

AMERICAN MOTORCYCLE ASSOCIATION, DISTRICT 37

IBLA 91-155

Decided May 7, 1991

Appeal from a decision of the California Desert District Office, Bureau of Land Management, denying permit to run the 1991 Barstow to Las Vegas motorcycle race. CA-060-EA1-03.

Affirmed.

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

The issuance of special use permits is discretionary, and BLM may properly reject a permit application for an organized off-road motorcycle event when there is evidence that the event would result in significant impacts to sensitive wildlife species and would be inconsistent with the management objectives, responsibilities, or programs for the impacted public lands.

2. Endangered Species Act of 1973: Section 7: Generally

The absence of a biological opinion from the Fish and Wildlife Service under authority of sec. 7(a)(2) of the Endangered Species Act of 1973, as amended, 16 U.S.C. § 1536(a)(2) (1988), does not preclude BLM from denying a permit for a motorcycle race when the denial is based on an environmental assessment showing that the anticipated impacts of the race, including cumulative impacts from holding the race in previous years, are unacceptably detrimental to a threatened species and its habitat.

APPEARANCES: David Elson, Esq., Los Angeles, California, for appellant; Burton J. Stanley, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

The American Motorcycle Association, District 37, has appealed from a December 17, 1990, decision by the California Desert District Manager (District Manager), Bureau of Land Management (BLM), denying appellant a

special recreation use permit (SRUP) to run the Barstow to Las Vegas motorcycle race across public lands in 1991. 1/

The District Manager's decision to deny the permit was based on his conclusion that the proposed race "will have significant and unacceptable adverse impacts on the environment." He found that the race would have a "direct, indirect, and cumulative adverse impact" on the desert tortoise, designated a threatened species under the Endangered Species Act (ESA), 16 U.S.C. § 1536 (1988). The District Manager also denied the permit based on cumulative adverse impacts on soils, vegetation, wildlife, and other resource values caused by permitting the event in the years 1983 through 1989. He noted that BLM had been unable to enforce protective stipulations or to minimize damage along the route in the past, and that what was considered a tolerable level of negative impacts in 1983 was no longer acceptable. Based on the evidence of significant adverse impacts to the environment as documented in BLM's environmental assessment, the District Manager concluded denial of the permit was warranted without preparation of an environmental impact statement under the National Environmental Policy Act of 1969 (NEPA).

On November 14, 1989, the U.S. Fish and Wildlife Service (FWS), issued to the California State Director, BLM, a biological opinion on the 1989 race in response to BLM's request for formal consultation pursuant to section 7 of the ESA, 16 U.S.C. § 1536 (1988). In its opinion, FWS considered the impacts of the race insufficient to jeopardize the continued existence of the desert tortoise. FWS reasoned that protective stipulations imposed by BLM "should reduce the potential for take of individual tortoises" and that loss of habitat would be limited to an already disturbed narrow corridor along the route (Opinion at 5). However, with respect to future races, FWS recommended:

The Bureau should investigate the feasibility of relocating future Barstow to Vegas races completely out of tortoise habitat. Although scheduling these events during periods of tortoise inactivity greatly reduces the potential for incidental take, the capriciousness of desert weather and tortoise behavior preclude the possibility that take will be completely eliminated. Additionally, all management actions in tortoise habitat should be coordinated to avoid further degradation and fragmentation of habitat, particularly within those regions recognized as important for the species' continued viability.

(Opinion at 9).

Having observed the impacts of the 1989 race, FWS notified BLM that impacts to tortoises and their habitat "were greater than planned

1/ On Mar. 25, 1991, appellant and BLM filed a joint stipulation requesting this appeal be given expedited consideration. That request is hereby granted.

or anticipated." FWS again encouraged BLM to examine alternative courses which would not adversely affect the desert tortoise (Answer, Exh. A, at 2-3).

Appellant argues that BLM has usurped the jurisdiction of FWS in failing to complete the ESA consultation procedures and to obtain a biological opinion for the proposed 1991 race. Appellant points out that FWS' November 1989 biological opinion found the impact on the desert tortoise insufficient to preclude the race. Appellant asserts that BLM does not have the expertise to conclude that the 1991 race would have destructive impacts on an endangered or threatened species. Appellant contends that effects or impacts to a species or habitat "do not necessarily rise to the level of jeopardizing the continued existence of the species or result in the destruction or adverse modification of habitat" (Statement of Reasons at 13). Appellant surmises that had FWS issued a biological opinion on the proposed 1991 race, its conclusion would have been the same as in 1989. Appellant contends that BLM's failure to complete the consultation process for the proposed 1991 event renders invalid its denial of the SRUP.

BLM responds that the permit for the 1991 race was denied for two reasons: the potential impact on the desert tortoise and the inability of both BLM and appellant to achieve compliance with protective stipulations issued for past races. BLM contends that both reasons are well documented in the record and constitute sufficient basis for denying the permit without further consultation with FWS. BLM points out that appellant has failed to dispute its own noncompliance with permit conditions for past races. BLM observes that consultation with FWS has been actively carried on. With its Answer, BLM submitted the declaration of a BLM biologist (Exh. A), who served as endangered species coordinator with FWS. According to the declaration, on July 17, 1990, BLM notified appellant of the requirements for the 1990 race and approved a contractor to make the required tortoise survey. On August 14, 1990, BLM furnished to appellant supplemental information concerning survey requirements for the proposed 1990 race. Apparently, both BLM and FWS understood that appellant had "committed to conduct desert tortoise surveys over most of the proposed racecourse and zone of influence." On October 12, 1990, FWS advised BLM that it had not received the necessary data "to complete the biological assessment as promised by District 37." The biologist's declaration goes on to explain what type of data was required by FWS and states that formal consultation for the 1990 race was never concluded, 2/ and formal consultation for the 1991 race never initiated because of lack of survey information. BLM asserts in its answer that "[t]o date appellant has not provided the information requested by [FWS] and, indeed, has indicated informally that it probably would not do so in view of the expense involved" (Answer at 2).

[1] Special use permits are issued under the general authority of the Secretary of the Interior to regulate the use of the public lands, pursuant

2/ On Sept. 6, 1990, District 37 issued a press release cancelling the proposed 1990 event.

to section 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1988). Special recreation use permit requirements are set forth in 43 CFR Subpart 8372. See 43 CFR 8344.1 (off-road vehicle (ORV) use). Regulation 43 CFR 8372.3 provides: "The approval of an application and subsequent issuance of a special recreation permit is discretionary with the authorized officer." Accordingly, BLM has the discretion to reject a special recreation use permit application if the proposed activity conflicts with BLM objectives, responsibilities, or programs for management of the public lands involved. Southern California Trials Association, 104 IBLA 141 (1988); Cascade Motorcycle Club, 56 IBLA 134 (1981); see also Whitewater Expeditions & Tours, 52 IBLA 80 (1981).

In the absence of compelling reasons for modification or reversal, a rejection of an application for a special recreation use permit will be affirmed if the decision is supported by facts of record. See California Association of Four-Wheel Drive Clubs, Inc., 38 IBLA 361 (1978), affirmed, California Ass'n of Four-Wheel Drive Clubs v. Andrus, No. 80-5666 (9th Cir. Jan. 22, 1982); cf. Dell K. Hatch, 34 IBLA 274 (1978). In California Association of Four-Wheel Drive Clubs, Inc., the appellants had appealed from two decisions of the California State Director closing two corridors in the California desert to ORV use. Four endangered and one threatened species of plants had been found in the closure area. Closure was ordered by BLM, invoking the ESA, 16 U.S.C. § 1531 (1988), and NEPA, 42 U.S.C. § 4321 (1988). At pages 367-68 of that decision we said:

Where conflicting uses of the public lands are at issue and the matter has been committed to the discretion of the BLM, the Board will uphold the decision of the BLM unless appellant has shown that the BLM did not adequately consider all of the factors involved, including whether less stringent alternatives would accomplish the intended purpose, or that there is sufficient reason to change the result. Cf. Questa Petroleum Co., 33 IBLA 116 (1977); Rosita Trujillo, 20 IBLA 54 (1975).

[2] Section 7(a)(2) of the ESA, as amended, 16 U.S.C. § 1536(a)(2) (1988), provides that:

Each Federal agency shall * * * insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical * * *. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

The court in Thomas v. Peterson, 753 F.2d 754, 763 (9th Cir. 1985), describes a three-stage process for complying with the ESA. First, an agency proposing to take an action must determine whether an endangered or threatened species may be present. If such a species is present, the agency must prepare a biological assessment to determine whether

the species is likely to be affected by the action. If the species would likely be affected, the agency must conduct a formal consultation with FWS, resulting in a biological opinion prepared by FWS. See also Conner v. Burford, 848 F.2d 1441, 1451 (9th Cir. 1988).

In the December 17, 1990, Decision Record denying appellant's application for a SRUP, BLM responded to the same arguments as those raised by appellant. We agree with BLM's response, which states as follows:

A number of commenters [sic] indicated that the BLM does not have the authority to make a determination on the significance of impacts on the desert tortoise; that only the U.S. Fish and Wildlife Service has the authority and expertise to make determinations of impact to listed species. This comment reflects a misunderstanding of BLM's responsibility under the National Environmental Policy Act of 1969 (NEPA) to make a determination on the significance of impacts of proposed actions. Under the Endangered Species Act of 1973, the U.S. Fish and Wildlife Service is responsible for providing a biological opinion as to whether or not a proposed action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify its critical habitat (see 50 CFR 402.14(g)). The biological opinion required under the authority of the ESA is separate and distinct from the finding regarding the significance of impacts required under the authority of NEPA. The BLM, not the U.S. Fish and Wildlife Service, has the responsibility under NEPA to determine whether or not the impacts of proposed actions involving public lands and resources are significant (40 CFR 1501.4).

(Decision Record at 6).

The record clearly shows that under the ESA, authorizing the race would be "likely to jeopardize" the desert tortoise or adversely affect its habitat, and that under NEPA, such action would result in "significant and unacceptable adverse impacts on the environment." Therefore, BLM's decision not to permit the race was in compliance with NEPA and the ESA. See Sierra Club, 104 IBLA 76, 88 (1988). The record also indicates that FWS was precluded from issuing a biological opinion assessing the impacts of the proposed 1991 race because appellant failed to furnish the input required of it. Under these circumstances, appellant cannot be heard to allege that a biological opinion is required and that such opinion would show the impacts of the proposed race would not jeopardize a threatened species.

In summary, BLM's decision not to permit the race in 1991 is fully consistent with NEPA and the ESA, is amply supported by the record, and requires no biological opinion from FWS. As noted earlier, FWS urged BLM to consider relocating the route out of the desert tortoise habitat, and advised that the impacts of the 1989 race were "greater than planned or anticipated." Moreover, appellant has failed to dispute BLM's assertion that in prior races, neither BLM nor appellant was able to effectively enforce protective stipulations designed to reduce adverse impacts on the desert tortoise and the environment in general.

Therefore, we conclude that appellant has failed to demonstrate error in BLM's decision and that such decision should be affirmed.

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.

John H. Kelly
Administrative Judge

I concur:
Gail M. Frazier
Administrative Judge

