

INTERIOR BOARD OF LAND APPEALS

Lassen Motorcycle Club

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LASSEN MOTORCYCLE CLUB

IBLA 95! 42

Decided July 20, 1995

Appeal from a decision of the District Manager, Susanville District, California, Bureau of Land Management, denying application for special recreation use permit for organized off-road motorcycle race. CA-026-93-01.

Affirmed.

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

BLM properly denies an application for a special recreation use permit for an organized off-road motorcycle race where the record establishes that it would widen an existing trail in a wilderness study area and thereby impair its suitability for designation as wilderness, as such use is forbidden by sec. 603(c) of FLPMA.

APPEARANCES: Arlin D. Billington, President, and Scott S. Maas, Legislative Officer, Lassen Motorcycle Club, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The Lassen Motorcycle Club (LMC) has appealed from an August 1, 1994, decision of the District Manager, Susanville District, California, Bureau of Land Management (BLM), once again denying its application for a special recreation use permit (SRUP) for the running of a 1! day cross-country motorcycle race over existing ways and trails on public lands in the Susanville District in northeastern California. 1/

1/ BLM originally denied the application by decision dated Jan. 28, 1993, and LMC appealed. On Dec. 3, 1993, the California State Office, BLM, filed a request for remand of the case for further review and documentation. BLM subsequently explained the reasons for its remand request: "Our review of the case reveals that neither an impairment assessment in accordance with our wilderness Interim Management Policy (IMP) nor a NEPA [National Environmental Policy Act] analysis were prepared prior to issuing the decision. We, therefore, request that the case be remanded for preparation of the appropriate documentation and re-issuance of a decision."

The entire race would be run over approximately 90 miles of existing ways and trails through public lands in Lassen County, California, and the adjacent County of Washoe in the State of Nevada. Part of the proposed racecourse (4.75 miles) passes through the Dry Valley Rim Wilderness Study Area (WSA) (CA-020-615), near the Skedaddle Mountains. ^{2/} The WSA was designated effective February 5, 1980, pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(a) (1988). 45 FR 1457 (Jan. 7, 1980).

On January 11, 1993, LMC applied for an SRUP to run a race involving 100 participants on March 28, 1993. BLM denied that application (CA-026-93-01) on January 28, 1993, holding that, to the extent that the race passed through the WSA, it would impair the suitability of the WSA for wilderness designation, and thus could not be permitted under section 603(c) of FLPMA, 43 U.S.C. § 1782(c) (1988).

BLM's January 28, 1993, decision was based on the following analysis:

It is our determination that, in an ORV [Off-Road Vehicle] event such as you have proposed, there is a high probability that individuals would drive off the existing narrow trail, either in passing other racers or in rapidly traveling along the trail. This determination is based on past experience with similar motorcycle races on other public lands. This off-trail use would cause impacts such as soil disturbance or vegetation destruction which would not meet the Nonimpairment criteria as stated in Chapter 1 part B.2.b of the [Interim Management Policy and Guidelines for Lands Under Wilderness Review (IMP), 44 FR 72022 (Dec. 12, 1979)].

The cited provisions of the IMP provide that, if an activity that impacts lands within a WSA is to be approved, the lands must be able to be reclaimed to the point that the impact will be substantially unnoticeable in the WSA as a whole by June 30, 1989, the date the Secretary of the Interior had been scheduled to make his recommendation regarding its suitability for designation as wilderness.

As noted above, an appeal was taken by LMC, but before a decision was rendered, BLM requested a remand of the matter so that it could assess the

fn. 1 (continued)

By order dated Mar. 18, 1994, we vacated BLM's decision and remanded the matter for further consideration. Lassen Motorcycle Club, IBLA 93! 258 (Order dated Mar. 18, 1994).

^{2/} A WSA is a roadless area of 5,000 or more acres which has been identified as having wilderness characteristics and is being reviewed for possible designation as wilderness, pursuant to the Wilderness Act, as amended, 16 U.S.C. §§ 1131-1136 (1988).

environmental impacts of issuing the SRUP and whether it would impair the suitability of the WSA for designation as wilderness. On remand, BLM prepared a "Wilderness Environmental Assessment" (Wilderness EA) of the proposed race, which considered its potential impacts, both individual and cumulative, on the wilderness characteristics of the Dry Valley Rim WSA.

Based on the Wilderness EA, on August 1, 1994, BLM again denied LMC's application for an SRUP for the motorcycle race. BLM held that the race did not comport with the nonimpairment mandate of section 603(c) of FLPMA, as interpreted under BLM's IMP (44 FR 72014 (Dec. 12, 1979)).^{3/} BLM based its conclusion of impairment on the facts that the race would inevitably cause a "surface disturbance" by widening the existing one-track trails in the WSA, even though the widening might be "only * * * in a few places," and that this disturbance would be compounded by subsequent races. BLM further stated that "[m]itigating measures such as no passing zones or speed limits would lessen the impact, but cannot eliminate it." BLM concluded that precluding the race was necessary to protect the wilderness resources until Congress could decide whether or not to designate the WSA as wilderness. LMC appealed from the August 1994 decision.

[1] BLM has discretionary authority to issue an SRUP for a motorcycle race across public lands, pursuant to section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), and implementing regulations at 43 CFR Subpart 8372. Eastern Sierra Audubon Society, 126 IBLA 222, 227 (1993); American Motorcycle Association, District 37, 119 IBLA 196, 198-99 (1991); Cascade Motorcycle Club, 56 IBLA 134, 137 (1981). However, BLM is required by section 603(c) of FLPMA to manage WSAs "during the period" they are under review "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c) (1988); The City of St. George, 116 IBLA 230, 231 (1990). To date, no action has been taken by Congress to designate the Dry Valley Rim WSA as wilderness, and the period of wilderness review is still underway. Thus, the lands involved here remain subject to the section 603(c) nonimpairment mandate. See Virgil Schuette, 131 IBLA 332, 335 (1994).

The Secretary was scheduled to send his recommendation to the President on the wilderness suitability of the Dry Valley Rim WSA on June 30, 1989 (California BLM Instruction Memorandum (IM) No. CA! 89! 306 (June 26, 1989) at 1). BLM has interpreted the nonimpairment mandate of section 603(c) of FLPMA as requiring that nothing that will disturb the surface of lands under wilderness review will be permitted after the date scheduled for the Secretary's recommendation until action is taken to designate the lands as wilderness or not. That is, no disturbance will be

^{3/} The IMP was originally published at 44 FR 72014 (Dec. 12, 1979), and thereafter amended at 48 FR 31854 (July 12, 1983). It is now contained in BLM's Manual (H! 8550! 1 (Rel. 8! 36 (Nov. 10, 1987))). We shall cite to the appropriate page in the Federal Register.

permitted while Congress is considering what areas will ultimately be designated as wilderness. ^{4/} Thus, in IM No. 89! 600 (July 13, 1989), the Director, BLM, instructed all BLM State Offices as follows:

[T]he key point to remember is that any action CANNOT NEGATIVELY IMPACT the wilderness values of a WSA, thus constraining or pre-empting congressional designation authority. THE ONLY ACTIVITIES PERMISSIBLE * * * under the nonimpairment criteria ARE TEMPORARY USES THAT CREATE NO NEW SURFACE DISTURBANCE. Such temporary uses may continue until Congress acts, so long as such uses can easily be terminated at that time. In effect, "no trace" activity. [Capitals in original.]

See also IMP at 44 FR 72016. This is because action could be taken at any time to designate the lands. BLM was concerned that, as there would no longer be any "grace period" for reclamation, the condition of those lands could not be altered without threatening the integrity of the recommendation/designation process.

The Director's 1989 policy pronouncement was reiterated in IM No. 94! 236:

The primary mandate from Congress is clear. We are not to impair any WSA's suitability for designation as wilderness. * * * It is not anticipated that many, if any, projects will be approved when weighed against the fact that there will no longer be a "grace period" for reclamation.

* * * * *

The general rule, since the reclamation deadlines have passed, is that the only activities permissible in WSA's are temporary uses. Temporary uses are activities that create no new surface disturbance [and] do not require reclamation. [^{5/}] [Emphasis supplied.]

We have long affirmed BLM's adoption of the nonimpairment standard that provides that the impacts of a surface-disturbing activity must be

^{4/} In IM No. 94-236 (July 13, 1994), BLM advised that the President has transmitted to Congress all final BLM wilderness recommendations.

^{5/} The State Director, California, BLM, had earlier stated in California BLM IM No. CA! 89! 306 at 3 that the general rule would permit only SRUP's that "have little or no physical evidence of the event immediately after its occurrence."

capable of being reclaimed to the point of being substantially unnoticeable in a WSA as a whole by the time the Secretary was scheduled to send his wilderness suitability recommendation to the President. See, e.g., The City of St. George, 116 IBLA at 231, 236-37. Where that date has passed, it is plainly no longer a question of whether the impacts of the activity are "capable of being reclaimed" (IMP at 44 FR 72018), but instead whether BLM is required to limit or prevent activity that would pre-empt the right of Congress to designate land as wilderness by rendering it no longer qualifying as wilderness under the Wilderness Act. The question is whether BLM may limit or prevent activities that impair wilderness values, even temporarily.

According to BLM, since the date has now passed, the only permissible activity is one that does not result in any surface disturbance requiring any reclamation, since there is no longer what BLM terms a "grace period" for reclamation (IM No. 94! 236 at 1). That is, the activity must not result in any surface disturbance that, at the time thereof, is substantially noticeable in the WSA as a whole, regardless of whether it could later be reclaimed so as to be substantially unnoticeable.

Policy pronouncements set forth in BLM Instruction Memoranda or in the BLM Manual, while deemed controlling on the agency, are not binding on the Board. Unlike regulations, they are not considered to have the force and effect of law. Pamela S. Crocker-Davis, 94 IBLA 328 (1986). Notwithstanding the above, where BLM adopts agency-wide procedures that are reasonable and consistent with the law, the Board will not hesitate to follow these procedures and require their enforcement. Beard Oil Co., 105 IBLA 285 (1988). We have affirmed a holding by BLM that any roadbuilding activity in a WSA after the time allowed for reclamation has passed would impair its wilderness suitability. Murray Perkins, 116 IBLA 288, 295-96 (1990). We have also held that BLM may properly require the cessation of any impairing activities on the date the WSA was submitted for approval. Virgil Schuette, 131 IBLA at 335-36. It is consistent with those holdings that BLM may properly prevent impairing activities proposed after the date scheduled for the Secretary's recommendation. Clearly, this is a very limiting standard, even more limiting than that applicable prior to the scheduled date. However, it is mandated by section 603(c) of FLPMA, which requires the Department, until Congress acts, to preserve the recognized wilderness characteristics of lands under review for possible designation as wilderness. See Rocky Mountain Oil & Gas Association v. Watt, 696 F.2d 734, 749 (10th Cir. 1982); State of Utah v. Andrus, 486 F. Supp. 995, 1007 (D. Utah 1979). To hold otherwise would allow a surface disturbance to occur that could foreclose Congress' options under the Wilderness Act.

LMC indicates that BLM's decision to deny its SRUP application based on the nonimpairment mandate was improper because BLM has recommended that the WSA is not suitable for wilderness designation. However, it is well settled that BLM is required by section 603(c) of FLPMA to prevent impairment of the wilderness suitability of a WSA during the entire period of

time it is under review by the President and then Congress for designation, even where BLM has recommended that it not be designated. Virgil Schuette, 131 IBLA at 335.

BLM concluded that the race would not satisfy the nonimpairment standard. Where BLM decides not to permit a particular activity on the basis that it will impair the suitability for wilderness designation of a WSA, the party challenging that decision has the burden of demonstrating, by a preponderance of the evidence, that the activity will not impair wilderness suitability. The City of St. George, 116 IBLA at 238.

The IMP provides that an activity will be considered "nonimpairing" where it results in temporary impacts that are, at a minimum,

capable of being reclaimed to a condition of being substantially unnoticeable in the wilderness study area * * * as a whole by the time the Secretary of the Interior is scheduled to send his recommendation[] * * * to the President [on the suitability of that area for inclusion in the National Wilderness Preservation System], and * * * the impacts [are reclaimed] to that standard by that date.

IMP at 44 FR 72018. Where impacts are "substantially unnoticeable," the wilderness characteristic of naturalness is satisfied. See 16 U.S.C. § 1131(c) (1988). As discussed above, it is appropriate to limit activities in WSA's after the recommendation deadline to those whose impacts are substantially unnoticeable prior to reclamation.

"Substantially unnoticeable" is defined in the IMP as "something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being manmade or man-caused because of age, weathering, or biological change." IMP at 44 FR 72034. A surface disturbance is not substantially unnoticeable where it is readily identifiable as manmade or man-caused. Southern California Motorcycle Club, Inc., 42 IBLA 164, 174 (1979).

The IMP specifically provides that organized ORV events are permitted where they would use "existing ways and trails." IMP at 44 FR 72024. The plan for appellant's proposed race calls for participants to stay on an existing trail. We interpret this IMP provision as allowing activities that do not alter the condition of any existing trail.

There are 2.75 miles of trails and 2 miles of ways in the WSA (Wilderness EA at 1; Map attached to Wilderness EA). ^{6/} Photographs in the

^{6/} A "way" is distinguished from a "road" by the fact that it has not been improved and maintained by mechanical means to ensure relatively regular and continuous use. Edward H. Howe, 76 IBLA 27, 28, 29 (1983).

record show that the trails are narrow (from 18 to 24 inches in width) and composed of bare dirt and rocks between sagebrush and other high desert vegetation. Issuance of the SRUP would permit 100 riders to use the trails during a 1! day event, passing over them in both directions. ^{7/}

BLM concluded that there is a high probability that individuals would drive off the existing narrow trail in passing other racers. In a competitive race, passing is inevitable. An 18! or 24! inch wide trail is clearly unable to accommodate two riders shoulder! to-shoulder. In addition, riders even stray from the paths along straight sections and (more likely) in rounding turns. As BLM stated:

There is a good probability that in a motorcycle race the participants will go as fast as they can over a given segment of the route. When doing this, the rider will inevitably move just off a single track trail to the right or left and go wide on curves. The result is that the tread will widen.

(Wilderness EA at 2). There can be little doubt that, in both cases, the result would be the destruction of some vegetation, thus exposing additional areas of dirt and rocks. The existing trails will be widened.

LMC has provided little evidence that widening will not occur. It initially notes that "[i]f the trail stays the same, then no reclamation would be required" (SOR at 2). This does not address the critical question of whether the trail will stay the same despite the race.

LMC has submitted copies of postrace reports regarding many of the other races run in the years 1975 through 1985. None assesses whether the race comported with the section 603(c) nonimpairment standard. They note only that LMC complied with all permit conditions, including rehabilitating resource damages. Thus, they imply that there were damages to resources from the race. As discussed above, such damages are not permissible in the current situation.

LMC points to the October 27, 1985, race, which involved 78 riders traversing the same course through the WSA as proposed for the current race, in both directions, during a similar 1! day event. Following the race, BLM assessed the condition of the trail in the WSA, concluding: "A slight increase in trail visibility was noted after the race. This was a

^{7/} Although LMC states on appeal that riders will pass over the trails in only one direction (SOR at 3), this is not borne out by the map of the racecourse submitted in 1993. The Wilderness EA states that the "race * * * would pass over the WSA part of the course twice" (EA at 1). As noted on the map, that portion of the route in the WSA is part of a significant segment of the course referred to as "2 Way" (Map attached to SRUP Application, dated Jan. 11, 1993).

result of light colored dust on the trail attracting attention. Subsequent rains have washed the dust and returned the trail to its earlier minimally apparent appearance" (Memorandum from BLM Recreation Planner to Area Manager, dated Jan. 9, 1986). LMC argues that BLM was well aware in 1994, when it considered whether to permit the race, that it had detected "[no] noticeable damage to the * * * trail" as a result of the 1985 race (Wilderness EA at 2).

Because BLM's management responsibility has changed, what might have been permissible in 1985 (before the date scheduled for the Secretary's wilderness suitability recommendation) is no longer permissible. Thus, even if there had been noticeable widening of the trail or other damage following the 1985 race, BLM could have concluded that there was no impairment because the impact of the race could be reclaimed by natural regeneration by June 30, 1989. BLM's statements as to damage caused by the 1985 race are no longer relevant to the new standards that it must apply.

It is more significant that BLM has detected widening of trails as a result of other motorcycle races. BLM stated that the occurrence of widening

is born[e] out by the wider motorcycle trails in the non-WSA areas in the Dry Valley country just to the east of the Dry Valley Rim WSA. There the motorcycle route trails are from 24 inches wide to 48 inches wide. * * * Experience has shown that the single track routes in the adjacent areas outside the WSA that have been used for organized events in the last few years are wider than the existing trail through the WSA. Each year the trails outside get a little wider as each event is held.

(Wilderness EA at 2). Appellant does not challenge this statement which supports BLM's finding that widening would occur if the present SRUP was granted.

It was BLM's expert opinion that such widening would impair the WSA's wilderness characteristic of naturalness, because it would be substantially noticeable in the WSA as a whole. Id. We find no basis to reverse that conclusion, given the open, rolling terrain evident in photographs of the areas where the single track trail passes through the WSA.

LMC also contends that BLM improperly failed to consider mitigation measures, such as no passing zones or speed limits, which would allow the race to go forward. It is true that, before effectively closing an area to ORV use, BLM must consider "less stringent alternatives." American Motorcycle Association, District 37, 119 IBLA at 199; California Association of Four Wheel Drive Clubs, Inc., 38 IBLA 361, 368 (1978), aff'd, California Association of Four-Wheel Drive Clubs, Inc. v. Andrus, 10th Cir. Jan. 22, 1982. BLM did consider those measures, but properly ruled them

out, since they would negate the competitive racing experience expected by participant riders and, in any case, would be almost impossible to enforce (see Wilderness EA at 3; Decision at 1). We agree with BLM's assessment of those options: "No one would want to participate in any event when they were required to slow down to 5 miles per hour and not pass for several miles" (Wilderness EA at 3).

In addition, LMC does not state that it would be willing to accept no passing zones or speed limits along the entire route of the trail through the WSA, or even those segments that are one-track (where damage is most likely to occur). Even if it were, LMC has failed to demonstrate that such measures would be adequate to prevent any widening of the trail. There is nothing to suggest that the entire 4.75 miles, or even the 2.75 miles of single-track trails, could be monitored to limit speeds, or especially to prevent passing (which poses the greatest threat of deviation from the trail). Thus, LMC has failed to rebut BLM's conclusion that such measures would "lessen the impact, but cannot eliminate it" (Decision at 1). See, e.g., American Motorcycle Association, District 37, 119 IBLA at 200; California Association of Four-Wheel Drive Clubs, 38 IBLA at 370.

BLM, in its decision, noted that there were "alternative routes" for the race that do not cross a WSA. LMC contends that there is only one alternative route (not on BLM land), which, although it was used in 1993 and 1994, is neither safe nor challenging. However, BLM is not required to authorize a race through the WSA, impairing its wilderness suitability, simply because there is no more desirable alternative. See The City of St. George, 116 IBLA at 237.

LMC has failed to establish that the instant race will not result in any impacts that must be reclaimed in order to render them substantially unnoticeable. As BLM is required to ensure that such impacts do not occur in the first place, it must adopt a conservative policy regarding allowance of potentially impairing uses.

LMC argues with reason that BLM failed to properly involve it in the EA process. No copy of the Wilderness EA was ever sent to LMC, and it was afforded no opportunity to comment on the EA. This could be deemed to have been violative of the public participation requirements of NEPA. See Southern Utah Wilderness Alliance, 122 IBLA 334, 341-42 (1992).

Further, BLM policy directives provide that it should have allowed LMC (as well as other members of the public) to comment on the EA (at least in terms of the impairment question) prior to taking action. See IM No. 94! 236 at 3. Although BLM apparently was aware of this requirement, it failed to involve LMC. ^{8/} However, at this point, no purpose would be

^{8/} In a Feb. 15, 1994, letter to LMC, the Area Manager, Eagle Lake Resource Area, BLM, stated, "I will involve the LMC in the Environment Assessment process when we receive the remand of the case file from IBLA."

served by remanding the case, since LMC's views were largely well known to BLM at the time of its decision, and it has had ample opportunity to present its position on appeal to the Board.

Therefore, we conclude that BLM has properly determined that the proposed motorcycle race would impair the suitability of the Dry Valley Rim WSA for designation as wilderness to the extent that it would pass through the WSA, and thus the District Manager, in his August 1994 decision, properly denied LMC's application for an SRUP for that race.

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.

David L. Hughes
Administrative Judge

I concur.

Bruce R. Harris
Deputy Chief Administrative Judge