit motor vehicle use only to handicapped individuals through the use of the Collard Trail. Upon reconsideration of that decision, he opened the area to snowmobile use, but due to an impending transfer of the Collard property, he declined to designate any roads or trails in the Mitchell/Oasis Creek area for use by motor vehicles. Transfer of the Collard property meant loss of public access to the Mitchell/Oasis Creek area. The Area Manager's decision is supported by the record and represents a return to the use designation outlined in the RMP. The designation authorizing motorized use was temporary for as long as public access was available across Collard's property. With the sale of the Collard property, such public access could no longer be guaranteed. Nor could BLM be sure that other provisions of the MOU regarding cooperative trail maintenance and visitor facilities would be carried out.

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4/ 43 CFR 8340.0-3 states that

"[t]he provisions of this part are issued under the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 et seq.); the Taylor Grazing Act (43 U.S.C. 315a); the Endangered Species Act (16 U.S.C. 1531 et seq.); the Wild and Scenic Rivers Act (16 U.S.C. 1281c); the Act of September 15, 1960, as amended (16 U.S.C. 670 et seq.); the Land and Water Conservation Fund Act (16 U.S.C. 460 1-6a); the National Trails System Act (16 U.S.C. 1241 et seq.) and E.O. [Executive Order] 11644 (Use of Off-Road Vehicles on the Public Lands), 37 FR 2877, 3 CFR Part 74, 332, as amended by E.O. 11989 42 FR 26959 (May 25, 1977)."

Appellant has failed to show compelling reasons for modification or reversal of the decision under review. The decision is consistent with the RMP travel designation for the area, and, as the Area Manager explained, to allow motor vehicle use without public access would amount to a grant of exclusive use by adjacent private landowners, such as appellant, which would not be fair to the public.

Therefore, 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. 5/

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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R. W. Mullen  
Administrative Judge

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5/ Under 43 CFR 4.21(a), except as otherwise provided by law or other pertinent regulation, a BLM decision is not effective during the time in which a person adversely affected may file a notice of appeal and the timely filing of a notice of appeal will suspend the effect of the decision appealed pending the outcome of the appeal. In this case, there is no other applicable regulation. Therefore, Rachesky's appeal had the effect of automatically staying the BLM decision during the pendency of his appeal. BLM's response to Rachesky's request to stay the decision may be considered a request to make BLM's decision effective immediately based on public interest concerns. Our resolution of the merits of the appeal obviates the need to act on either request.