

INTERIOR BOARD OF LAND APPEALS

Eastern Sierra Audubon Society

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EASTERN SIERRA AUDUBON SOCIETY

IBLA 91-47

Decided May 21, 1993

Appeal from a decision of the Bishop Resource Area Office, Bureau of Land Management, to issue permit allowing off-road vehicle race. CA-107-RU90-23.

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 off-road vehicle tours over existing roads and trails may be affirmed on appeal where the record establishes that the potential impacts were carefully considered and protective stipulations and mitigating measures were applied to avoid significant adverse environmental impacts.

APPEARANCES: Sylvia Colton, President, Eastern Sierra Audubon Society; Robert C. Nauert, California State Office, Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The Eastern Sierra Audubon Society has appealed from a decision of the Bishop Resource Area Office, Bureau of Land Management (BLM), to issue permit CA-107-RU90-23 for a motorcycle event.

On June 18, 1990, California Trail Rides filed a special recreation application for a permit to hold a dual sport street legal motorcycle ride on August 25 and 26, 1990, from Bishop, California, to June Lake and back, a 250-mile circuit.

Subsequently, BLM prepared an environmental assessment (EA) which found that the proposed race "will not have significant environmental impacts and is in conformance with approved land use plans" (EA at 3). The Area Manager, Bishop Resource Area, approved the EA on July 25, 1990, subject to 17 mitigating measures and stipulations listed in the EA, and signed the permit on July 27, 1990. In a letter dated August 6, 1990, to the California State Director, BLM, appellant notified BLM of its reasons for opposing the issuance of the permit. The race was run as scheduled on August 25 and 26, 1990. In a September 14, 1990, letter, appellant advised BLM that it also objected to the fact the California Department of Fish and Game was not informed of the ride prior to the permit, although "[the Department] is involved in Fish Slough's Management Plan and the 'ride' went through the ACEC category I."

On September 7, 1990, BLM filed with the Board appellant's August 6 objections and a request for an extension in which to file its answer, noting that the objections were not timely forwarded because "we were initially unclear the letter was in fact an appeal." BLM noted the Bishop Resource Area Office prepared a point-by-point rebuttal in response to appellant's August 6 objections, and the BLM California State Office, by cover memorandum dated October 1, 1990, forwarded the rebuttal with the case file to the Board. The cover memorandum notes that appellant's objections were not forwarded "because both the BLM and appellants were unsure whether the submission was appealing the decision to issue the permit event."

By order dated March 12, 1993, the Board completed service of BLM's answer on appellant. On April 1, 1993, appellant filed its response, stating "We think the BLM responses avoided answering our basic concerns which were stated in our appeal. We continue to stand by them."

We first address the procedural aspects of this appeal. When BLM received appellant's August 6 letter, it should have treated it as a notice of appeal and statement of reasons (SOR), and immediately forwarded it and the case file to the Board. Appeals from approvals of special use permits for recreational purposes is governed by 43 CFR 8372.6(a) which provides that "any final decision of the authorized officer" may be appealed to the Board by a person adversely affected. The issue in this case is whether the permit in this case was a final decision by an authorized officer. Appellant's letter does not address a proposed appeal, but specifically refers to the signed permit and states that its letter is filed in "opposition to this permit."

Next, we examine the issues on appeal. Appellant's August 6 letter listed eight reasons for appeal. Those reasons and BLM's responses thereto are as follows:

1. The permit has questionable validity since the permit was issued by Mr. Ferguson through the Bishop Resource Area Office. Mr. Ferguson has no authority at the Ridgecrest Office.

Response:

The permit was submitted to both the USFS, Mono Lake Ranger District, and to the Bishop Resource Area of the Bureau of Land Management. After consultation with the USFS, the Bishop Resource Area took the lead in doing the environmental assessment, and in issuing the permit.

The reference to the Ridgecrest Office of the BLM is contained in items 7a and 7b in the permit (please see the permit). This is a question asking if the applicant has previously been issued a permit for a similar event. The applicant responded that they had been issued a permit for a similar event, and

that the permit had been issued by the Ridgecrest Resource Area. This question has nothing to do with the event, but provides a means for us to check on past performance in adhering to permit stipulations.

2. No public input was used in the preparation of the Environmental Assessment. This should be mandatory, given the sensitivity of the area. The Eastern Sierra Audubon Society is on record of having proven concerns and commitment to this area. As an organization, we have adopted the Fish Slough ACE as our primary area of concern. No one in our organization was asked for input on the preparation of the EA.

Response:

The environmental assessment was prepared under normal office procedures, including review by staff specialists. All environmental assessments may be reviewed by the public upon request. Ms. Sally Miller of the Mono Lake Committee, and Mr. Gary Morgan of the Audubon Society were both contacted by this office and informed of the proposed event.

Please refer to the telephone conversation records contained in the file for a further review of discussions surrounding this permit.

Within this past month, we have initiated an office policy of publicizing in the local media all EAs being prepared, and all EAs which have been completed. We hope that this will improve public awareness of our actions. We continue to inform interested parties by phone, letter or personal contact of all pending actions.

3. The EA states that the WSA boundaries are well marked. This is TOTALLY incorrect. Based on observations of Audubon members there are absolutely no WSA boundary markers anywhere along the subject route. We should also point out that we have found a total of only four markers along the edge of roads and trails adjacent to all of the WSA's in the Tablelands (hundreds of miles of roads and trails). It is hard to understand how your agency expects to protect WSA resource values when the WSA's are unsigned [and essentially unpatrolled. In addition, there are 11 primitive routes that junction with the subject primitive road. Contrary to the EA, the permitted route is NOT so well defined. Driving off into a WSA is a real possibility.

Response:

The environmental assessment states that the WSA boundary routes are well defined. It makes no mention of signing. The route used for the course (known as the "northern shepherd

road") is well defined and passable by a normal 2 wheel drive passenger vehicle. It appears that Audubon has confused this route used in the event with the parallel route (known as the "southern sheepherder road" approximately one mile to the south which is indeed a primitive 4wd route. Please refer to the conversation record of Douglas Dodge with Gary Morgan, dated 8/30/90, in the file.

4. The EA fails to mention that some of the rocky cliff like areas that this trail traverses through may provide nesting habitat for golden eagles and other raptors. In addition, this area provides some chukar habitat. Your 1987 EIS notes these facts as well.

Response:

Refer to the statement above. The cliffs described are located along the less developed route to the south (the "southern sheepherder road"), which was not used for this event.

5. This area is part of the High Desert Study, as you are no doubt aware. This study was to be completed many months ago, but is, as of today, still in a state of flux. The Technical Review Team [TRT] has still not seen the most recent draft or tentative decisions, nor has the general public. To make a major decision as to allow an organized motorcycle ride through such a sensitive area BEFORE finalizing decisions we feel, is a major error.

Response:

Existing planning documents, decisions, and policies, as well as environmental effects, govern the decision-making process for discretionary actions of this type. Because the High Desert OHV Plan was not complete when this application was made and the ride held, it did not bear upon the event. The decision was made under the management decisions and direction contained in the Benton-Owens Valley Management Framework Plan (MFP); and as noted in the Record of Decision, is compatible with that plan.

Note: Currently, the High Desert OHV Plan has been reviewed and accepted by the TRT. All presenters indicated that the plan provided a logical framework to manage off-highway vehicle use within the study area. The plan is slated for final approval and signature by BLM, USFS, and Los Angeles Dept. of Water and Power sometime between Oct. 10 and Oct. 19, 1990.

6. We have been told by some Bishop Area BLM employees that the probable management direction for this area of the High Desert Study will be to emphasize 'dispersed recreation use.' A major organized ride is hardly 'dispersed recreation use' and

certainly not in keeping with the highly sensitive nature of the area.

Response:

The High Desert Plan encourages long touring routes, the dispersion of users in the area, and few any developed facilities. Use of street legal, dual purpose vehicles is encouraged due to the large number of County and agency maintained routes and the resource values (and a desire not to increase the number of routes if possible). User education, monitoring, and protection of the area's resources are the key components.

The event which took place was a long tour for dual purpose, street legal motorcycles. Riders left directly from the town of Bishop, and there were no staging areas on BLM lands. Additionally, there was a staggered start between 7-9 am where riders left in small groups no more than four riders every minute, thus avoiding the problems of route widening from mass starts.

Photo points were established along the route to document before and after appearance, record any changes, and ensure that any impacts were within acceptable limits (these photos are available upon request). BLM personnel were stationed along the route to monitor the event while it occurred. Numerous Audubon members were also in the area to monitor the event. Our monitoring of the event showed that impacts to the area were virtually non-existent. Comments from several Audubon members indicated that the event was not what they had envisioned, and that they considered it to be well run.

7. The easterly portion of the subject route lies within the boundary of the Fish Slough Area of Critical Environmental Concern. We assume that lands with special resource values are designated as ACECSs. We feel it inappropriate to allow an organized ride on a primitive road within an ACEC. This is certainly not in keeping with protecting the sensitive resource values within the ACEC.

Response:

The Fish Slough ACEC Plan provides for vehicle use on designated routes within the ACEC (pg 6 and 17 of the ACEC plan). The routes used in this event also appear on the current Interagency Vehicle Access Guide which is distributed to the public. As already mentioned, while not a maintained road, the route is well defined, passable by 2 wheel drive vehicle, and is not the primitive route that Audubon thought it was.

The original application contained a proposal to run the event on a route through the sensitive section of the ACEC on the

"east side road." This route request was denied based upon the sensitive resources which could have been impacted. On page 24 of the ACEC plan, Goal #1 is to "[p]rovide protection to sensitive resources and natural value of the area while allowing for reasonable vehicle access." As permitted, the event was consistent with the management goals of the ACEC Plan.

8. As you know, this entire area, the subject primitive road included, has been proposed as wilderness by statewide conservationists working on BLM non-desert wilderness proposals. We support Wilderness designation for this truly unique area. Allowing 150 motorcyclists to travel over this primitive road would, without doubt, significantly degrade the current primitive nature of the route, and hence the wilderness value.

Response:

There are four (4) WSAs within the Volcanic Tablelands. None of these have been recommended as suitable for Wilderness in our final Wilderness EIS. However, in recognition of the resource values found on the Tablelands, BLM is proposing semi-primitive management in the draft Bishop Resources Management Plan. This event was consistent with such management.

Please refer to response number three. The route utilized has been confused with the southern sheepherder road, which is indeed primitive, and is within the conservationists' proposal for wilderness. The northern sheepherder road, is a well established route; and as we understand, forms the northern boundary of the conservationists' wilderness proposal. Use of that route would not affect the wilderness value of the area.

[1] Section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 CFR 1732(b) (1988), allows the Secretary of the Interior, through BLM, the discretion to issue permits for special uses of public lands. Requirements for the issuance of special recreation use permits are authorized by the regulations in 43 CFR 8372, and provide: "The approval of an application and subsequent issuance of a special recreation permit is [sic] discretionary with the authorized officer." 43 CFR 8372.3. Accordingly, BLM has the discretion to issue a special recreation use permit if the proposed activity is consistent with BLM objectives, responsibilities, or programs for management of the public lands involved. Owen Severance, 118 IBLA 381, 389 (1991).

Appellant argues that BLM's EA was deficient. Mere differences of opinion, however, provide no basis for reversal of BLM's decision. Red Thunder, Inc., 117 IBLA 167, 175, 97 I.D. 263, 267 (1990). The ultimate burden of proof is on the appellant and such burden must be satisfied by objective proof. Id. Such proof must demonstrate either an error of

law or fact, or that the analysis failed to consider a substantial environmental problem of material significance to the action. G. Jon Roush, 112 IBLA 293 (1990). We conclude appellant has failed to demonstrate either.

In its response filed April 20, appellant asserts that BLM's answer avoided responding to its basic concerns. We do not agree. Our review of BLM's responses indicates they are not only responsive but are supported by the record. Appellant failed to demonstrate any error of law or fact. On the contrary, appellant made no effort to rebut BLM's allegations. Appellant erroneously thought the route was within an area proposed as wilderness by conservationists. Nor has appellant demonstrated that BLM failed to consider any substantial environmental problem of material significance.

We note that BLM did not rebut appellant's subsequent allegation that BLM failed to inform the California Department of Fish and Game prior to approval of the permit. However, even if we assume the allegation to be true, appellant has not shown why this oversight is sufficient to fatally flaw BLM's approval of the permit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior at 4.1, the decision appealed is affirmed.

John H. Kelly
Administrative Judge

I concur:

C. Randall Grant, Jr.
Administrative Judge