

INTERIOR BOARD OF LAND APPEALS

Robert P. Muckle

143 IBLA 328 (April 15, 1998)

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ROBERT P. MUCKLE

IBLA 97-114

Decided April 15, 1998

Appeal from a decision of the Area Manager, Kremmling Resource Area, Bureau of Land Management, to renew a special recreation permit to Brian Munro of Mountain Madness, Inc. for a commercial snowmobile operation on BLM land known as the Strawberry Area in Grand County, Colorado. CO-018-18-SRP-615.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

Issuance of a special recreation permit for snowmobile tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impact to natural resources was carefully considered, routes were altered accordingly, and protective stipulations were attached to the permit.

2. Environmental Policy Act--Environmental Quality: Environmental Statements--National Environmental Policy Act of 1969: Environmental Statements--Public Lands: Special Use Permits--Special Use Permits

A finding of no significant environmental impact associated with a special recreation use permit for a commercial off road snowmobile tour service may be affirmed where the record establishes that BLM took a "hard look" at the environmental impacts of the activity authorized by the permit, considered reasonable alternatives, and applied mitigating measures to avoid significant adverse environmental impacts.

APPEARANCES: Robert P. Muckle, Louisville, Colorado, pro se; Brock Wood, Esq., Office of the Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, Lakewood, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Robert P. Muckle (Muckle or Appellant) has appealed from a November 8, 1996, Decision of the Area Manager, Kremmling Resource Area, Bureau of Land Management (BLM), approving renewal of a permit for a commercial snowmobile tour operation for Brian Munro of Mountain Madness, Inc. for the 1996-97 season. Muckle alleges that he owns land adjacent to the BLM land for which the permit was issued.

The November 8, 1996, Decision appealed from authorizes Muckle to conduct guided snowmobile tours in the Strawberry Area of Grand County Colorado from November 1, 1996, through May 1, 1997. The Decision provides that the permit is subject to the BLM Standard Stipulations for Commercial Recreation Use (Standard Stipulations) and the Special Stipulations for Mountain Madness Snowmobile Tours (Special Stipulations) incorporated into the Decision. The Standard Stipulations include, but are not limited to: (1) limiting the permit to a specified time period; (2) subjecting the permit to all applicable provisions of 43 C.F.R. Part 8300; (3) subjecting the permit to all equal opportunity requirements; (4) allowing no transfer or reassignment of the permit; (5) requiring that estimated user fees be paid to BLM in advance; (6) requiring that the permittee observe all Federal, State and local laws; (7) requiring all reasonable precautions to prevent fires and prevent pollution; (8) ensuring that roads and trails in public use are not enclosed; (9) indemnifying the U.S. for any damage to its property; (10) requiring prior written permission from BLM to cut any timber; (11) indemnifying the U.S. against any claims resulting from the operation; (12) allowing access to Federal officials on official business at all times; and (13) requiring that historical, archeological, and cultural values are not disturbed.

The Special Stipulations agreed to by the operator include: (1) regulation of approved routes and speeds; (2) enforcement of minimum snow cover requirements and the responsibility to repair any road damage; (3) the requirement to give prior notice to BLM before commencing operations; (4) authorization for BLM to temporarily close routes to protect wildlife wintering habitats; (5) limitation on group tour size to 16 machines; (6) the requirement to keep all tour groups in sight of the leader; (7) the requirement to monitor for and preclude fuel leaks from the snowmobile vehicles; (8) the requirement to select a designated refueling area, to ensure no leaks or spills during refueling and to ensure any contaminated snow or soil is properly disposed of off-site in accordance with state and local requirements; (9) the requirement to minimize disturbance of big game animals by maintaining set separation distances between snowmobiles and animals in open and timbered areas, to limit speeds when animals are encountered, and to monitor animal movements weekly to minimize disturbance; (10) the requirement to ensure no harassment of wildlife, off-route travel, or other inappropriate behavior; (11) the requirement to properly brief all tour groups concerning safety, the need to remain on approved routes, and the proper techniques for viewing wildlife to assure the animals' well-being; (12) the requirement to cut only dead and down trees for firewood after advance approval from BLM, and after a firewood

permit has been obtained; (13) the requirement to obtain prior approval from BLM for any signs or advertising related to the operation; (14) the requirement to provide tour groups with sanitation facilities at the staging areas and warming tent in compliance with state and local requirements; (15) the requirement that all garbage and refuse is picked up daily and disposed of in compliance with state and local requirements; (16) the requirement that tours not start before 9:00 a.m. with nighttime rides limited to routes approved in advance; (17) the requirement that all customers/guests are shuttled to the area by the Permittee with no guest parking on the Strawberry Access Road or on County Route 84; (18) the requirement that, if any cultural, archeological, or paleontological resources are discovered, permitted activities must be immediately suspended in the area of the discovery, and a report made to the Area Manager; and (19) the requirement to immediately report to the Area Manager, and suspend operations in the immediate area of the discovery of human remains, funerary items, sacred objects, or objects of cultural patrimony for a period of 30 days or until advised to proceed by the authorized officer.

The November 8, 1996, Decision found that the permit would provide needed guided recreational opportunities for guests in the east Grand County area. (Decision at 1.) The Decision stated that the operation would be monitored to assess the significance of impacts to wildlife and private landowners. It found that the selected alternative is in compliance with the Kremmling Resource Management Plan (RMP) and determined that impacts are not expected to be significant and an environmental impact statement (EIS) is not required. (Decision at 1.)

In his Statement of Reasons (SOR), Muckle challenges the Area Manager's Decision and the adequacy of the Environmental Assessment (EA) on the basis of the negative impacts of the Mountain Madness operation on the wildlife, nonmotorized users of the public land, and local property rights and values. (SOR at 1-2.) Appellant claims the Area Manager issued the permit renewal over these and other public objections and issued a Finding of No Significant Impact (FONSI), EA Number CO-018-97-1. (SOR at 2.) Appellant requests reversal of the FONSI on the grounds that it is not supported by substantial evidence, and requests that the Area Manager "conduct an adequate environmental impact assessment of the Mountain Madness commercial snowmobiling operation." *Id.* Pending BLM's "completion of [a] meaningful environmental review, Appellant seeks reversal of the decision to issue the special recreation permit as it was arbitrary, capricious, an abuse of discretion, and is otherwise not in accordance with law." (SOR at 2.)

Appellant further asserts that the BLM Decision to renew this permit "demonstrates a pattern of clear disregard of public and government input about the negative environmental effects of a commercial snowmobile operation in a designated wildlife habitat area." (SOR at 8.) Appellant claims:

Effectively all the public comments were ignored or summarily dismissed on the basis of little or no evidence. Permitting

the Mountain Madness commercial snowmobiling operation creates significant environmental impacts and is inconsistent with the applicable land use plan, the RMP. The purported "mitigation" in the form of permit stipulations is illusory, ineffective, not based on the substantial evidence and fails to mitigate the operation to the level of insignificance or of consistency with the RMP.

(SOR at 8.) Appellant argues that significant adverse environmental impacts have resulted to the elk population, to existing recreational uses such as cross-country skiing and snowshoeing, to increased noise impacts, to negative impacts on visual effects, and to interference with private property rights. (SOR at 9-10.) Muckle claims the Decision to grant the permit is incompatible with the RMP because, as a Priority Wildlife Habitat, the area provides support for big game, and that the stipulations within the permit are insufficient to reduce the impacts to a level of insignificance. (SOR at 10-11.) Finally, Muckle reasserts his request that the FONSI be reversed, that a further environmental impact assessment be conducted, and that the November 8 Decision granting the permit be reversed. (SOR at 12.)

In support of his appeal, Muckle has submitted declarations of property owners Dwight and Jean Miller and his own declaration in opposition to the permit. Muckle's Declaration, dated January 14, 1997, includes, as exhibits, a number of documents in addition to the EA and Record of Decision at issue here, as well as photographs, and the following additional substantive information:

4. In 1985, my wife and I purchased the property at the intersection of the Strawberry Road and County Road 84, in a small subdivision known as "Ranch Creek Estates." The Strawberry Road, which provides public access to the BLM land known as the Strawberry Area, traverses our property. The BLM land directly adjoins our property on the north side. Our land contains a portion of a south-facing hillside and a section of Ranch Creek, with a meadow and willows surrounding the creek.

5. We purchased the land with the intention of building a small year-round cabin when we moved back to Colorado where we both grew up. We chose this lot based, in large part, on consideration of the undeveloped nature and semi-wilderness quality of the adjacent public land. We specifically favored this lot because of the cross-country ski trail on the adjacent BLM land and the fact that the elk herd frequented the hillside and meadow; these assets were described to us by the realtors in 1985 prior to our purchase.

(Muckle Decl. at 2.)

The Millers also complained that, in their view, the snowmobile operation should not have been permitted on public land because of the negative

impact on the previous grazing pattern of the elk herd in the area, the claimed negative impact on cross country skiing that had previously taken place on public land, the adverse visual effect created by the positioning of the staging area buildings for the operation on BLM land, and the fact that the presence of the permitted activity led to the trespass by at least one private snowmobiler who visited the commercial operation staging area. (D. Miller Decl. at 2-3; J. Miller Decl. at 2-4.)

In BLM's Answer to Muckle's SOR, it states that in this case, it took a very hard look at the environmental consequences of its actions. (Answer at 2.) The BLM explained that before issuing the permit, it produced a thoroughly researched EA document that considered the impacts of the proposed action on 10 different critical elements of the environment. Id. The BLM explains that it provided detailed analyses of the impacts of the proposed action for the following environmental concerns: soils, water quality, air quality, wildlife, recreation, visuals, noise, vegetation/ forestry, range management, and land use/realty. (Answer at 2.) The BLM relates that it explained in the EA that it solicited input on the proposed action from adjacent private landowners, other snowmobile tour operators, the Grand County Planning Department, the Colorado Division of Wildlife, and the U.S. Forest Service. It goes on to state that based on the feedback from the above individuals and organizations, BLM identified the following areas of concern that it considered in developing the final EA: wildlife disturbance, noise and solitude, visuals, trespass, recreational use, environmental damage, and property values. (Answer at 2-3.)

The BLM explains that, as stated in the EA, it developed an alternative to the proposed action that provided for issuance of the permit coupled with significant mitigation of the environmental impacts identified by BLM's analysis of the available data and the feedback solicited from interested parties. (Answer at 3.) Respondent states: "These mitigation measures included numerous limitations on the operation that effectively addressed the concerns of the parties whose input was solicited." (Answer at 3.) As alleged by BLM, the alternative selected was specifically designed to reduce the impacts of the operation on the environment and permitted operation was determined to have no significant impact on the environment. Id.

The BLM in its Answer notes that Appellant simply disagrees with its findings that the proposed operation, as mitigated by the BLM's limitations on it, will not have a significant effect on environmental values. The BLM urges, moreover, that a review of the EA clearly shows that the BLM has taken a "very hard look" at the environmental impacts of the operation and has designed a mitigation plan that reduces all of the impacts to insignificant levels. (Answer at 3.) The BLM further urges that the contrary opinions of the Appellant are not enough to carry his burden of showing by a preponderance of the evidence that BLM has failed to consider the environmental consequences of its action. (Answer at 3.)

[1] The BLM has the authority, pursuant to the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1994), and other acts and

Executive Orders, to regulate the use and operation of snowmobiles and other off-road vehicles (ORVs) on the public lands. See 43 C.F.R. Part 8340. ^{1/} In cases in which we have reviewed BLM decisions relating to its authority to authorize ORV use through the permitting process, this Board has held that absent compelling reasons for modification or reversal, a BLM determination will be affirmed if the decision is supported by the record. Stan Rachesky, 124 IBLA 67, 70 (1992); 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.

The EA for the 1-year permit renewal does analyze the potential for impacting various natural resources and values, concluding that there will be no significant impact. The EA relates that, in approving Alternative #1, the proposed action was modified by adding stipulations, conditions, and mitigating measures developed from BLM staff, State, and public input and concerns. (EA at 3.) To minimize trespass on adjoining private lands, snowmobiles are allowed only on approved routes with off-route travel only allowed in designated "open" areas. To minimize noise, travel speeds along the Strawberry Road from the staging area to the gate at the State land boundary and on the Hurd Peak Road to the green gate are limited to 10 miles per hour. (EA at 3.) To minimize wildlife conflicts, routes are subject to temporary closure at the discretion of the BLM for wildlife wintering concerns. (EA at 4.) To further minimize wildlife conflicts and to minimize trespass, all machines in a tour group must remain within sight of the tour leader. (EA at 4.) To minimize conflicts with other users and wildlife, the permittee will conduct briefings with each tour to ensure respect for nonmotorized recreationists and to ensure the proper techniques are used to view wildlife such that the animals' well-being is protected. Id.

Several measures are imposed to specifically protect the rights and interests of adjoining private landowners, including Muckle. To reduce noise and disturbance to nearby landowners, the EA provides that tours may not start before 9 a.m. and nighttime rides are limited to routes approved in advance. (EA at 5.) To evaluate and reduce wildlife impacts, BLM will monitor big game use and movement at least once a month, especially near the staging area. If snowmobile activity causes significant disturbance,

^{1/} 43 C.F.R. § 8340.0-3 states that

"[t]he provisions of this part are issued under the Federal Land Policy Act of 1976 (43 U.S.C. 1701 et seq.); the Wild and Scenic Rivers Act (16 U.S.C. 1281c); the Endangered Species Act (16 U.S.C. 1531 et seq.); the Taylor Grazing Act (43 U.S.C. 315a); 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)."

some trails may be closed temporarily to provide for animal movement or security. Id. To help alleviate local residents' concerns about noise, BLM will monitor noise levels from adjacent private lands at least once a month for daytime rides, will notify BLM of scheduled nighttime rides and twice during the season will monitor nighttime rides. If noise levels are significant, then smaller groups, lower speeds or changes in timing of tours may be required. Id. Finally, to encourage private snowmobilers to follow the same ethical standards applied to the commercial operation, signs will be posted to advise private snowmobilers to remain on the groomed routes and to obey the speed limits on the Strawberry and Hurd Peak Roads. Id. The above modifications to the Proposed Action were adopted by BLM in its Decision Record and EA for this permit to reduce the wildlife disturbance, noise impacts, visual impacts, trespass concerns, recreation use conflicts, environmental damage, and will help to maintain the local property values. See EA at 6.

[2] Appellant criticizes the EA, charging that it did not properly consider the impacts on specific critical areas and did not sufficiently consider the views and concerns of adjoining landowners to be a complete environmental review. However, it was precisely the views of adjoining landowners which led to the development of specific stipulations in the 1996-97 permit which had not been included in the previous year's permit. This Board has previously noted that an EIS is not always required for compliance with the National Environmental Policy Act of 1969 (NEPA). In preparing an EA, which assesses whether an EIS is required under section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C) (1994), an agency is required to take a "hard look" at the problem addressed, identifying relevant areas of environmental concern, and make a convincing case that the environmental impact is insignificant. Maryland-National Capitol Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973); Owen Severance, 118 IBLA 381, 392 (1991); Yuma Audubon Society, 91 IBLA 309, 312 (1986).

This Board has stated clearly that it will affirm a FONSI with respect to a proposed action if the record establishes that a careful review of environmental problems has been made, all relevant environmental concerns have been identified, and the final determination is reasonable. Southern Utah Wilderness Alliance, 140 IBLA 341, 348 (1997); The Ecology Center, Inc., 140 IBLA 269, 271 (1997); Blue Mountains Biodiversity Project, 139 IBLA 258, 265-66 (1997).

A party challenging the determination must show that it is premised on a clear error of law or demonstrable error of fact, or that the analysis failed to consider a substantial environmental question of material significance to the proposed action. Southern Utah Wilderness Alliance, supra, at 348; The Ecology Center, supra, at 271; Hoosier Environmental Council, 109 IBLA 160, 173 (1989); United States v. Husman, 81 IBLA 271, 273-74 (1984). The ultimate burden of proof is on the challenging party. G. Jon and Katherine M. Roush, 112 IBLA 293, 298 (1990); In Re Blackeye Timber Sale, 98 IBLA 108, 110 (1987). Mere differences of opinion provide

no basis for reversal. Id.; Glacier-Two Medicine Alliance, 88 IBLA 133, 144 (1985). See Cady v. Morton, 527 F.2d 786, 796 (9th Cir. 1975). Appellant, in this case, has alleged that BLM's approval of the snowmobile permit is based on an inadequate EA, which fails to consider all relevant environmental issues and concerns.

Appellant's argument suggests that failure to select the "no authorized use" alternative fatally flaws the decisionmaking process. An EA must include a brief discussion of alternatives as mandated by section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) (1994). See 40 C.F.R. § 1508.9(b); 516 DM 3.4(A). See also Southern Utah Wilderness Alliance, supra, at 348; Oregon Natural Resources Council, 115 IBLA 179, 186 (1990); In Re Long Missouri Timber Sale, 106 IBLA 83, 87 (1988). Section 102(2)(E) of NEPA requires, independent of the necessity to file a formal EIS, that every Federal agency "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E) (1994). The requirement that appropriate alternatives be studied applies to the preparation of an EA even if no EIS is found to be required. Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1228-29 (9th Cir. 1988), cert. denied, 489 U.S. 1066 (1989); Powder River Basin Resource Council, 120 IBLA 47, 55 (1991); State of Wyoming Game and Fish Commission, 91 IBLA 364, 369 (1986). Among the alternatives which must be considered pursuant to this mandate is the "no authorized use" alternative. See Bob Marshall Alliance v. Hodell, supra, at 1228.

The EA, upon which the Decision to authorize a commercial snowmobile operation on BLM land in the Strawberry Area of Grand County, Colorado, was based, considered three principal alternatives and three alternatives that were considered and eliminated. The first alternative considered, the Proposed Action, provided for Mountain Madness to conduct snowmobile tours of 1 to 3 hours on an hourly schedule to provide a guided recreational opportunity for the public. The Operating Plan for this alternative called for trips to follow existing Strawberry, Hurd Peak, Behler Creek, and several spur roads with some connecting trails between roads to provide loop trips. The trips would start from a base/staging area on the Strawberry Road with customers brought to the staging area by van from the company's other operation near Fraser, Colorado. A warming site would be provided at the base area. A second warming tent would be established at Behler Creek. Sanitation and garbage disposal facilities would be provided at both these locations, and communications and road grooming would be provided by the permittee. Under the Proposed Action, some evening/moonlight and 4-hour trips could be conducted upon request of customers. (EA at 3.)

Alternative #1, the selected alternative, was a BLM modification of the Proposed Action which significantly changed the Proposed Action by adding stipulations, conditions and mitigating measures developed from BLM staff comments, information provided by the Colorado Division of Wildlife, and from public input and concerns. (EA at 3.) The selected alternative added conditions which minimized trespass (EA at 3), minimized wildlife

conflicts (EA at 4), reduced noise and trespass (EA at 4), provided conditions for a safe and clean operation (EA at 4), placed responsibility on the permittee for actions of customers (EA at 4), and provided protections for cultural, historical, and geological artifacts. (EA at 4.) In comparison to the Proposed Action, the selected alternative was designed to reduce wildlife disturbance, noise impacts, visual impacts, trespass concerns, recreation use conflicts, environmental damage, and to help maintain local property values. (EA at 6.)

The third alternative, the no action alternative, was not selected. In consideration of this alternative, the BLM stated that there would be no environmental impacts from the commercial operation, if permit renewal was not approved, although the area would still be open to the public for private snowmobile and nonmotorized recreation and most of the same impacts would be expected to occur, but to a smaller extent. The BLM explained that if this alternative had been selected, the public demand for guided snowmobile tours would not have been met and recreational opportunities would have been lost. The operator would have foregone revenues and some employees would have been laid off. (EA at 10.)

The three alternatives considered but eliminated by BLM included: (1) moving the operation at least 1 mile from private land; (2) moving the operation closer to Highway 40 or the railroad; and (3) limiting the hours of operation to between 10 a.m. and 3 p.m. The first of these was rejected by BLM because it is currently impractical and unsafe for the permittee to plow the road more than a mile past private land due to the narrow road width and switchbacks that would be encountered. (EA at 6.) The second of these alternatives was eliminated because it would require moving tour groups along the county road and this would create many of the same impacts as the proposed action as there would be a safety concern of mixing vehicle traffic and snowmobile tours on a busy county road. (EA at 6.) The third alternative considered but eliminated by BLM, severely limiting the time authorized, was rejected because of the requests for evening and moonlight rides, which provide the opportunity to view the lights of the Fraser Valley and for star gazing without the interference from street and vehicle lights. (EA at 6.)

Our review of the BLM Decision in this case and the attendant EA reflect that BLM took a "hard look" at the environmental consequences of the action; identified the relevant areas of environmental concern; carefully considered the available alternatives and determined the least harmful alternative to the environment consistent with the purpose and need for the proposed action; made a reasonable finding that the impacts studied are insignificant; and with respect to any potentially significant impacts, proposed mitigating measures that would reduce the potential impact to insignificance. See Southern Utah Wilderness Alliance, supra, at 350; Oregon Natural Resources Council, 131 IBLA 180, 186 (1994).

To the extent not expressly or impliedly addressed in this Decision, all other errors of fact or law alleged by Appellant have been considered

and are rejected. See National Labor Relations Board v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954); Glacier-Two Medicine Alliance, *supra*, at 156.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

James P. Terry
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge